

THE DIGEST
ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND A

SELECTION FROM THOSE OF THE SCOTCH AND IRISH COURTS

WITH

A COLLECTION OF CASES FOLLOWED, DISTINGUISHED,
EXPLAINED, COMMENTED ON, OVERRULED,
OR QUESTIONED

FROM

1898 to 1907 inclusive

FORMING A SUPPLEMENT TO
MEWS' DIGEST OF ENGLISH CASE LAW, 16 VOLS.

BY

EDWARD MANSON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. II.

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THE DECENNIAL DIGEST,

BEING A CONSOLIDATION OF

THE ANNUAL DIGESTS 1898-1907 (INCLUSIVE).

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1. STATUTES.

63 & 64 Vict. c. 50 is the *Agricultural Holdings Act*, 1900.

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2. TENANCY.

Nature of—Construction of Agreement—Weekly Rent—"Rent not to be raised" during Continuance of Lessor's Interest.]—On January 11, 1900, a shop was demised to the plaintiff under a written agreement as follows:—"I shall be pleased to accept you as tenant for barber's shop at the rental of seven shillings per week, the rent not to be raised during my present tenancy." The landlord was the lessor of the shop under a lease which would expire on June 24, 1901:—*Held*, that the plaintiff was not a mere tenant from week to week, but was entitled to a term which would expire on June 24, 1901. *Adams v. Cairns*, 85 L. T. 10—C.A.

(a) *Tenancy at Will*.

Entry by Landlord to Repair—Statute of Limitations.]—Where a tenant at will remains in

possession of the premises for more than twelve years after the expiration of the first year of the tenancy, but pays no rent, and the landlord enters from time to time to do repairs, there being no evidence whether such entry was made with or against the consent of the tenant, the entry does not operate so as to constitute a resumption of possession by the landlord, and thereby to determine the tenancy at will, and the tenant therefore acquires a statutory title to the premises by virtue of section 7 of the Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1874. *Lynes v. Snaith*, 68 L. J. Q.B. 275; [1899] 1 Q.B. 486; 80 L. T. 22; 47 W. R. 411—D.

Determination of Tenancy by Mortgage of Reversion—New Tenancy by Estoppel—Statute of Limitation.]—A tenancy at will is determined by a mortgage of the premises by the landlord, such mortgage being brought to the knowledge of the tenant. *Jarman v. Hale*, 68 L. J. Q.B. 681; [1899] 1 Q.B. 994—D.

Where the tenant remains in possession, the new tenancy, necessary to prevent the Statute of Limitations running against the landlord, is sufficiently created by estoppel, and the fact that he had by the mortgage parted with his reversion is immaterial. *Ib.*

Expiration of Lease—Creation of Express Tenancy at Will—Application of Terms of Lease not Inconsistent with such Tenancy—Arbitration Clause.]—The principle that a tenant who holds over after the expiration of a lease and pays or agrees to pay rent, and becomes a tenant from year to year, is deemed to hold upon all the terms and conditions of the original lease, so far as they are applicable to a yearly tenancy, applies where an express tenancy at will has been created on the termination of a lease. An arbitration clause contained in the old lease is not inconsistent with such tenancy at will, and applies during the continuance of the tenancy. *Morgan v. Harrison*, 76 L. J. Ch. 548; [1907] 2 Ch. 137; 97 L. T. 445—C.A.

Tenant at Will or on Sufferance—Power to Create Relationship of Landlord and Lodger.]—The relationship of landlord and lodger may be created between a tenant at will or on sufferance, and a person occupying part of the premises of such tenant. On compliance, therefore, by the lodger with the requirements of the Lodgers' Goods Protection Act, 1871, his goods are exempt from distress at the instance of the superior landlord. *Bensing v. Ramsay*, 62 J. P. 613—D.

(b) Yearly Tenancy.

Demise for Twelve Months with Option of Lease—Term not Specified.]—The plaintiff by an agreement in writing demised to the defendant a shop and dwelling-house for a period of twelve months "with the option of a lease of the same after the aforesaid time at the rental of 30*l.* per annum." Before the expiration of the twelve months the defendant claimed to exercise the option reserved by the agreement and refused to give up possession. In an action brought by the plaintiff to recover possession of the premises the Judge held that, upon the exercise of the option by the defendant, a further tenancy was

created for one year:—*Held*, that the true meaning of the agreement was that, upon the exercise by the defendant of the option, a tenancy for at least a further period of one year was created, and that the plaintiff was not entitled to recover possession upon the expiration of the twelve months. *Austin v. Newham*, 75 L. J. K.B. 563; [1906] 2 K.B. 167; 95 L. T. 490—D.

Seemle, per KENNEDY, J., that the further tenancy created was one for the life of the defendant. *Ib.*

Notice to Quit—Letting "until such tenancy shall be determined as hereinafter mentioned"]—

Three Months' Notice to Quit.]—An agreement of tenancy provided that the letting should be from May 13 "until such tenancy shall be determined as hereinafter mentioned" at a "yearly" rent, and it also provided that "It shall be lawful for either party to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing":—*Held*, that a yearly tenancy was created determinable by a special three months' notice to quit to expire at the end of any year of the tenancy, and not an indefinite tenancy determinable by three months' notice. *Doe v. King v. Grafton* (21 L. J. Q.B. 276; 18 Q.B. 496) distinguished. *Lewis v. Baker* (No. 2), 75 L. J. K.B. 848; [1906] 2 K.B. 599; 95 L. T. 10; 22 T. L. R. 680—C.A. Affirming, 54 W. R. 146—Jelf, J.

Estoppel by—Bankruptcy of Assignee of Lease—Disclaimer by Trustee—Liability of Assignee's Mortgagee in Absence of Vesting Order—Lessor's Claim for Rent under Tenancy from Year to Year.]—A tenancy from year to year is created by estoppel between the mortgagee of an assignee of a lease, disclaimed by the assignee's trustee in bankruptcy, and the original lessor, where, in the absence of a vesting order under section 55 of the Bankruptcy Act, 1883, in favour of either party, the mortgagee has entered into possession and occupation of the premises, and has for some years continued to pay quarterly the original rent reserved by the lease to the lessor. That the mortgagee had done this merely to preserve his security is no defence to an action for rent due under a tenancy from year to year, nor is it a defence that the lessor had a remedy by distress. *Jump v. Payne*, 68 L. J. Q.B. 607—Day, J.

Sporting Rights—Licence—Successive Tenancies for Single Year—Incorporeal Hereditament—Six Months' Notice—Reasonable Notice.]—A lessor purported to lease certain shooting rights for one year from March 25, 1895, by an instrument not under seal. On December 31, 1895, the lessor consented to a future reduction of rent in a letter addressed to the lessee. Subsequently to March 25, 1896, the lessee continued for some years longer in tacit possession of the shooting at the reduced rent, but nothing further was agreed between the parties as to the nature or duration of such tacit possession. On February 26, 1901, the lessor determined the said possession by verbal, and on March 23 by written, notice, as from March 25 then instant:—*Held*, that the possession of the lessee subsequent to March 25, 1896, was not that of a mere licensee. *Lowe v. Adams*, 70 L. J. Ch.

783; [1901] 2 Ch. 598; 85 L. T. 195; 50 W. R. 37—Cozens-Hardy, J.

Wood v. Leadbitter, [14 L. J. Ex. 161; 13 M. & W. 889] questioned, having regard to *Walsh v. Lonsdale*, [52 L. J. Ch. 2; 21 Ch. D. 9]. *Ib.*

Quare, whether such possession was that of a tenant granted successive rights each year for a single year, or that of a tenant from year to year. *Ib.*

Held, however, that the common-law rule as to the necessity of giving six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of an incorporeal hereditament such as the one now in question; and assuming that the defendants were entitled to "reasonable notice," that "reasonable notice" had in fact been given in the circumstances. *Ib.*

3. LEASES AND AGREEMENTS.

(a) Generally.

Lease of Floor—Outer Wall.—A lease of the rooms on a floor is a lease of a separate dwelling, and includes the outer wall so far as it is solely appropriate to the rooms let. *Carlisle Cufé Co. v. Muse*, 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107—Byrne, J.

Lease of Shootings—No Implied Obligation on Landlord to Keep Plantation Fences in Repair.—Under a lease of a mansion-house and policies, with the right of shooting over the estate, there is no implied obligation upon the landlord to keep the fences round the plantations in such a state of repair as to be effectual to exclude live stock. *Patrick v. Harris's Trustees*, 6 F. 985—Ct. of Sess.

Interest on Arrears of Rent—Title not Shewn.—Where the lessor has not shewn a good title to grant the lease until after the grant of the lease, interest on arrears of rent does not begin to accrue until the time of good title shewn. *Canadian-Pacific Railway v. Toronto Corporation*, 74 L. J. P.C. 15; [1905] A.C. 83; 91 L. T. 703; 21 T. L. R. 44—P.C.

Interpretation of Lease—Parcels—Right of Way—Misdescription—Falsa Demonstratio—Rectification.—In the application of the doctrine *falsa demonstratio non nocet* it is immaterial in what part of the description the *falsa demonstratio* appears. It is not necessary that it should follow the true part, and qualify what has gone before. *Coven v. Truett*, 68 L. J. Ch. 563; [1899] 2 Ch. 309; 81 L. T. 104; 47 W. R. 661—C.A.

Whether the doctrine applies in a case where the Court can see what the document in question was really intended to mean, *quære*. *Ib.*

Document—Construction of—Immediate Interest in Land—Document Void, not being under Seal—Agreement for Lease—Lease for Life—Specific Performance.—The agent of the plaintiffs signed a document, not under seal, which

recited, "I have let to" the defendant a house "at a weekly rental of 23s., and I agree not to raise" the defendant's "rent as long as he lives in the house and pays the rent regular. I shall not give him notice to quit. Any time" the defendant "wishes to move out, I promise to return to him the 6l. he has paid me on taking possession of the house":—*Held*, that the document did not create an immediate interest in land at law as between the plaintiffs and the defendant by reason of its not being by deed as required by section 3 of the Real Property Act, 1845, but that it could be treated as an agreement for a lease for the defendant's life, subject to the conditions that the plaintiffs might turn him out if he did not pay rent regularly, and that the defendant might determine his life interest by moving out on notice being given to the plaintiffs; and further, that such agreement was one in respect of which specific performance could be enforced. *Zimnier v. Abrahams*, 72 L. J. K.B. 103; [1903] 1 K.B. 577; 88 L. T. 46; 51 W. R. 343—C.A.

Lease for Life or in Perpetuity.—C., owner in fee of certain premises, and H., a yearly tenant under C. of the premises, entered into an agreement in writing whereby, after reciting the existing yearly tenancy, and that C., "for herself and her heirs, executors, administrators and assigns," had agreed with H., "his executors, administrators and assigns," to allow him to hold and occupy the undisturbed possession of the premises in consideration of the due payment by H. of the yearly rent of 50l., it was witnessed that C. agreed to let and H. to take the premises at the yearly rent of 50l. The agreement contained covenants whereby H., "for himself, his executors, administrators and assigns," agreed to keep the premises in repair and to carry out alterations on the approval of C., and a covenant by C. whereby she, "for herself, her heirs, executors, administrators and assigns," agreed with H. that so long as he, "his executors, administrators or assigns," continue to pay the yearly rent, C. would continue H., "his executors, administrators or assigns," as the tenant of the premises, and preserve to him and them the quiet and peaceable enjoyment of same, and a further covenant by H. that he, "his heirs, executors or administrators," should not let, sell or assign his interest in the premises without the consent of writing in C., "her heirs, executors, administrators or assigns, or her or their agent at the time being": *Held*, that the agreement created a tenancy for the lessee's life. *Coleman's Estate, In re*, [1907] 1 Ir. R. 483—Ross, J.

Parcels—Right of Way—Falsa Demonstratio.

—By a lease the upper rooms in two adjoining houses, Nos. 13 and 14, were demised to the plaintiff, "together with free ingress and egress for her servants and customers through the staircase and passages of No. 13 to and from the premises hereby demised on the second floor of the said messuages Nos. 13 and 14." Before the date of the lease the staircase of No. 13 had been pulled down and a lift made in lieu thereof. The only staircase was that of No. 14, and access to that was through the shop where the lessors carried on an extensive business:—*Held*, that the words "of No. 13" should be rejected as *falsa demonstratio*, and that the plaintiff was entitled to use the staircase of

No. 14. *Cowen v. Truefitt*, 67 L. J. Ch. 695; [1898] 2 Ch. 551; 79 L. T. 848; 47 W. R. 29—Romer, J.

Presumption—Occupation of Additional Land Enclosed.—H. demised an island to E. Subsequently E. occupied two other plots of H.'s land. These plots were situate on the mainland, and were something between half a mile and a mile from the island demised to E. They were inclosed land. There was no evidence that they were occupied by E. as an addition to his holding under H., and no rent was paid in respect of them. After more than twelve years had elapsed, when E.'s tenancy of the island had determined, H. brought an action against E.'s successor in title to obtain possession of the two plots. The County Court Judge held that there was a presumption that E. had occupied them as H.'s tenant, and in the absence of evidence to rebut this presumption H. was entitled to recover possession. On appeal:—*Held*, that there was no such presumption. *Seem*, the presumption that a tenant who occupies more land than is demised to him occupies it for the benefit of his landlord is confined to encroachment on waste. *Hastings (Lord) v. Saddler*, 79 L. T. 355—D.

Shooting Rights—Profit à Prendre—Agreement not under Seal.—By agreement in writing not under seal dated July 30, 1898, Lord C. agreed to let to the plaintiffs part of the lands of B and C, reserving, except as thereafter provided, the exclusive right to game and the exclusive right of shooting upon the demised premises, for one year, from May 1, 1898, and so on from year to year, till the letting should be determined, at the yearly rent of 45*l.*; and further agreed that the plaintiffs should for the term of ten years from the date of the agreement have the right of shooting over all the lands of B and C, and full authority to use proper means for the preservation of the game on the said lands. The lands (of which Lord C. was owner in fee) consisted mainly of mountain in his occupation and also of holdings in the occupation of yearly tenants. These tenants held under agreements in writing, not under seal, made in 1868, which gave them the exclusive right of grazing on the mountain, and reserved to the landlord the exclusive right to the game and the exclusive right of shooting and sporting. Some of these tenants (together with other persons living in the neighbourhood) interfered with the plaintiffs' shooting on the mountain. In an action for an injunction to restrain them from interfering with the plaintiffs' right of shooting, it was contended for the defendants—first, that the right of shooting over the tenants' holdings was not validly reserved to Lord C. as the agreements were not under seal, and, secondly, that the agreement made between Lord C. and the plaintiffs, not being under seal, was invalid as regards the sporting rights:—*Held*, first, that the right of shooting was validly reserved; secondly, that the grant of the right of shooting was not a mere licence, but a demise of a profit à prendre, and that the agreement was valid. *Radclyffe v. Hayes*, [1907] 1 Ir. R. 101—M.R.

Lease of Land Adjoining New Street—Presumption as to Ownership of Soil usque ad Medium

Filum, Via—Rebutting Circumstances.—The presumption that a conveyance of land abutting on a highway passes the soil of the road *usque ad medium filum* is rebutted by the surrounding circumstances where a new street is made by commissioners under an Act of Parliament which imposes on them duties and obligations inconsistent with the presumption, and where the parcels and plan shew no intention to pass any part of the street. *Mappin v. Liberty*, 72 L. J. Ch. 63; [1903] 1 Ch. 118; 87 L. T. 523; 51 W. R. 264; 67 J. P. 91; 1 L. G. R. 167—Joyce, J.

Seem, the presumption does not apply to building estates or schemes. *Quere*, whether the presumption applies to leases or to grants from the Crown. *Id.*

Public-house—Reversionary Lease—Implied Condition as to Premises being Continued as Public-house.—In 1885 a reversionary lease for fifty years to take effect on the determination in 1899 of the tenancy then existing was granted to the defendant's testator. At the date of the lease the premises included therein were occupied as a fully licensed public-house, and one of the covenants was that the lessee should, during the continuance of his lease, use the demised premises as a fully licensed house so long as the necessary licence could be obtained for that purpose. The licence was forfeited about 1893, by the tenant then in possession, and no fresh licence had been obtained. In an action by the lessor against the lessee for rent, *Held*, that there was no implied condition that the premises should be fully licensed when the lease came into operation, and that the lessee was therefore liable for the rent reserved. *Blum v. Ansley*, 64 J. P. 184—Phillimore, J.

Express Demise of Lights—Covenant not to "object to any works to adjoining premises"—"Obstruction of Lights."—Under a lease dated September 20, 1894, W. became the lessee of certain premises for a term expiring in 1932. By a deed dated August 3, 1899, W. demised the premises to H. for a term of twenty-one years, "together with all . . . lights, easements, . . . and appurtenances to the said premises belonging." The deed contained a covenant by the lessee that he would not "object to any works to adjoining premises" that might be sanctioned by or on behalf of the lessor or the superior landlords or landlord. The lease also contained a covenant by the lessor for quiet enjoyment of the premises. A company had acquired an interest in certain property adjoining to the demised premises and forming part of the same estate, and were proposing to erect thereon some buildings which, as H. alleged, would obstruct the access of light hitherto enjoyed by his premises. He accordingly brought an action to restrain the company from building so as to obstruct his light. The proposed buildings had been approved by the surveyor of the estate. In these circumstances, W., who was interested in the company, brought an action against H. to restrain him from objecting to the buildings then being erected by the company, on the ground that his action constituted a breach of the covenant; and he then moved, under section 24, sub-section 5 of the Judicature Act, 1873, for a stay of proceed-

ings in H.'s action:—*Held*, that the words "adjoining premises" did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised building; that "adjoining" meant adjoining in the sense in which it was used in the London Building Act, 1894, and could not be used in the sense of "neighbouring"; and that therefore H. was not precluded on that ground from objecting to the erection of the buildings. *White v. Harrow*, 86 L. T. 4; 50 W. R. 259—C.A.

Derogation from Grant in Lease—Light—Trespass—Architect's Authority—Party-wall—External Wall—Injunction.—The defendants demised a plot of ground in London to the plaintiffs, agreeing to clear it of certain old buildings for the erection of a warehouse proposed by the plaintiffs. The defendants left the roof timbers and stanchions of a shed situate upon adjoining land which belonged to them projecting by some inches over one boundary of the demised premises. By leave of the plaintiffs' architect, but without the plaintiffs' knowledge or authority, these projections were built into the new wall of the warehouse, which was erected entirely within the land demised. It appeared that this converted the wall into a party-wall within the meaning of the London Building Act, 1894, with the consequence that two of the warehouse windows would have to be blocked up:—*Held*, that, on the assumption that the windows would have to be blocked up, the defendants had acted in derogation of their own grant, and that, the architect having acted outside the scope of his authority, they had committed a trespass upon the plaintiffs' property, which must be restrained by injunction. *Betts, Lim. v. Pickfords, Lim.*, 75 L. J. Ch. 483; [1906] 2 Ch. 87; 94 L. T. 363; 54 W. R. 476; 22 T. L. R. 315—Kekewich, J.

Lease of Coal—Prior Lease of Fireclay—Damage by Working.—In 1896 the proprietor of lands containing both fireclay and coal let for thirty-one years from 1893 the whole fireclay therein to lessees without reserving a right to work the coal. At the date of that lease, and within the knowledge of the lessees, part of the coal was being worked by the proprietor's tenants. Prior to 1902 the proprietor re-acquired the right to the coal, and in that year granted to other persons a lease of all the workable seams of coal, limestone, and fireclay so far as belonging to him in the said lands. Neither the fireclay nor the coal could be worked by the respective lessees without material injury to the other:—*Held* (LORD MONCREIFF dissenting), that the lessees of the fireclay were entitled to interdict the lessees of the coal from working the coal so as to interfere with or to make it impracticable to work the fireclay. *Shawcross Fireclay Co. v. Larkhall Collieries*, 5 F. 1131—Ct. of Sess.

Reversionary Term—Interesse Termini—Merger.—A reversionary lease only confers an *interesse termini* until after entry under the lease when the date fixed for the commencement of the term has arrived. It cannot, therefore, coalesce with an earlier subsisting

term so as to cause a merger. *Smith v. Day* (6 L. J. Ex. 219; 2 M. & W. 624) and *Dee d. Rawlings v. Walker* (4 L. J. (o.s.) K.B. 93; 5 B. & C. 111) followed. *Ib.*

Vesting of Property in Underlessee—Costs of Enquiry as to New Rent.—Where a lease became forfeited by virtue of a proviso contained therein, and the Court, acting under section 4 of the Conveyancing and Law of Property Act, 1892, made an order vesting the property in the underlessee, the underlessee was ordered to pay the costs of the enquiry that was necessary to determine the new rent. *Ewart v. Fryer*, 86 L. T. 676—Joyce, J.

Disclaimer of.—See BANKRUPTCY, col. 118.

Lease by Mortgagor in Possession.—See MORTGAGE.

Mining Lease.—See MINES AND MINERALS.

Wayleave—Demise of—Covenant for Periodical Payments by Grantee.—See EASEMENT.

(b) *Statute of Frauds.*

Agreement for Renewed Lease—Part Performance—Payment of Increased Rent—Specific Performance.—Where a tenant in possession agrees verbally with his landlord for a further tenancy at an increased rent and remains in possession and pays the increased rent, this is a sufficient part performance of the contract to prevent the application of the Statute of Frauds in an action for specific performance. So held on the authority of *Nunn v. Fabian* (35 L. J. Ch. 140; L. R. 1 Ch. 35). *Miller and Aldworth v. Sharp*, 63 L. J. Ch. 322; [1899] 1 Ch. 622; 80 L. T. 77; 47 W. R. 268—Byrne, J.

(c) *Reservations.*

Shooting Rights—Assigns—Licence to Stranger.—The plaintiff was grantee of lands under a fee-farm grant, by which "free liberty" was reserved to the grantor, "his heirs and assigns, and his and their attendants, gamekeepers and servants, to hunt, fowl, fish, hawk, and set" in the demised premises:—*Held*, that this did not authorise the grantor or his assignee to permit a stranger to shoot game on his own account in the absence of the grantor or the assignee. *Reynolds v. Moore*, [1898] 2 Ir. R. 641—Q.B. D.

(d) *Option of Renewal.*

Agreement for Three Years—Specific Performance.—Premises were let by agreement in writing, not under seal, for a term of three years commencing from a certain date, at a clear yearly rental of 80*l.* and 8*l.* yearly for the use of water, payable on the usual quarter days, "with the option of renewal":—*Held*, that the words "with the option of renewal" were sufficiently definite to enable the Court, at the instance of the tenant, to carry them out by a decree for specific performance for a renewed

agreement for the same period, on the same terms, except as to renewal, as those contained in the agreement. *Lewis v. Stephenson*, 67 L. J. Q.B. 296; 78 L. T. 165—Bruce, J.

(e) *Option to Buy Fee.*

Perpetuity—Lease—Long Term—Covenant Running with Land.—S., the owner in fee of certain land, by lease dated July 6, 1867, demised it to W., his executors, administrators, and assigns, for ninety-nine years from June 24, 1866, at a yearly rent. The lease contained a provision that if the lessee, his heirs or assigns, should at any time during the term become desirous of purchasing, the fee-simple in the land demised at the rate of 500*l.* per acre, and such further sum for the timber thereon as should be ascertained by a fair valuation, upon the receipt of the purchase-money, the lessor, his heirs or assigns, would execute a conveyance of the premises with the timber thereon in favour of the lessee, his heirs and assigns. On July 14, 1869, S. demised another piece of land to W. for ninety-nine years from September 29, 1868, at a yearly rent. This lease also contained a provision giving the lessee an option to purchase the fee-simple in substantially the same form as in the former lease, except that the option to purchase was given to the lessee, "his executors administrators and assigns," and the price was to be 600*l.* per acre. The plaintiff was the assignee of the two leases, and he desired to exercise the option to purchase. The defendants were, as trustees of a settlement, the owners of the fee-simple subject to the leases:—*Held*, by WARRINGTON, J., that the options to purchase created an estate or interest in land, and were void as infringing the rule against perpetuities. *Held*, by the COURT OF APPEAL, that the provisions giving the option to purchase were concerned with something wholly outside the relations of landlord and tenant, and could not be said to run with the land under the statute 32 Hen. 8, c. 34, and therefore could not be enforced by the plaintiff. *Woodall v. Clifton*, 74 L. J. Ch. 555; [1905] 2 Ch. 257; 93 L. T. 257; 54 W. R. 7; 21 T. L. R. 581—C.A.

A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute 32 Hen. 8, c. 34, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. *London and South-Western Railway v. Gomm* (51 L. J. Ch. 530; 20 Ch. D. 562) applied by WARRINGTON, J. *Ib.*

—Charitable Purpose—Specific Performance—Damages.—A lease of land for thirty years to a public body for a charitable purpose contained a covenant giving the lessees an option to purchase the fee at any time during the term:—*Held*, that the covenant created an interest in land which infringed the rule against perpetuities, and could not be specifically enforced in equity. *London and South-Western Railway v. Gomm* (51 L. J. Ch. 530; 20 Ch. D. 562), *Woodall v. Clifton* (74 L. J. Ch. 555; [1905] 2 Ch. 257), *Bowen, In re*; *Lloyd Phillips v. Davis* (62 L. J. Ch. 681;

[1893] 2 Ch. 491), and *Stratheden and Campbell, In re*; *Alt v. Stratheden and Campbell* (63 L. J. Ch. 872; [1894] 3 Ch. 265), applied. *Worthing Corporation v. Heather*, 75 L. J. Ch. 761; [1906] 2 Ch. 532; 95 L. T. 18; 4 L. G. R. 1179; 22 T. L. R. 750—Warrington, J.

But *held*, also, that, the covenant being valid in law, damages could be recovered for its breach. *Collins v. Plummer* (2 Vern. 635; 1 P. Wms. 104) followed. *Sevis v. Bruton* (2 Vern. 251) explained and distinguished. *Ib.*

Lease—Lessee and Assigns—Equitable Assignee of Lease.—An option to purchase the fee-simple given to a lessee or his assigns is not exercisable by an equitable assignee. *Friary, Holroyd & Healey's Breweries v. Singleton*, 63 L. J. Ch. 622; [1899] 2 Ch. 261; 81 L. T. 101; 47 W. R. 662—C.A.

4. AGRICULTURAL TENANCIES.

63 & 64 Vict. c. 50 is the *Agricultural Holdings Act, 1900.*

Authority of Agent—Agreement that Tenant may Change Cultivation from that of Agricultural Land to Market Garden—Valuation on Determination of Tenancy—Claim "otherwise than in manner authorised by this Act."—The manager of an estate has, in the absence of any limitation of his authority, power to bind the landlord by an agreement with the tenant that the latter may be at liberty to change the cultivation of the estate from agricultural land to that of a market garden. Where, by such an agreement, made since the passing of the Agricultural Holdings (England) Act, 1883, it is provided that the tenant shall be allowed a market-garden valuation upon leaving the estate, the tenant is entitled at the termination of his tenancy to receive from the landlord under the agreement the amount of such valuation. *Pearson and Tanson, In re*, 68 L. J. Q.B. 878; [1899] 2 Q.B. 618; 81 L. T. 289; 48 W. R. 154; 63 J. P. 677—D.

Section 57 of the Agricultural Holdings (England) Act, 1883, which prohibits a tenant from claiming compensation in respect of an improvement under the Act, otherwise than in manner authorised by the Act, only applies to a tenant claiming compensation under the Act, and not to a tenant who is claiming under an agreement outside the Act. *Ib.*

Market Garden—Fruit Trees—Agreement as to Compensation.—A fixed sum specified in a lease of market gardens as a compensation for the exercise by the lessor of a power reserved to him by the lease of resuming possession of any part of the land on giving six calendar months' notice to the lessee,—*Held*, by STIRLING, L.J., and FLETCHER MOULTON, L.J. (VAUGHAN WILLIAMS, L.J., doubting, but not dissenting), upon the terms of the particular lease not to be payable in respect of fruit trees permanently set out on the land subsequently to January 1, 1896, when the Market Gardeners' Compensation Act, 1895, came into operation. *Smith and Devonshire (Duke), In re*, 22 T. L. R. 619—C.A.

Away-going Crop—Deductions under Lease—Deductions by Custom of the Country—Inconsistency.]—The following proviso was in a lease made between the landlord and the tenants: "Provided, lastly, that on the determination of his tenancy the tenant shall, in the event of his having duly performed the several stipulations and agreements hereinbefore contained and to be performed on his part, be entitled to have and take a following or away-going crop of corn not exceeding one-third of the arable land hereby demised, such crop to be taken from land summer fallowed or from which turnips or rape have been eaten, or from land sown in the regular course with seeds and depastured by sheep, and which said away-going crop shall be taken at a valuation to be ascertained by two disinterested persons, one to be named by the on-coming, the other by the off-going tenant or their umpire (in case they cannot agree), such umpire to be appointed by such valuers before proceeding upon such valuation, and the decision of such two arbitrators or of their umpire shall be final and binding on both parties. And it is further agreed that one-half of the value of such away-going crop shall be paid at Christmas next after the determination of this demise and the remaining half at Lady Day following; subject, nevertheless, to such deductions as the same may be liable to under any of the covenants and agreements hereinbefore contained on the part of the tenant, and which the landlord is hereby authorised to deduct accordingly, and also subject to such of the rents hereinbefore reserved as shall be due and owing, to the payment of which it shall be primarily liable, and for which rents the said landlord shall be entitled at any time to distrain the same away-going crop before or after severance as for rent in arrear." The covenants thereinbefore referred to were inserted for the benefit of the landlord as to cultivation and repairs to buildings, and gave him in certain cases a right of lien on the valuation of the away-going crop in respect of his claim for damages against the tenant for breaches of covenant committed by him. There were no stipulations, however, as to the mode of ascertaining the value of such crop:—*Held*, that there was nothing to prevent the application of the custom of the country, and that the tenants were entitled to the away-going crop and manurial value of the straw, but that the landlord was entitled to deductions for standage, rateable proportion of the rates and taxes, and cost of labour. *Constable and Cranwick, In re*, 80 L. T. 164—D.

Reference—Enforcing Award—Claims Outside Act—Agreement to Refer all Claims to Umpire Appointed under Act.]—An outgoing tenant of an agricultural holding gave notices to the landlord of his intention to claim compensation under the Agricultural Holdings Act, 1883, and the landlord gave counter-notices of his intention to claim for breaches of covenant. Referees and an umpire having been appointed under the Act, it appeared that, while some of the claims were within the Act, others were outside it, and it was thereupon agreed between the landlord and tenant that all matters in difference between them, as set out in the various claims and counterclaims, should be referred for decision to the referees and umpire already appointed under the Act. The umpire having awarded that there was a balance due from the tenant

to the landlord,—*Held*, that the agreement constituted a submission to arbitration outside the Act, and that nothing in the Act prevented the landlord from being entitled to leave under section 12 of the Arbitration Act, 1889, to enforce the award in the same manner as a judgment to the same effect. *Lloyd and Tooth, In re*, 68 L. J. Q.B. 376; [1899] 1 Q.B. 559; 80 L. T. 394—C.A.

Agricultural Holdings Act—Statutory Arbitration—Agreement in Writing.]—A clause in an agricultural lease referring to two arbitrators certain questions of compensation under the lease is not an agreement in writing in the sense of section 1 of the Second Schedule, Part II. of the Agricultural Holdings Act, 1900. *Hamilton Ogilvy v. Elliot*, 7 F. 1115—Ct. of Sess.

An agricultural lease gave the tenant right on the termination of the lease to compensation for manure and feeding-stuffs purchased by the tenant and applied to the lands, the amount of compensation to be determined by arbitration in the manner and according to the rules set forth in the lease. On the termination of the lease the tenant lodged a claim in an arbitration under the Agricultural Holdings Act, 1900, in which he claimed, *inter alia*, compensation for manure and feeding-stuffs:—*Held*, that the claim, in so far as it was for compensation for manure and feeding-stuffs, was incompetent, in respect that such compensation fell to be determined by arbitration under the lease. *Ib.*

Retrospective Effect of Statute.]—The Agricultural Holdings Act, 1900, gives tenants right to compensation, *inter alia*, for "laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy":—*Held*, that a tenant, whose tenancy terminated less than two years from the date of the Act, was entitled to compensation under this enactment. *Ib.*

Dispensing with Notice as to Terms of Compensation.]—An agreement under section 4 of the Agricultural Holdings Act, 1883, to dispense with written notice need not be in writing. *Ib.*

Reservation—Landlord's Right to Sell Land for "Building sites"—Sale of Site for Smallpox Hospital.]—A reservation to the landlord, in an agreement under which land is let for farming purposes, of a right to sell portions of the land for "building sites" is confined to the sale of the land for the erection of dwelling-houses and the like, and does not extend to the sale to a local authority of a site for a smallpox hospital. *English v. Tynemouth Corporation*, 67 J. P. 239; 1 L. G. R. 177—D.

5. RENT.

Apportionment of Rent—Payment in Advance—Re-entry for Breach of Covenant.]—Section 2 of the Apportionment Act, 1870, does not apply to a sum duly paid in pursuance of the terms of a contract before the happening of the incident which is said to necessitate or require the ap-

portmentment. *Ellis v. Rowbotham*, 69 L. J. Q.B. 379; [1900] 1 Q.B. 740; 82 L. T. 191; 48 W. R. 428—C.A.

An agreement for the letting of a house contained a covenant by the tenant to pay the rent by instalments in advance, and also gave the landlord the right to re-enter for breach of covenant without prejudice to other remedies he might have. The tenant having made default in the payment of an instalment of rent, the landlord re-entered and also sued the tenant for the amount of the instalment:—*Held*, that the landlord was entitled to recover the whole amount of the instalment, and that the Apportionment Act, 1870, had not the effect of limiting the liability of the tenant to an apportioned part of the rent to the date of the re-entry. *Ib.*

— **Assignment.**—P. took an assignment by way of mortgage from O.N. of lands held by the latter as tenant to G. The assignment was made between the two half-yearly terms on which rent was payable. G. claimed to recover from P. the full amount of the half-year's rent falling due upon the next usual rent-day after the assignment:—*Held* (KENNY, J., dissenting), that the Apportionment Act, 1870, applies to the liability to pay as well as the right to receive, and that G. was entitled to recover from P. only an apportioned part of the rent, computed *de die in diem* from the date of the assignment to the usual rent-day. *Glass v. Patterson*, [1902] 2 Ir. R. 660—K.B. D. And see *Ellis v. Rowbotham*, 80 L. T. 328.

Lease to Company—Surety for Payment of Rent During Term—Dissolution of Company—Liability of Surety.—The plaintiffs granted a lease for a certain term of certain land to a company incorporated under the Companies Acts, the defendants being sureties for the payment of the rent, which was payable monthly. The lease provided that "the lessees do and each of the sureties doth for himself covenant that the lessees and sureties, or some or one of them, will during the said term pay the said rent on the dates and in the manner hereinbefore mentioned." During the term the company was wound up and finally dissolved under section 143 of the Companies Act, 1862, and the rent was paid down to the date of the dissolution. The plaintiffs thereupon sued the defendants as sureties for the rent due for the following month:—*Held*, that the term came to an end when the company was dissolved, and that therefore the defendants, who were sureties for the payment of the rent during the term, were not liable. *Hastings Corporation v. Letton*, 97 L. T. 582; 23 T. L. R. 456; 77 L. J. K.B. 149; [1908] 1 K.B. 378—D.

Salvage Payment by Sub-tenant—Principle of Contribution.—Lands held for ever subject to a fee-farm rent were sold in lots. Six lots were made primarily liable for the head rent in certain proportions, and were bound to indemnify the remaining lots accordingly. Afterwards the head rent fell into arrear, owing to the default of the owners of some of the indemnifying lots to pay their proportion, and an ejectment for non-payment of rent was brought by the head landlord. The plaintiff, who was a sub-tenant of part of one of the indemnified lots, paid the

rent and costs in order to save the lands from eviction, and claimed contribution from the owners of the several lots:—*Held*, that the plaintiff was entitled to contribution on the principle of salvage, and that the owners of the lots should contribute according to the value of the lots at the date when the salvage payment was made. *Allison v. Jenkins*, [1904] 1 Ir. R. 341—M.R.

Tithe-rentcharge—Agreement by Tenant, to Pay—Validity.—By an agreement of tenancy a farm was let to a tenant at a yearly rent of 235*l.*, "and also by way of further rent so much as the landlord shall pay for tithe-rentcharge on the said premises." The tenant agreed to pay the rent reserved and also the tithe-rentcharge:—*Held*, that the agreement to pay the further rent was void by virtue of section 1 of the Tithe Act, 1891. *Davies v. Fitton* (2 Dr. & W. 225) followed. *Ludlow (Baron) v. Pike*, 73 L. J. K.B. 274; [1904] 1 K.B. 531; 90 L. T. 453; 52 W. R. 475; 68 J. P. 243; 20 T. L. R. 276—Channell, J.

Covenant to Pay Rent in Advance—Admissibility of Parol Agreement to Give Bills.—*See EVIDENCE.*

Rent—Claim for—Bankruptcy of Tenant.—*See BANKRUPTCY*, col. 134.

Liability of Assignee—Disclaimer by Trustee.—*See Stein v. Pope*, 57 L. J. K.B. 322; *ante*, *BANKRUPTCY*.

6. DISTRESS.

(a) Generally.

Unlawful Entry—Trespass ab Initio—Second Distress for Same Rent—Replevin.—A landlord issued a distress warrant for rent in arrear. The bailiff to whom the warrant was handed effected an unlawful entry upon the demised premises, and having seized goods of the plaintiff remained in possession of them for some days. He then left the premises, and on returning was refused admission. The landlord then issued a second distress for the same rent under which the same goods were seized, whereupon the plaintiff brought an action of replevin against him:—*Held*, that the first entry and seizure were a trespass *ab initio* and void as a distress, and that the second entry and seizure were justified, as the defendant had not lost his right to distrain. *Attack v. Bramwell* (32 L. J. Q.B. 416; 3 B. & S. 520) followed. *Grinnell v. Welch*, 75 L. J. K.B. 657; [1906] 2 K.B. 555; 95 L. T. 238; 54 W. R. 581; 22 T. L. R. 688—C.A.

Sub-lease—Assignment.—A sub-lease for a period co-extensive with, or longer than, the sub-lessor's term operates as an assignment, and the sub-lessor cannot distrain for rent in arrear. *Parmenter v. Webber* (8 Taunt. 593; 2 Moore, 656) and *Preece v. Corrie* (6 L. J. (o.s.) C.P. 205; 5 Bing. 24) followed. *Lewis v. Baker* (No. 1), 74 L. J. Ch. 39; [1905] 1 Ch. 46; 91 L. T. 744; 21 T. L. R. 17—Swinfen Eady, J.

Neither section 5 of the Landlord and Tenant Act, 1730, nor section 44 of the Conveyancing and Law of Property Act, apply so as to give a

right of distress where the original right has been lost by reason of the lessor of a term at a rent parting with the whole of his interest. *Ib.*

Levy by Uncertificated Bailiff—Goods of Third Person on Demised Premises.]—Section 7 of the Law of Distress Amendment Act, 1888, which provides that no person other than a certificated bailiff shall levy a distress for rent, applies not only as to distresses between landlords and tenants, but also as to those between landlords and third persons whose goods may be on the demised premises. *Perring v. Emerson*, 75 L. J. K.B. 12; [1906] 1 K.B. 1; 93 L. T. 748; 54 W. R. 47; 22 T. L. R. 14—D.

Exemption from Distress—Machine on Hire-purchase Agreement—Estoppel—Substitution of Complainant in Summons.]—A sewing machine in the possession of a tenant under a hire-purchase agreement, and used by the tenant's wife to support the family, is exempt from distress, under section 4 of the Law of Distress Amendment Act, 1888, as a tool and implement of the trade of such tenant. Upon a distraint being made upon such a sewing machine, and a man being put in possession, a letter was written to the landlord: "I hereby request you to remove the sewing machine and other goods you have distrained on my premises."—*Held*, that this did not stop the respondent from raising the question whether the machine could be distrained upon at all. *Semble*, that although the husband was the tenant and the hirer, the proceeding could be maintained by the wife, but that in any case the proceedings could be put right, either by having fresh proceedings or substituting the husband for the wife as complainant. *Masters v. Fraser*, 85 L. T. 611; 66 J. P. 100—D.

— Goods Belonging to Crown—Privilege from Distress.]—Crown property, even though the Crown be not tenant, is privileged from distress for rent on premises demised to a subject. *Secretary of State for War v. Wynne*, 75 L. J. K.B. 25; [1905] 2 K.B. 845; 93 L. T. 797; 54 W. R. 235; 22 T. L. R. 8—D.

— Implement of Trade—Cab—Only Chattel on Premises Worth More than Five Pounds.]—A four-wheeled cab used by a cab-driver for the purposes of his trade is within the protection from distress for rent afforded to a tenant by section 4 of the Law of Distress Amendment Act, 1888 (incorporating the words of section 147 of the County Courts Act, 1888), in respect of the "tools and implements of his trade" to the value of 5*l.* *Lavell v. Ritchings*, 75 L. J. K.B. 287; [1906] 1 K.B. 480; 94 L. T. 515; 54 W. R. 394; 22 T. L. R. 316—D.

An implement of trade whose value exceeds 5*l.* is within the exemption from distress for rent given by section 4 of the Law of Distress Amendment Act, 1888, to the tools and implements of the tenant's trade "to the value of five pounds," provided that it is the only chattel upon the premises. *Ib.*

— Public Trade—Things Delivered to be Managed in the Way of His Trade.]—The plaintiff was the sub-lessee of certain premises upon which he carried on a club to which artists, who were members, sent pictures for exhibition.

Members and friends, introduced by them, a one could use the club, and the plaintiff received a commission upon all pictures sold. By the rules of the club the entire management of the pictures and their exhibition was vested in the picture committee. Certain pictures which were being exhibited were distrained upon by the superior landlord for rent due from his lessee. The plaintiff and the artists who owned the pictures brought an action claiming an injunction to restrain the lessor from proceeding with the distress. *NEVILLE, J.*, held that the plaintiff did not carry on a public trade so as to render the pictures privileged from distress:—*Held*, on appeal, affirming the decision, that the pictures were not delivered to the plaintiff to be managed in the way of his trade, so as to be privileged from distress, his trade being that of a club proprietor, and the committee having the management of the pictures. *Challoner v. Robinson*, 77 L. J. Ch. 72; [1908] 1 Ch. 49; 24 T. L. R. 38; 71 J. P. 585—C.A.

— Goods Protected from Seizure in Execution up to 5*l.*—"Bedding."]—Section 4 of the Law of Distress Amendment Act, 1888, exempts from distress for rent goods to the value of 5*l.*, protected from seizure in execution by section 147 of the County Courts Act, 1888, and the word "bedding" in the latter section includes "bedstead." *Davis v. Harris*, 69 L. J. Q.B. 282; [1900] 1 Q.B. 729; 81 L. T. 780; 48 W. R. 445; 64 J. P. 186—D.

— Chattel Belonging to Third Person Annexed to Soil—Hire-purchase Agreement—Engine on Concrete Bed in Soil Secured by Screws to Bolts Sunk in Concrete—Fixture.]—A gas engine laid on a raised bed of concrete and screwed down on to bolts sunk in the concrete and fastened into the ground is a fixture, and is therefore not distrainable by the landlord for rent. *Hobson v. Gorringe* (66 L. J. Ch. 114; [1897] 1 Ch. 182) and *Reynolds v. Ashby & Son* (72 L. J. K.B. 51; [1903] 1 K.B. 87) followed. *Hellawell v. Eastwood* (20 L. J. Ex. 154; 6 Ex. 295) not followed. *Crossley v. Lee*, 77 L. J. K.B. 199; [1908] 1 K.B. 86; 97 L. T. 850—D.

Removal of Chattels by Execution Creditor without Regarding Landlord's Claim for Rent—Tort—Measure of Damages.]—Where cattle, exceeding in value one year's rent, were seized in execution by a special bailiff, who, after notice of a claim for rent by the landlord, removed them from the lands without paying a year's rent, and subsequently, after five or six days, returned them to the lands, on the amount of the claim being satisfied:—*Held*, that the landlord was entitled to damages, as in an action of tort, which were measured at the amount of the year's rent, of which he had been deprived. *Wren v. Stokes*, [1902] 1 Ir. R. 167—C.A.

Illegal Distress—Damages—Mortgagor and Mortgagee—Receiver.]—Where a mortgagee of a leasehold house has appointed a receiver of the rents and profits under section 19 of the Conveyancing Act, 1881, a distress for arrears of rent levied by the mortgagor, without any authority from the receiver, is illegal. *Woolston v. Ross*, 69 L. J. Ch. 363; [1900] 1 Ch. 788; 82 L. T. 21; 48 W. R. 556; 64 J. P. 264—Cozens-Hardy, J.

So long as the receivership is in force, and the notice to the tenant of the appointment has not been withdrawn, no valid distress can be levied except by the receiver, or some person authorised by him. *Ib.*

Contract for Percentage in Excess of Statutory Charges—Order of Justices for Treble Amount.]—A bailiff employed to make a distress for rent which did not exceed 20l. obtained the signature of the landlord to a warrant containing a clause authorising him to deduct 5 per cent. as commission over and above the statutory costs allowed on the amount recovered. The Justices dismissed a summons under the Distress (Costs) Act, 1817, for treble the amount so taken:—*Held* (DARLING, J., dissenting), that the agreement was not made unlawful by section 1 of the Distress (Costs) Act, 1817, and that therefore the Justices were not bound to make the order under section 2 of the Act. *Robson v. Biggar*, 76 L. J. K.B. 248; [1907] 1 K.B. 690; 96 L. T. 271; 71 J. P. 164; 23 T. L. R. 276—D.

Impounding Distress—Actual Possession of Goods—Pound Breach.]—It is not necessary that a landlord who has impounded distrained goods upon the premises under section 10 of the Distress for Rent Act, 1737, should retain actual possession of them. *Jones v. Beirnsstein*, 69 L. J. Q.B. 1; [1900] 1 Q.B. 100; 81 L. T. 553; 48 W. R. 232—C.A.

Agreement to take over Stock at Valuation in Lieu of Rent.]—A landlord of a farm cannot—by entering into an agreement with his tenant after bankruptcy of the latter, not to levy a distress on the terms of taking over the dead stock at a valuation, although such agreement is beneficial to the estate—obtain a larger amount in respect of arrears of rent due to him than the six months' rent allowed him by the conjoint effect of section 42 of the Bankruptcy Act, 1883, and section 28 of the Bankruptcy Act, 1890. *In re Griffith; ex parte Official Receiver*, 66 L. J. Q.B. 763—D.

Pound Breach—Treble Damages.]—An action for treble damages for pound breach or rescous of goods distrained for rent, under section 4 of 2 Will. & M. c. 5, is maintainable by the landlord without proof of any special damage suffered by him. *Kemp v. Christmas*, 79 L. T. 233—C.A.

Power of Sale—Auction—Landlord Buying in.] A landlord cannot himself become the purchaser of goods sold by him under a distress. *Dictum* of BLACKBURN, J., in *King v. England* (33 L. J. Q.B. 145; 4 B. & S. 782) followed. *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, 73 L. J. K.B. 457; [1904] 1 K.B. 820; 90 L. T. 469; 52 W. R. 385; 63 J. P. 369; 20 T. L. R. 366—C.A.

Patented Chattel—Sale to Purchaser with Notice of Restrictions on User.]—The purchaser of a patented article at a sale of a distress for rent does not acquire the right to use the article, in breach of a contract entered into by the tenant with the patentee restricting the right to use the article, if at the time of purchase he has notice of the contract. *British Mutoscope and Biograph Co. v. Homer*, 70 L. J. Ch. 279; [1901] 1 Ch. 671; 84 L. T. 26; 49 W. R. 277—Farwell, J.

(b) Lodgers' Goods.

Illegal Distress—Liability of Bailiff.]—Under section 2 of the Lodgers' Goods Protection Act, 1871, an action for illegal distress lies against a bailiff who levies or proceeds with a distress upon the goods of a lodger after being served with the declaration and inventory mentioned in section 1 of the Act, and after the lodger has paid or tendered to the superior landlord or his bailiff the rent, if any, due from him to his immediate landlord, or so much thereof as is sufficient to discharge the claim of the superior landlord. (COLLINS, M.R., dissenting.) *Towce v. Dorling*, 75 L. J. K.B. 1019; [1906] 2 K.B. 772; 95 L. T. 243; 22 T. L. R. 779—C.A.

—Bailiff Employed by Landlord—Liability to Action for Illegal Distress.]—An action will lie under section 2 of the Lodgers' Goods Protection Act, 1871, against a bailiff who, being employed by a landlord to distrain, commits an illegal distress. *Lowe v. Dorling*, 74 L. J. K.B. 794; [1905] 2 K.B. 501; 93 L. T. 398; 54 W. R. 28; 21 T. L. R. 616—D.

—Declaration and Inventory—"Inventory subscribed by the lodger."—An inventory is sufficiently subscribed by a lodger for the purposes of sections 1 and 2 of the Lodgers' Goods Protection Act, 1871, if it is referred to in the declaration to which it is annexed and the declaration is signed by the lodger. *Godlington v. Fulham and Hampstead Property Co.*, 74 L. J. K.B. 242; [1905] 1 K.B. 431; 92 L. T. 362; 21 T. L. R. 223—D.

7. SURRENDER.

Surrender by Operation of Law—Possession of Surrendered Lease.]—A lessee, notwithstanding a surrender of his term by operation of law, retains an interest in the lease, and on the granting of a new lease to him by the lessor is entitled to retain the old lease. *Knight v. Williams*, 70 L. J. Ch. 92; [1901] 1 Ch. 256; 83 L. T. 730; 49 W. R. 427—Coxens-Hardy, J.

The surrender of an old lease, implied from the acceptance of a new lease, is subject to an implied condition that the new lease is valid. *Ib.*

Power to Surrender on Giving Three Months' Notice—Lunar or Calendar Months.]—By an agreement dated October 2, 1902, the defendant agreed to let to the plaintiff certain premises for five hundred years from November 1, 1902, at the yearly rent of 100l. payable half-yearly in advance on May 1 and November 1 in each year, with a proviso that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice beforehand of his intention to do so. On July 30 the plaintiff sent to the defendant by registered post a notice of his intention to surrender on November 1, 1904. The letter was not delivered to the defendant till August 1:—*Held*, that whether the word "months" was to be read as calendar or as lunar months, a notice served on August 1, 1904, of intention to surrender on November 1 following was good. *Wilkins v. M'Ginity*, [1907] 2 Ir. R. 660—C.A.

8. RE-ENTRY AND FORFEITURE.

(a) Generally.

Writ for Recovery of Possession—Inconsistent Claims—Mining Lease.—To avoid a lease under a proviso that upon breach of covenant by the lessee the lessor may "re-enter and thereupon the lease shall determine," the lessor must either actually re-enter or issue a writ for recovery of possession equivalent in law to re-entry. *Jones v. Carter* (15 M. & W. 718) and *dictum* of BAYLEY, C.; in *Fenn v. Smart* (12 East, 444, 448) followed. *Moore v. Ullocoats Mining Co.*, 77 L. J. Ch. 282; [1908] 1 Ch. 575; 97 L. T. 845—Warrington, J.

In order that a writ for recovery of possession may be equivalent in law to re-entry it must be an unequivocal demand for possession. Principle of *Evans v. Davis* (48 L. J. Ch. 228; 10 Ch. D. 747) followed. *Ib.*

A writ claiming possession *simpliciter* and any further relief which is incident to a claim for possession is equivalent to re-entry; but, where a lessor claims in his writ not only recovery of possession, but also an injunction to restrain breach of covenants in the lease and an order for inspection of the premises, the claims are inconsistent, and accordingly the writ does not constitute an unequivocal demand for possession, and is not equivalent to re-entry. *Ib.*

A notice by the lessor of his intention to re-enter, and demanding possession, is not entry or equivalent to entry, and is not sufficient to determine the lease. *Ib.*

Peaceable Re-entry—Statutory Notice.—The giving of the statutory notice provided for by section 14 of the Conveyancing Act, 1881, is a necessary preliminary to peaceable re-entry on the part of a lessor as well as to re-entry by process of the Court. *Riggs, In re; Trustee, ex parte*, 70 L. J. K.B. 541; [1901] 2 K.B. 16; 84 L. T. 428; 49 W. R. 624; 8 Manson, 233—Wright, J.

Notice—Action for a Declaration of Forfeiture.—An action for declaration of forfeiture of a lease for breach of a covenant to which section 14 of the Conveyancing Act, 1881, applies, though not intended to be followed by a re-entry, will not lie unless the notice required by sub-section 1 of that section has first been served. *Wilson v. Rosenthal*, 22 T. L. R. 233—Sutton, J.

Notice to Remedy Breach—Validity of Notice.—A notice under section 14 of the Conveyancing and Law of Property Act, 1881, requiring satisfaction from a lessee for breach of covenant, may contain allegations of several breaches, though some only shall prove to be actual breaches; a separate notice for each alleged breach is not necessary. *Horsey Estate v. Steiger* (68 L. J. Q.B. 743; [1899] 2 Q.B. 79) and *Skinner's Co. v. Knight* (60 L. J. Q.B. 629; [1891] 2 Q.B. 542) distinguished. *Lock v. Pearce* (62 L. J. Ch. 582; [1893] 2 Ch. 271) followed. *Pannell v. City of London Brewery*, 69 L. J. Ch. 244; [1900] 1 Ch. 496; 82 L. T. 53; 48 W. R. 264—Buckley, J. And see *Gentle v. Faulkner* and *Jacob v. Down*, *supra*.

Sufficiency.—A notice under the Conveyancing and Law of Property Act, 1881, s. 14, to the lessee, "that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is an insufficient notice of the particular breach of a covenant to repair. *Fletcher v. Nokes* (66 L. J. Ch. 177; [1897] 1 Ch. 271) followed. *Serle, In re; Gregory v. Serle*, 67 L. J. Ch. 344; [1893] 1 Ch. 652; 78 L. T. 384; 46 W. R. 440—Kekewich, J.

A notice specifying particular breaches of distinct covenants will not entitle the lessor to maintain an action to enforce a right of re-entry or forfeiture if it is insufficient as to the alleged breach of any one covenant. *Ib.*

Action for Possession on Breach of Covenant to Repair—Assignee of Equity of Redemption—"Assign" of Lessor—Notice Specifying Breach.—The assignee of the equity of redemption, subject to two mortgages, of house property leased for eighty-one years in 1819 (being in receipt of the rents and profits), is, within the meaning of section 14, sub-section 3 of the Conveyancing Act, 1881, an "assign" of the lessor, and may, by the operation of the Judicature Act, 1873, s. 25, sub-s. 5, proceed, as of his own right, under the power of re-entry contained in the lease, to recover possession by action for forfeiture upon breach, on the part of the tenants, of the covenant to repair. *Matthews v. Usher*, 68 L. J. Q.B. 988; 81 L. T. 542—Ridley, J.

Notice under section 14, sub-section 1 of the Conveyancing Act, 1881, need not specify the repairs required in each particular house, but is sufficient if it give in copious detail every repair that may be required according to the condition of each house. The tenant must, on knowing what sort of work is required to be done, do it where it is wanted, and distinguish the work he is legally required to do from that which does not fall upon him according to law. *Ib.*

Continuing Breach—Notice of Breach Complaind of.—A lease under which rent was payable quarterly on the usual quarter days contained a covenant by the tenant to keep the demised premises in repair, and gave the landlord a right of re-entry for breach of covenant. The premises being out of repair, the landlord on September 22, 1896, served a notice upon the tenant under section 14, sub-section 1 of the Conveyancing Act, 1881, requiring him to execute certain specified repairs within three months. The repairs were not executed, and on January 14, 1897, the physical condition of the premises being then the same as on September 22, 1896, the landlord commenced an action by which he claimed possession of the premises and rent for the quarter ending December 25, 1896:—*Held*, that the action was maintainable, for the breach of covenant being a continuing one, the landlord by claiming rent up to December 25, 1896, did not preclude himself from insisting upon his right of re-entry in respect of the continuing breach subsequent to that date, and, the physical condition of the premises being the same, the notice of September 22, 1896, was a good notice of the breach complained of within the meaning of section 14, sub-section 1 of the Conveyancing

Act, 1881. *Penton v. Barnett*, 67 L. J. Q.B. 11; [1898] 1 Q.B. 276; 77 L. T. 645; 46 W. R. 33—C.A.

Covenant to Use Land for Agricultural Purposes Only—Attempted Sale in Plots—Breach—Forfeiture.—Where land has been leased for agricultural purposes only and not for subdivision in building lots, it being provided that on breach of such conditions the lessor shall have the right to resume possession, if the lessees advertise the sale of the land in a number of lots which are to be intersected by streets, and the land is shown in plans annexed to such advertisements as so laid out, a forfeiture is incurred and the lessor is entitled to resume possession; forfeiture, not interdict, being the appropriate remedy where actual steps have been taken in breach of the terms of the lease. *Short v. Turffontein Estates*, 74 L. J. P.O. 148; [1905] A.C. 584; 93 L. T. 57—P.C.

Covenants "to be performed" by Lessee—Default in "performance"—Negative Covenant—Not to Use Premises for Particular Business without Licence—Licence to Predecessor in Title—Breach.—A lease contained a covenant by the lessee not to use the premises for any business except that of an outfitter without the licence in writing of the lessor. It also contained a proviso for re-entry in case the lessee should "make default in the performance of any of the covenants upon his part to be performed." The original lessor gave to the original lessee licence in writing to use the premises for a business other than that of an outfitter. The successor in title of the original lessee used the premises otherwise than for the business of an outfitter. In an action of ejectment by the successor in title of the original lessor, *Held*, that the proviso for re-entry applied only to breaches of positive and not of negative covenants. *Semble*, also, that there was no breach of covenant. *Harman v. Ainslie*, 72 L. J. K.B. 533; [1903] 2 K.B. 241; 88 L. T. 770—Wright, J.

"Act or thing whereby the premises become vested in another"—Sub-letting.—A lease of a public-house for twenty-seven years contained a proviso for re-entry "if the lessees or their assigns should do or suffer any other act, matter, or thing whereby or by reason or means whereof the demised premises, or any part thereof, should either directly, or by operation of law, or otherwise howsoever indirectly become or be rendered liable to become vested, either for the whole or any part of the term thereby created, in any person other than the lessees." The lessees sub-let to a tenant from year to year:—*Held*, that the lessees had done an act whereby the demised premises became vested for part of the term in the sub-tenant, within the meaning of the proviso, and that a forfeiture had been incurred. *Dymock v. Showell's Brewery Co.*, 79 L. T. 329—C.A.

Limited Company—Liquidation of Solvent Company for Purposes of Reconstruction—Conveyancing Act, 1881, s. 2 (xv.).—The voluntary liquidation of a company, although the company be solvent and the liquidation be only for the purpose of amalgamation with other companies and of reconstruction, operates as a forfeiture of a lease under a proviso giving a right of re-

entry to the lessors on liquidation, voluntary or compulsory. Such a liquidation is within the words of section 2 (xv.) of the Conveyancing Act, 1881, under which "Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having... effects or results similar to those of bankruptcy." *Fryer v. Ewart*, 71 L. J. Ch. 433; [1902] A.C. 187; 86 L. T. 242; 9 Manson, 281—H.L. (E.)

The results of bankruptcy and winding-up compared. *Id.*

Condition for Re-entry on Liquidation—Condition Running with the Land—Notice to Remedy Breaches of Covenant—Necessity for Sufficiency of Notice—Covenant not to Underlet—Agreement to Purchase—Letting into Possession.—A plot of land was demised for a term of years to certain persons, one of whom was a limited company. By the lease the lessees for themselves and their assigns, and each of them for himself and itself respectively and his and its respective assigns, covenanted to repair all buildings to be erected on the land, and not to assign or underlet the premises without the consent of the lessors. The lease contained a proviso that if the lessees failed or neglected to perform or observe any of the covenants, or "if the lessees shall become bankrupt or enter into liquidation for the benefit of or compound with his creditors, or being a company shall enter into liquidation whether compulsory or voluntary," the lessors might re-enter. The lessors conveyed their interest in the premises to the plaintiffs, and the lessees with the consent of the plaintiffs assigned the residue of the term to the defendants, one of whom was a limited company. Subsequently, in January, 1897, the defendant company passed a resolution for a voluntary winding-up, not because of insolvency, but for the purpose of reconstruction and increasing the capital. A new company was formed, and the defendant company agreed to sell to the new company all their interest in the leasehold premises for the residue of the term. No assignment was executed, but the new company were let into possession. On November 2, 1897, the plaintiffs served notice on the defendants under section 14 of the Conveyancing Act, 1881, stating that the defendant company had entered into liquidation, and that the defendants had broken the covenant to repair, and that if the defendants failed to remedy the breaches specified within a reasonable time the plaintiffs would re-enter. Two days afterwards the plaintiffs brought an action to recover possession:—*Held*, that the proviso for re-entry in the lease meant that if either the individual lessee became bankrupt or the company lessee entered into liquidation the lessors might re-enter; that the right of re-entry accrued upon the liquidation of the company for any cause whatever, and not merely in consequence of insolvency; and that the condition for re-entry in the event of the company entering into liquidation ran with the land, and bound the assignees of the lessees. *Horsley Estate v. Steiger*, 68 L. J. Q.B. 743; [1899] 2 Q.B. 79; 80 L. T. 857; 47 W. R. 644—C.A.

Held, also, that the liquidation of the company was equivalent to bankruptcy within the meaning of section 14, sub-section 6 of the Conveyancing Act, 1881, and that the effect of

section 2, sub-section 2 of the Conveyancing Act, 1892, was to take the case of forfeiture for bankruptcy or liquidation for one year from the date of the bankruptcy or liquidation out of the cases in which notice, required by section 14, sub-section 1 of the Act of 1881 before enforcing the forfeiture, was not necessary; that, therefore, notice was necessary, and that the notice was bad. *Ib.*

Held, further, that as the new company had been let into possession under an agreement to purchase, there was not an underletting of the premises within the meaning of the covenant not to underlet. *Ib.*

(b) *Relief.*

Relief upon Terms.—Under section 14, sub-section 2 of the Conveyancing Act, 1881; the Court can only grant relief from the consequences of past forfeiture, and cannot do anything to condone a continuing breach of covenant in the future. *Batson v. London School Board*, 69 J. P. 9—Channell, J.

For Non-payment of Rent—Right of Under-lessee to Relief.—Section 4 of the Conveyancing Act, 1892, is a general section, and not merely an amendment of section 14 of the Conveyancing Act, 1881, and under it the Court has power to grant relief to an under-lessee in case of the forfeiture of the superior lease for non-payment of rent. *Gray v. Bonsall*, 73 L. J. K.B. 515; [1904] 1 K.B. 601; 90 L. T. 404; 52 W. R. 387; 20 T. L. R. 335—C.A.

"Lessor, his heirs and assigns"—Mortgage of Reversion—Mortgagor in Possession.—The Judicature Act, 1873, does not confer on a mortgagor entitled to the receipt of the rents and profits of land on lease at the date of the mortgage the rights of a legal assignee of the reversion, so as to entitle him in his own right to recover possession of the land on a forfeiture for breach of covenant in the lease. *Matthews v. Usher*, 69 L. J. Q.B. 856; [1900] 2 Q.B. 535; 88 L. T. 353; 49 W. R. 40—C.A.

Under-lessees—Parties Necessary to Application—Original Lessee—Original Assignee.—Although as a general rule upon an application by under-lessees for relief against forfeiture of the head-lease the Court will require the original lessee to be made a party to the proceedings, yet this will be dispensed with where good reason is shewn for not making him a party. Where, therefore, in an action by mortgagees by sub-demise of an under-lease for relief against forfeiture of the lease for non-payment of rent it appeared that the original lessee became bankrupt in 1877, that his trustee assigned the lease, and that the assignee subsequently disappeared and had not been heard of for twenty-six years, the Court dispensed with the necessity of making either the original lessee or assignee parties to the action. *Hare v. Elms* (62 L. J. Q.B. 187; [1893] 1 Q.B. 604) discussed. *Humphreys v. Morten*, 74 L. J. Ch. 370; [1905] 1 Ch. 739; 92 L. T. 834; 53 W. R. 552—Swinfen Eady, J.

Costs.—Where in such an action the right of the applicants to relief is contested by the lessor, the order as to costs made in *Howard v.*

Fanshawe (64 L. J. Ch. 666; [1895] 2 Ch. 531) should be followed—namely, that the applicants must pay the costs of obtaining the relief except so far as they have been increased by the resistance to the claim by the lessor. *Newbolt v. Bingham* (72 L. T. 852) distinguished. *Ib.*

Under-lease—Forfeiture of Lease—Relief to Under-lessee—Terms.—By a lease dated June 22, 1896, the plaintiff company demised unto S. T. and C. T. the ground floor and basements of No. 21 R. Approach for a term of twenty-one years at a rent of 300*l.* for the first three years, and thereafter at a rent of 350*l.* By an under-lease dated December 31, 1896, S. T. and C. T. demised unto T. J. C. a part of the ground floor of No. 21 R. Approach for the same term of twenty-one years, except the three last days thereof, at a rent of 125*l.* Forfeiture of the lease of June 22, 1896, having occurred by reason of the non-payment of rent, on September 9, 1902, the plaintiff company instituted an action to recover possession of the premises demised by them to S. T. and C. T. and for 226*l.*, being arrears of rent up to June 24, 1902, and for further proportionate rent from June 24, 1902, until payment. The action was brought against all persons then interested in the premises, and on January 7 and January 15, 1903, judgment was recovered against all the defendants except T. S. C. T. S. C., by his defence and counterclaim delivered January 13, 1903, denied that under the lease of June 22, 1896, any cause of forfeiture had arisen, and claimed an order under section 4 of the Conveyancing and Law of Property Act, 1892, vesting in him the premises comprised in the underlease of December 31, 1896, for the whole of the term thereby created. It was admitted by T. S. C. at the trial that cause of forfeiture had in fact arisen under the lease of June 22, 1896. The Court granted the order as claimed by T. S. C., but upon the terms that he should pay all arrears of rent due from S. T. and C. T. to the plaintiff company down to January 15, 1903, and the costs of the present proceedings, and that as from January 15, 1903, he should pay a fair rent to be ascertained. *London Bridge Buildings Co. v. Thomson*, 89 L. T. 50—Joyce, J.

Assignment of Lessee's Estate, except Leaseholds, for Benefit of Creditors—Declaration of Trust as to Leaseholds—Right of Re-entry on Lessee Executing Assignment for Benefit of Creditors—Notice of Breach—Covenant against "disposing of the land leased"—Sufficiency of Notice—Service on Trustee.—A lessee who had covenanted in his lease that he would not assign the land leased without the consent of the lessor, and that upon breach of any of his covenants, or if he should execute an assignment for the benefit of his creditors, the lessor should have the right to re-enter, executed a deed of assignment of all his estate, except leaseholds, to a trustee who sub-let the premises to a tenant who became the holder of the licence, for a term expiring before the original lease. The sub-tenant while in possession was convicted of permitting drunkenness on the premises, and at the general annual licensing meeting the renewal of the licence was refused. In an action by the lessor against the defendant to recover damages for breach of

covenant,—*Held*, that there had been no breach, as the sub-tenant was not an "assign" within the meaning of the covenant, and that the plaintiff was therefore not entitled to recover. *Bryant v. Hancock*, 67 L. J. Q.B. 507; [1898] Q.B. 716—C.A. See s.c. in H.L., *infra*.

• Decision of the Court of Appeal (67 L. J. Q.B. 507; [1898] 1 Q.B. 716) affirmed on the grounds that on the evidence and on the construction of a covenant by the tenant of licensed premises there had been no breach of the covenant. *Bryant v. Hancock*, 68 L. J. Q.B. 889; [1899] A.C. 442—H.L. (E.)

• **Restrictive, when Implied—Common Scheme—Residential Flats.**—Where a landlord enters into an agreement to let a residential flat to a tenant, under conditions and regulations which shew on the face of them that the building in which the flat is situated is intended to be used for residential flats only, and the building has in fact been so used, the landlord will be restrained at the suit of the tenant from converting a large part of the building into a club during the tenancy. *Hudson v. Crapps*, 65 L. J. Ch. 328; [1896] 1 Ch. 265—North, J.

Mortgage by Demise before Conveyancing Act, 1881—Under-lease by Mortgagor—Foreclosure—Acceptance of Rent by Mortgagee—Sub-lease by Licence of Mortgagee—Sale by Mortgagee Subject to Under-lease—Rights of Purchaser as Against Under-lessee and Sub-lessee—Representation by Mortgagee.—The lessee of certain premises under a lease for sixty years mortgaged the premises by demise to N. on March 9, 1881. By under-lease of March 24, 1892, the mortgagor purported to demise the premises to the defendant company for twenty-one years subject to a power of re-entry if the defendant company should be wound up. On March 21, 1895, N. foreclosed, and from that date the defendant company paid their rent to him, and his executors after his death. N. died in 1899, and on October 18, 1899, his executors gave to the defendant company licence in writing to demise to S. the premises comprised in the under-lease for the residue of the term of twenty-one years, less the last ten days, and in this licence the executors described themselves as being the persons in whom the reversion expectant on the determination of the under-lease was vested. On November 27, 1899, the defendant company sub-let the premises to S. On August 9, 1900, N.'s executors assigned the premises to the plaintiff for the residue of the term, subject to but with the benefit of the under-lease. After that the defendant company paid their rent to the plaintiff. On October 1, 1901, the plaintiff gave the defendant company notice to do certain repairs in accordance with the covenants of the under-lease. On October 8, 1902, an order was made for the winding-up of the defendant company. The plaintiff brought the action to recover possession of the property. His contention was that the under-lease was not binding upon him, it having been granted by a mortgagor without the concurrence of the mortgagee under a mortgage created before the Conveyancing Act, 1881, and that the defendant company were merely tenants from year to year to N. and himself of the premises comprised in the under-lease upon the terms thereof so far as they were not inconsistent with such a tenancy, and he could determine the tenancy

on account of the winding-up order.—*Held*, that N.'s executors had by their assertion that the reversion expectant on the determination of the under-lease was vested in them caused both the defendant company and S. to believe in that state of things, and to act on that belief so as to alter their previous positions, and the plaintiff, their successor, was estopped as against both the defendant company and S. from denying that he was the reversioner; and none the less so because the assertion was made by persons who, as mortgagees, were at the time entitled to say that the under-lease was not binding on them. *Held*, also, that it was a proper case for relief against forfeiture under section 14 of the Conveyancing Act, 1881. *Keith v. Gancia*, 73 L. J. Ch. 411; [1904] 1 Ch. 774—C.A.

• **Relief against Forfeiture—Liquidation—Sale within a Year of Forfeiture—What Amounts to, within Meaning of Section 2, Sub-section 2 of the Conveyancing Act, 1892.**—The M. B. Co., defendants, were mortgagees in possession of the freehold of certain premises leased to the H. C. Co. This company went into liquidation, and thereby incurred a forfeiture for breach of a covenant in their leases against bankruptcy. The receiver appointed by the H. C. Co., to enable him to take advantage of the provision for relief against such a forfeiture under section 14, sub-sections 1 and 6 of the Conveyancing Act, 1881, and section 2, sub-section 2 of the Conveyancing Act, 1892, entered into a contract for sale within one year from the date of the company going into liquidation, but such contract was conditional only and entered into solely for the purpose of obtaining the benefit of the provisions in the Acts. Section 14, sub-section 1 of the Conveyancing Act, 1881, provides for relief against forfeiture. Sub-section 6 of this section excludes from such relief breaches of conditions for forfeiture on the bankruptcy of a lessee. Section 2, sub-section 2 of the Conveyancing Act, 1892, extended these provisions for relief given by section 14 to a case of forfeiture on bankruptcy, but for one year only from the date of the bankruptcy; but, in case of a sale within one year, the provisions for relief were made applicable. On a motion in the action by the M. B. Co. for possession of the premises for the forfeiture,—*Held*, there was no sale within the meaning of section 2, sub-section 2 of the Conveyancing Act, 1892. To come within the provisions of that section and sub-section a sale must be completed by conveyance, or the contract entered into must be an absolute contract for sale. *Castle & Sons, Lim., In re; Mitchell v. Castle & Sons, Lim.*, 94 L. T. 396—Joyce, J.

Breach of Covenant not to Assign Without Consent—Equitable Relief.—By a lease granted by the plaintiffs to the defendants, the defendants covenanted (*inter alia*) not to underlet, assign, or part with the possession of the rooms or offices and premises, or any part thereof, to any person or persons without the written consent of the plaintiffs, such consent not to be unreasonably withheld; and there was a further clause entitling the plaintiffs to re-enter upon and into the rooms, &c., or any part in the name of the whole, if the defendants should not perform these covenants. The defendants re-

ceived a letter from B, in which all the terms of a sub-letting to him of a room were set out, and he was actually permitted by the defendants to partly move into the room. He was admitted to be a desirable tenant, but no written consent had been obtained from the plaintiffs:—*Held*, that there was a sub-letting, for the letter amounted to an agreement which could have been enforced, and so a forfeiture ensued and the plaintiffs were entitled to possession. *Held*, further, on the authority of *Barrow v. Isaac* (60 L. J. Q.B. 179; [1891] 1 Q.B. 417), that the defendants were not entitled to equitable relief. *Eastern Telegraph Co. v. Dent*, 70 L. T. 713—Kennedy, J.

(c) *Recovery of Premises.*

Warrant under Small Tenements Recovery Act—Execution of Warrant.—In proceedings under the Small Tenements Recovery Act, 1838, the magistrate made an order for a warrant to issue, but suspended it for ten days, with an intimation that if the tenant did not go out within the ten days the warrant would issue:—*Held*, that the magistrate had no power to make such an order, as the Act provides that the warrant cannot be enforced within less than twenty-one days from its date. *Reg. v. Hopkins*, 64 J. P. 454—D.

Rent in Arrear—Action for Recovery of Demised Premises—Sub-lessee in Possession—“Tenant” —Tender of Rent and Costs—Stay of Proceedings.—Where rent is in arrear under a lease, and an action is brought by the lessors for the recovery of the demised premises against the lessee and a sub-lessee in possession, who has not proved any title under the original lessee, but who has paid rent to the lessors, the sub-lessee is a “tenant” within the meaning of section 212 of the Common Law Procedure Act, 1852, and is consequently entitled to a stay of the proceedings upon payment of the rent in arrear and costs. *Doe d. Wyatt v. Byron* (14 L. J. C.P. 207; 1 C. B. 623) applied. *Moore v. Smea*, 76 L. J. K.B. 658; [1907] 2 K.B. 8; 96 L. T. 594—C.A.

Public-house—Tenant Vacating Possession—Action to Recover Possession—Appointment of Receiver of Licences—Power to Receiver to Appoint Person to Carry on Business.—The defendant, who was tenant to the plaintiffs of a public-house, disappeared and vacated the premises, and his address was unknown. The plaintiffs commenced an action to recover possession of the premises, and moved *ex parte* for the appointment of a receiver of the rents and profits of the public-house and of the licences belonging thereto, and that the receiver when appointed might be at liberty to appoint some fit and proper person to reside upon the premises and to hold the licences under his supervision. The Court, following though doubting *Charrington v. Camp* (71 L. J. Ch. 196; [1902] 1 Ch. 386), made an order as asked. *Whitbread v. Grain*, 23 T. L. R. 462—Kekewich, J.

9. DETERMINATION OF TENANCY.

Lease—Failure of Purpose for which Subjects Let—Implied Warranty.—The lease of a shop

bore to be granted for ten and a half years, and that only for the purpose of the tenants “carrying on therein the business of wine and spirit merchants,” and provided that it should be used exclusively for the business of a wine and spirit merchant. The tenants, after occupying the shop as a public-house for three and a half years, were refused a renewal of the licence. In an action at the landlord’s instance against the tenants, in which he agreed to remove the restriction upon the use of the premises,—*Held*, that the lease was not brought to an end by the loss of the licence and consequent failure of the purpose for which the shop was let. *Hart’s Trustees v. Arrol*, 6 F. 36—Ct. of Sess.

Agricultural Holdings—“Determination of the tenancy”—Compensation.—The words “determination of the tenancy” in section 7 of the Agricultural Holdings (England) Act, 1883, mean the determination of the holding in so far as it is an agricultural holding, so that under a tenancy of agricultural land terminating by a custom recognised in the lease on an earlier date than the tenancy of the buildings, the tenancy for the purposes of compensation under the Act of 1883 is determined at the earlier date. *Morley v. Carter*, 66 L. J. Q.B. 843; [1898] 1 Q.B. 8; 77 L. T. 337; 46 W. R. 77—D.

Abandonment of Farm by reason of Landlord’s Breach of Obligation to Fence.—The tenant under an agricultural lease for nineteen years left the farm at the end of the third year in consequence of the landlord’s failure to carry out his obligation to put the fences into good tenantable repair:—*Held*, that the breach of this obligation did not entitle the tenant to terminate the contract of lease, and that his abandonment of the farm did not constitute a “determination of tenancy” within the meaning of section 42 of the Agricultural Holdings (Scotland) Act, 1883, which corresponds to section 61 of the English Act, 1883. *Todd v. Bowie*, 4 F. 435—Ct. of Sess.

Tenancy from Year to Year—Parol Agreement Varying the Terms, Accepted by Tenant and Acted on by Landlord—Surrender by Operation of Law—Surrender by Estoppel—Statute of Frauds.—An existing tenancy from year to year may be surrendered by parol agreement of the parties, where the landlord and tenant mutually agree that the tenant shall be released, and free to quit the premises at a given date, earlier than he could otherwise have done. A new tenancy is thereby created, and its acceptance by the tenant works a surrender of the tenancy from year to year by operation of law. And where the landlord, acting upon the new agreement, and relying on the tenant quitting the premises, conveys them to a purchaser with possession at the particular date the tenant agreed to deliver them up, a surrender of the tenancy from year to year is worked by estoppel. In neither instance can the tenant set up section 3 of the Statute of Frauds in answer to an action by the landlord for possession. *Fenner v. Blake*, 69 L. J. Q.B. 257; [1900] 1 Q.B. 426; 82 L. T. 149; 48 W. R. 392—D.

10. NOTICE TO QUIT.

Notice—By Whom to be Given—Equitable Charge.—Where a lease for twenty-one years

contains the usual proviso for its determination by the lessee or his assigns by six months' notice at the expiration of the first seven or fourteen years of the term, such notice, in order to be valid, must be given by or on behalf of the person in whom the term is vested; and therefore the first assignee of the lease, who has purchased an equitable charge created by a second assignee by the deposit of the lease with the assignments as a security for a loan, is not entitled to give such notice, as he is not the person in whom the term is vested. *Seaward v. Drew*, 67 L. J. Q.B. 322; 78 L. T. 19—Channell, J.

Agricultural Holding—Service by Registered Letter.—A year's notice to quit a holding to which the Agricultural Holdings (England) Act, 1883, applies, made necessary and sufficient by virtue of section 33 of that Act, is a notice under the Act within the meaning of section 28 of the Act, and may be served upon the person to whom it is to be given by being sent through the post in a registered letter addressed to him at his last known place of abode in England. *Van Grutten v. Trevenen*, 71 L. J. K.B. 544; [1902] 2 K.B. 82; 87 L. T. 344; 50 W. R. 516—O.A.

Omission of Reservation of Lessor's Rights—Liability of Lessee for Breaches of Covenant.—Where a lease has been determined by notice given by the lessee, the lessor is entitled to maintain an action for damages for breaches of covenant committed by the lessee during the term, notwithstanding that the lessor's rights are not expressly reserved by the lease. *Blore v. Charlton*, 72 L. J. K.B. 114; [1903] 1 K.B. 356; 88 L. T. 235; 51 W. R. 336—Wright, J.

Yearly Tenancy—"Three months' notice on either side."—A tenant agreed in writing to take a tenement at a certain rent per annum from a certain date, and to pay rates and taxes. The agreement contained this clause, "Three months' notice on either side to terminate this agreement":—*Held*, that the tenancy was a yearly tenancy, and that a notice to quit expiring on any day not being an anniversary of the date of the commencement of the tenancy was invalid. *Dixon v. Bradford and District Railway Servants' Coal Supply Co.*, 73 L. J. K.B. 136; [1904] 1 K.B. 444; 90 L. T. 122; 20 T. L. R. 159—D.

End of Current Year's Tenancy.—A notice to determine a yearly tenancy from Lady Day to Lady Day, dated and served on March 24, requiring the tenant to quit on June 24, 1898, or at the end of the current year's tenancy, although a bad notice as regards June 24, must be understood to mean a year's notice to quit on March 25, 1899, and not a one day's notice. *Doe d. Huntingtower v. Culliford* (4 Dowl. & Ry. 248) approved. *Wride v. Dyer*, 69 L. J. Q.B. 17; [1900] 1 Q.B. 23; 81 L. T. 453; 48 W. R. 73; 64 J. P. 118—D.

Tenancy for One Year certain, and so on from Year to Year—Proviso for Notice to Quit at any Time—Notice to Quit during First Year.—Premises were let, under a written agreement, "for the term of one year certain from the date thereof, and so on from year to year, unless or until the tenancy thereby created should be

determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year without any reference to the time of entry, the date of the agreement, or the commencement of the tenancy":—*Held*, that the tenancy could not be determined by notice during the first year. *Cannon Brewery v. Nash*, 77 L. T. 648—C.A.

Grant of Lease during Yearly Tenancy—Notice to Quit by Original Landlord—Validity.—A landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant a valid notice to quit. *Wordsley Brewery Co. v. Halford*, 90 L. T. 89—D.

Quarterly Tenancy—Notice not Expiring on Quarter-day Named—Validity of Notice.—An agreement of tenancy of a public-house provided that the rent should be payable every three months on May 1, August 1, November 1, and February 1 in each year, "subject to three months' notice on either side at any time to terminate this agreement":—*Held*, that, in the absence of any express provision in the agreement that a tenancy from year to year was entered into, a three months' notice might be given at any time to determine the agreement. *Soames v. Nicholson*, 71 L. J. K.B. 24; [1902] 1 K.B. 157; 85 L. T. 614; 50 W. R. 169—D.

Weekly Tenancy.—By an agreement for a weekly tenancy it was agreed that the tenancy might be terminated by either landlord or tenant giving the other one week's notice, the key to be given up before twelve o'clock on the day of leaving:—*Held*, that a notice given at 10 A.M. on November 17 to expire on November 24 was not a good notice. A week's notice is seven clear days, and the law does not take notice of the fraction of a day. *Weston v. Miller*, 88 L. T. 769; 67 J. P. 203—D.

11. DANGEROUS DEFECTS IN DEMISED PREMISES.

Unfurnished House—Promise by Landlord to Repair—Injury to Tenant's Wife—Liability of Landlord.—The wife of a tenant injured in consequence of the defective condition of the premises, which the landlord has promised to repair, has no cause of action against the landlord. The wife is not in a better position to recover damages than a customer or a guest. *Cuvalier v. Pope*, 75 L. J. K.B. 609; [1906] A.C. 428; 95 L. T. 65; 22 T. L. R. 648—H.L. (E.)

Liability of Landlord for Injury to Tenant—Agreement by Landlord to Repair—Notice of Want of Repair.—A landlord is not liable to his tenant for personal injuries caused by the defective condition of the demised premises unless the landlord has agreed to repair the premises and has received notice of the want of repair. *Tredway v. Machin*, 91 L. T. 310; 53 W. R. 136; 20 T. L. R. 726—C.A.

Damage by Fall of Ceiling—Known Danger—Assurance by Landlord of Safety.—In an action of damages by the tenant of a house taken from year to year against the landlord, for damage

to furniture due to a fall of plaster from the ceiling of a room, the pursuer averred that on re-taking the house he pointed out to the landlord's factor that the plaster on a beam in the ceiling was apparently insecure, as evidenced by cracks therein; that the factor told him, and that he accepted the assurance, that there was no danger; that the plaster work was not repaired, and that a portion of it fell and damaged the furniture six months later in consequence of not having been repaired:—*Held* (Lord Young dissenting), that the action was maintainable. *Calder v. McCallum*, 4 F. 371—Ct. of Sess.

Negligence of Contractor—Liability of Landlord for—Defective Cistern—Overflow of Water

—Damage to Tenant's Goods—Competent Contractor Employed by Landlord after Notice of Defect.]—Where a person uses his land for any purpose for which it may in the ordinary course of the enjoyment of land be used, and without any default or negligence on his part damage happens to his neighbour's premises, no liability attaches to him. Further, if a person claiming to be compensated for damage caused by dangerous matter upon his neighbour's land has consented to such dangerous matter being brought upon his neighbour's land, he cannot recover. Therefore, where a landlord of premises lets a part of them, and at the time the tenant takes such part a water supply has been laid on to the premises by the landlord, the landlord is not, in the absence of contractual obligation, liable to the tenant for injury to goods of the latter, upon that portion of the premises occupied by him, caused by an overflow of water by reason of defective work to the landlord's water supply by a contractor employed by him, provided that the contractor is competent to do the work and was employed by the landlord upon receipt of notice of the defect in the water supply. *Blake v. Wolf*, 67 L. J. Q.B. 818; [1898] 2 Q.B. 426; 79 L. T. 188; 47 W. R. 8; 62 J. P. 559—D.

Negligence—Derogation from Grant—User by Lessor of Land Retained—Injury to Land Let—Duty of Lessor to Take Reasonable Care.]—A person who lets part of his land, retaining other part, is bound to take reasonable care in the user of the part retained not to cause damage to the tenant in his occupation of the part let. *Hargroves, Aronson & Co. v. Hartop*, 74 L. J. K.B. 233; [1905] 1 K.B. 472; 92 L. T. 414; 53 W. R. 262; 21 T. L. R. 226—D.

A floor of a building was let to the plaintiffs by the defendants, who retained the roof, with gutters attached thereto, in their own possession. One of the gutters became stopped up. The defendants had notice of its condition, but delayed taking any steps to clear it out, owing to which delay the plaintiff's floor was flooded:—*Held*, that the defendants were liable. *Id.*

Title of Third Party to Sue for Injuries.]—An action for damages against the landlord of a dwelling-house for breach of the contract of lease will not lie at the instance of any one who is not either a party to the lease or a person having a *jus quasitum* under it; but any person who sustains injuries through the fault of the landlord can sue him therefor in

an action *ex delicto*:—So *held* in an action of damages by a domestic servant employed by the tenant of a dwelling-house against the landlord. *Cavalier v. Pope* (75 L. J. K.B. 609; [1906] A.C. 428) distinguished. *Kennedy v. Bruce*, [1907] S.C. 845—Ct. of Sess.

Warranty—Evidence.]—An affirmation made upon the sale or letting of real property as to the then state of the property may amount to a warranty, provided the like conditions exist as in the case of a warranty upon the sale of a chattel. *De Lassalle v. Guildford*, 70 L. J. K.B. 533; [1901] 2 K.B. 215; 84 L. T. 549; 49 W. R. 467—C.A.

Written Agreement of Tenancy—Parol Warranty as to Condition of Drains.]—Upon the execution of a lease of a dwelling-house, the landlord verbally warranted that the drains were in good condition. The lease contained covenants by the lessee to do the inside, and by the lessor to do the outside repairs, but was silent as to the then condition of the drains:—*Held*, that the parol warranty was collateral to the lease and admissible in evidence, and that the tenant was entitled to maintain an action for the breach of it. *Id.*

12. LICENCE.

Licence or Lease—Construction of Document.]

—The owners of a house and shop, in September, 1890, wrote a letter to the person who was then in occupation, in the following terms: "We hereby agree to let you keep peaceable possession of your present house and shop in Strand Lane for a term of ten years, on condition that you commit no nuisance, and pay us the sum of 9s. 3d. per week for rent thereof. You to pay local board rates and we to pay poor rates and water rates as hitherto":—*Held*, that there was a demise of the premises for a term of ten years. *Duxbury v. Sandiford*, 80 L. T. 552—C.A.

To Use Part of Premises—Breach.]—The lessee of a theatre granted to a refreshment contractor "the free and exclusive licence and right to the use of all the refreshment bars, smoking rooms, wine cellars, and offices" in the theatre, together with the free right of access thereto, and also the sole and exclusive right of advertising therein, for a term of years at a fixed rent. The grant contained a power to determine the terms on non-payment of rent, and a covenant for quiet enjoyment:—*Held*, that the effect of the document was to grant a licence under which the refreshment contractor took no estate or interest in the property, and therefore it did not amount to breach of a covenant in the lease not to assign without the consent of the lessor. *Edwards v. Barrington*, 85 L. T. 650; 50 W. R. 358—H.L. (E.)

Agreement to let Hoarding—Yearly Tenancy—Notice to Quit.]—An agreement to let a hoarding for a bill-posting and advertising station and use a wall of a house for the same purpose, at a rental of 10l. per annum, payable quarterly, on the usual quarter-days,—*Held*, to constitute a licence and not a tenancy, and that a three months' notice to quit, expiring at the end of a year of the term, was a reasonable and

valid notice to determine it. *Wilson v. Turner*, 70 L. J. Ch. 263; [1901] 1 Ch. 578; 84 L. T. 48—Joyce, J.

— to Cut Timber—Licence Amounting to Demise of Land.]—A licence to cut timber on land whereby exclusive possession of the land is conferred upon the licensee amounts to a demise of the land, although there may be reservations or restrictions in respect of the purposes for which the land may be used. *Glenwood Lumber Co. v. Phillips*, 73 L. J. P.C. 62; [1904] A.C. 405; 90 L. T. 741; 20 T. L. R. 531—P.C.

Shooting Rights.]—See *Radcliff v. Hayes*, [1907] 1 Ir. R. 101—M.R.

18. FIXTURES.

Trade Fixtures—Right of Removal—Market Garden—Glass-Houses.]—Glass-houses erected for the purpose of his trade by a tenant who is carrying on the business of a market gardener, with the knowledge of his landlord, are trade fixtures, and may be removed by the tenant during the tenancy though attached to the freehold. *Mears v. Cullender*, 70 L. J. Ch. 621; [1901] 2 Ch. 388; 84 L. T. 618; 49 W. R. 534; 65 J. P. 615—Cozens-Hardy, J.

— Right of Tenant's Trustee in Bankruptcy to Remove.]—A lease of a messuage for a term of twenty-one years contained a covenant by the lessee to yield up the same at the end of the term, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stoves, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures, and things which are now, or at any time during the said term hereby granted shall be fixed, fastened, or belong to the said messuage and premises, or any part thereof." The lessee was described in the lease as a boot and shoe manufacturer, and he covenanted not to carry on on the premises any business other than that of a boot and shoe maker. He brought on to the premises for the purpose of his trade certain machinery which was nailed, screwed, or bolted to the floors:—*Held*, that the articles enumerated having this common characteristic—that they would not, as between landlord and tenant, ordinarily be removable by the tenant if put up by him—the general words which followed must be confined to articles of the same *genus*; and that the trade machinery in question, which was not connected with the building in such a way as to become an integral part of it, but only for its more convenient user, was not included in the covenant. The principle of *Bishop v. Elliott* (24 L. J. Ex. 249; 11 Ex. 113) applied. *Lambourn v. McLellan*, 72 L. J. Ch. 617; [1903] 2 Ch. 268; 88 L. T. 748; 51 W. R. 594—C.A.

Per VAUGHAN WILLIAMS, L.J.—If a covenant in a lease to leave fixtures at the end of the term leaves the matter doubtful, the ordinary right of a tenant to remove trade fixtures will not be interfered with. *Ib.*

Tenant's Fixtures—Mortgagee—Removal after Forfeiture of Lease—Debenture-holders.]—Where

a tenant surrenders his lease to the landlord, a mortgagee or purchaser from the tenant has a right to remove fixtures within a reasonable time after the surrender. So where a company forfeits a lease by passing a resolution for a voluntary winding-up, in which resolution debenture-holders do not concur, the latter have a similar right to remove fixtures within a reasonable time afterwards. *Pugh v. Arton* (38 L. J. Ch. 619; L. R. 8 Eq. 626) questioned. *Glasdir Copper Mines, In re*; *English Electro-Metallurgical Co. v. Glasdir Copper Mines, Lim.*, 73 L. J. Ch. 461; [1904] 1 Ch. 819; 90 L. T. 412; 11 Manson, 224—Joyce, J. And see FIXTURES.

14. IMPROVEMENTS.

Compensation for—Arbitration—Enforcement of Award—Jurisdiction of County Court Judge—Prohibition.]—An agreement for the letting of a farm provided for the adjustment of the rights of the parties on the determination of the tenancy by arbitrators, each party choosing one, whose joint decision should be binding on both parties. Under this agreement the parties respectively appointed arbitrators. The landlord refused to permit the arbitrator appointed by him to concur in the appointment of an umpire. Upon an application by the tenant, the Board of Agriculture appointed an umpire, who made an award in favour of the tenant. Subsequently, upon an application by the tenant under section 24 of the Agricultural Holdings Act, 1883, the County Court Judge made an order that the sum awarded should be recoverable from the landlord. The landlord formally objected to the Board of Agriculture before the appointment by the board of an umpire, and also before the County Court Judge at the hearing of the case. Upon an application by the landlord, the Divisional Court granted a writ of prohibition to restrain the County Court Judge and the tenant from proceeding in the matter of the order of the Judge. Upon appeal by the tenant, *Held* (SIR THOMAS BARNES, P., dissenting), dismissing the appeal, that the arbitration never was one to which the Agricultural Holdings Acts applied, and that the County Court Judge had therefore no power to make an order under section 24 of the Agricultural Holdings Act, 1883. *Cundall and Vavasour, In re*, 95 L. T. 483; 22 T. L. R. 302—C.A.

Easement—Outlay by Lessee on Excepted Premises—Mistake as to Rights—Acquiescence.]

—If, after an agreement for a lease involving a stipulated outlay on the demised premises by the lessee, before the lease is granted the landlord stands by and encourages the lessee to expend additional moneys in artistically paving a passage excepted from the demise, but over which the lessee is given a right of way to the demised premises, the lessee, to the landlord's knowledge, being under the belief that the pavement will remain, the landlord cannot afterwards, as legal owner, insist on its removal or alteration. Nor can the landlord insist on the removal of an advertisement board affixed by the lessee to the outside wall of the landlord's premises under similar circumstances. The propositions stated in *Willmott v. Barber* (49 L. J. Ch. 792; 15 Ch. D. 96) applied. *Civil*

Service Musical Instrument Association v. Whiteman, 68 L. J. Ch. 484; 80 L. T. 685; 63 J. P. 441—Kekewich, J.

Agricultural Holding—Compensation for Improvement—Agreement by Landlord to Pay Compensation of Tenant Quitting before Determination of Tenancy—Action by Tenant—Claim “otherwise than in manner authorised by this Act.”—A verbal agreement was made between a landlord and a tenant of an agricultural holding that the tenant would quit before the determination of his tenancy, and that the landlord would pay him such amount as might be found by two valuers, one appointed by each party, to be a reasonable compensation in respect of (*inter alia*) an improvement for which compensation can be obtained under the Agricultural Holdings Act, 1883. The valuers having been appointed and agreed the amount, *Holt*, that the tenant was entitled to maintain an action to recover the amount, since there is nothing in the Act which prohibits a landlord and a tenant from making an agreement as to the terms on which the tenant will quit in respect of matters for which compensation can be obtained under the Act; and section 57, which prohibits a tenant from claiming compensation in respect of an improvement under the Act otherwise than in manner authorised by the Act, only applies to a tenant claiming compensation under the Act, and not to a tenant claiming compensation under an agreement outside the Act. *Newby v. Eckersley*, 68 L. J. Q.B. 261; [1899] 1 Q.B. 465; 80 L. T. 314; 47 W. R. 245—C.A.

—Fruit Trees—Landlord's Consent.—A power in an agreement for an agricultural tenancy for the tenant to turn meadow land into orchard is a consent in writing by the landlord to the planting of fruit trees within section 3 of the Agricultural Holdings (England) Act, 1883, and the tenant is entitled to compensation for trees so planted. *Mears v. Callender*, 70 L. J. Ch. 621; [1901] 2 Ch. 388; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615—Cozens-Hardy, J.

—Market Gardeners Compensation (Scotland) Act, 1897—Retrospective Effect.—The Market Gardeners Compensation (Scotland) Act, 1897, s. 4 (which corresponds with section 4 of the English Act of 1895) is not retrospective, and does not entitle tenants under leases current at the commencement of the Act to compensation in respect of market-garden improvements executed prior to the commencement of the Act. *Smith v. Callander*, 70 L. J. P.C. 53; [1901] A. C. 297; 84 L. T. 801—H.L. (Sc.) *And see col. 1190.*

Agriculture, Board of.—*See* 3 Edw. 7.

15. FURNISHED HOUSE.

Lease of Furnished House—Right of Tenant to Remove Pictures from Walls during Lease.—The tenant of a furnished house is entitled, in the absence of a stipulation to the contrary, to remove the pictures from the walls and to store them in one of the rooms during the currency of the lease, notwithstanding the objections of the lessor (Lord Young *dissentiente*). *Miller v. Stewart*, 2 F. 309—Ct. of Sess.

16. COVENANTS.

(a) Generally.

Implied Covenant—Construction.—A covenant in a lease, followed by the declaration, “There shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto,” must be construed as qualified and controlled by the declaration, and on its true construction does not run with the reversion, is not incident to the relation of landlord and tenant, and the liability for its breach properly falls to be borne by the testator's (the lessor's) general estate. *Eccles v. Mills*, 67 L. J. P.C. 25; [1899] A.C. 360; 78 L. T. 206; 46 W. R. 898—P.C.

Covenant by Lessee for Himself and Assigns—Sub-lessee for part of Term—Liability for Act of Sub-lessee.—Where a lease of a public-house contains a covenant whereby the lessee for himself and his assigns covenants with the lessor and his assigns in manner following—that is to say, “The lessee will at all times during the continuance of this demise use and keep open the said premises as a licensed public-house for the sale of ale wine beer and spirits therein and will so conduct and manage the same as to afford no reasonable or lawful ground or pretence for the Justices refusing to renew endorsing or objecting to renewal of the licences now attached to the said premises for the sale of ale wines and spirituous liquors and which licences are hereby agreed and declared to be the property of the lessor but any endorsement which may be made on the said licences shall not be deemed a breach of the covenant contained in this clause if the conviction in respect of which such endorsement shall have been made is reversed or annulled on appeal”—the covenant is an absolute one that the licence shall not be endangered by any one, and therefore if a sub-lessee by demise of the public-house is convicted of opening the house in prohibited hours the covenant is broken, and the lessee and his assigns will be liable at the suit of the lessor for the breach. The judgments in *Bryant v. Hancock* (67 L. J. Q.B. 507; [1898] 1 Q.B. 716; 68 L. J. Q.B. 889; [1899] A.C. 442) explained. *Mumford v. Walker*, 71 L. J. K.B. 19; 85 L. T. 518—Ridley, J.

Abatement of Nuisance Caused by Structural Defect—Incidence of Expense—Liability of Tenant to Indemnify Landlord.—Where a lessee has by his lease covenanted to “pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted),” and the lease contains no covenant by the lessee to repair, he will not be liable as between himself and his landlord to pay the expense of the abatement of a nuisance arising from a defect of a structural nature which has been required by the sanitary authority under section 4 of the Public Health (London) Act, 1891. In such a case, in order to fix the tenant

with liability there must be in the covenant a contract or undertaking by him to indemnify the landlord against a particular charge which he (the landlord) has been called upon to pay, and the covenant must be construed and the obligation of the tenant determined by looking at the whole terms of the covenant and also at the lease, in order to see whether or not the terms import a contract by the tenant to indemnify the landlord in respect of the particular expense. *Foulger v. Arding*, 70 L. J. K.B. 580; [1901] 2 K.B. 151; 84 L. T. 467; 49 W. R. 442—D.

(b) *Alterations, not to make.*

Covenant not to make any "alteration to premises" without consent—Construction—Trade Premises—Erection of Clock.—The erection by the lessee, without the lessor's consent, of a large clock by way of advertisement outside a watchmaker's shop, supported by iron stays bolted into the stonework of the front of the house, is not a breach of a lessee's covenant not to make any "alteration to the premises" without the lessor's consent. *Bickmore v. Dimmer*, 72 L. J. Ch. 96; [1903] 1 Ch. 158; 88 L. T. 78; 51 W. R. 180—C.A.

(c) *Not to Assign or Sub-let without Consent.*

Original Lessee.—A covenant running with the land not to assign a lease without the lessor's consent is broken even where the lessee for the time being so assigns to the original lessee, and an injunction will lie to restrain such assignment. *M'Eacharn v. Colton*, 71 L. J. P.C. 20; [1902] A.C. 104; 85 L. T. 594—P.C.

Theatre—Refreshment Contract—Breach.—On February 8, 1894, E., the lessee, granted an under-lease of a theatre to D. for a term of years. D. covenanted with E. not to "assign, demise, or otherwise part with the indenture, or any estate or interest therein" without the licence of E. There was a provision for re-entry on any breach of the covenants by the under-lessee. On April 15, 1898, D. granted to F. W. & Co. "the free and exclusive licence and right to the use of all refreshment rooms, bars, smoking rooms, wine cellars, and offices" in the theatre, together with the free right of access thereto, and also the sole and exclusive privilege of advertising therein, for a term of years. The "landlord" had power to determine the term on non-payment of rent; and covenanted that the tenants should peaceably and quietly "hold, occupy, and enjoy the hereditaments and premises without lawful let, suit, trouble, eviction, or disturbance by the landlord or any other person." No licence to "assign, demise or otherwise part with" was obtained by D. from E. as required by the covenant in the under-lease: On September 4, 1898, E. took possession of the theatre, on the ground that D.'s contract with F. W. & Co. was a breach of that covenant:—*Held*, that, looking at the document of April 15, 1898, as a whole, the fair effect of it was that a licence instead of a lease of the property was really what was intended by the parties, although there were particular words in the document which might lead to a contrary conclusion; that F. W. & Co. took no estate or interest in the property; but that they were entitled to consider themselves as having an exclusive privilege for the supply of refresh-

ments; and that therefore no breach of the covenant in the under-lease had been committed. *Daly v. Edwards*, 83 L. T. 548; 49 W. R. 244—C.A.

Assignment of Lessee's Estate, except Leaseholds, for Benefit of Creditors—Declaration of Trust as to Leaseholds—Right of Re-entry on Lessee Executing Assignment, for Benefit of Creditors—Notice of Breach—Covenant against "disposing of the land leased"—Sufficiency of Notice—Service on Trustee.—A lessee who had covenanted in his lease that he would not assign the land leased without the consent of the lessor, and that upon breach of any of his covenants, or if he should execute an assignment for the benefit of his creditors, the lessor should have the right to re-enter, executed a deed of assignment of all his estate, except leaseholds, to a trustee for the benefit of his creditors, and declared therein that he would stand possessed of his leaseholds upon trust for the trustee to assign and dispose of the same as the trustee should direct. The lessor served on the trustee under the deed a notice of breach of covenant by the execution of the deed of assignment:—*Held*, first, that as the deed of assignment did not contain a legal assignment of the land leased, it did not constitute a breach of the covenant not to assign it; secondly, that the condition for re-entry on the lessee's executing an assignment for the benefit of his creditors was not a condition "against assigning, under-letting, parting with the possession, or disposing of the land leased," within the meaning of section 14, sub-section 6 (i) of the Conveyancing and Law of Property Act, 1881, and therefore it was necessary for the lessor to give notice of breach under section 14, sub-section 1, before enforcing his right of re-entry; and thirdly, that the provisions of section 67, sub-section 2 of the Act had not the effect of making the notice on the trustee under the deed a sufficient notice on the lessee within the meaning of section 14, sub-section 1. *Gentle v. Faulkner*, 69 L. J. Q.B. 777; [1900] 2 Q.B. 267; 82 L. T. 708—C.A.

Leave not to be "Unreasonably" Withheld. Unreasonableness.—Where a landlord and tenant occupy different parts of the same premises, and the tenant has covenanted not to assign or under-let his part of the premises without the written leave of his landlord, but this leave is not to be unreasonably refused, it is not unreasonable for the landlord, as conditions of granting such leave, to enquire for what purposes the proposed under-tenant intends to use the premises, and to stipulate that the under-tenant shall enter into a covenant with him with reference to the assignment or sub-letting of the premises similar to the covenant already in existence between him and his own immediate tenant. *Sparke's Lease, In re; Berger v. Jenkinson*, 74 L. J. Ch. 318; [1905] 1 Ch. 456; 92 L. T. 537; 53 W. R. 376—Swinfen Eady, J.

Covenant by Assignee to Pay Rent during the Residue of the Term—"Fine, or sum of money in the nature of a fine."—A lease of a public-house contained a covenant against assigning or under-letting without the licence of the lessor, which was not to be unreasonably with-

held, but it contained no provision that any fine should be payable in respect of such licence. After several assignments, the person in whom the term was vested applied to the lessor (the plaintiff) for permission to assign to the defendant. As a condition of giving such licence the plaintiff required the defendant as assignee to execute a deed containing a covenant to pay the rent reserved by, and to perform the covenants contained in, the lease during the residue of the term. The defendant entered into that covenant, and the lease was assigned to him and was subsequently assigned by him with the licence of the plaintiff to a person who failed to pay the rent. The plaintiff brought an action against the defendant on his covenant for rent which had accrued due since the assignment by the defendant:—*Held*, that the defendant was liable for the rent under his covenant in the licence, and that he could not rely upon section 3 of the Conveyancing Act, 1892, as a defence to the action, inasmuch as that section has not made the payment of a fine an illegal payment and the defendant had voluntarily and without protest entered into the covenant. *Waite v. Jennings*, 75 L. J. K.B. 542; [1906] 2 K.B. 11; 95 L. T. 1; 54 W. R. 511; 22 T. L. R. 510—C.A.

Semble, per VAUGHAN WILLIAMS, L.J., that only the original lessee, whose purchase-money had been reduced by the taking of the fine, could claim the advantage of the proviso in section 3. *Ib.*

Semble, per VAUGHAN WILLIAMS, L.J., and STIRLING, L.J. (FLETCHER MOULTON, L.J., dissenting), that money payable under such a covenant was not a "fine, or sum of money in the nature of a fine," within section 3. *Ib.*

Proviso for Re-entry on Default in Performance of Covenants "to be performed"—**Application to Negative Covenant.**—A lease of a house, shop, and premises contained, in addition to the usual affirmative covenants to pay rent, rates, and taxes and to keep the premises in repair, negative covenants by the lessee not to use the premises for any business except that of an outfitter, and not to assign or under-let without the consent in writing of the lessor. There was a proviso for re-entry "if the lessee shall commit any breach of the covenants hereinbefore contained and upon his part to be performed":—*Held*, that upon the true construction of the lease the proviso was not limited by the words "to be performed" to breaches of the affirmative covenants, but applied to a breach of the covenant against under-letting. *Harman v. Ainslie*, 73 L. J. K.B. 539; [1904] 1 K.B. 698; 90 L. T. 624; 52 W. R. 615; 20 T. L. R. 356—C.A.

Without Written Assent—Partners.—F. L. leased certain premises to T. C. D. for twenty-one years. The lease contained a covenant by T. C. D. for himself, his heirs, administrators, and assigns, that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. T. C. D. assigned the premises, with the consent of F. L., to E. V. Subsequently E. V. assigned them, with the consent of F. L., to W. H. and J. L. H., who were partners in the firm of W. H. & Son.

W. H. and J. L. H. dissolved partnership, and J. L. H. assigned to W. H. all his undivided share and interest of and in (amongst other property) the premises contained in the lease. F. L. had no notice of this assignment, nor was his consent given:—*Held*, that the assignment was a breach of the covenant. *Langton v. Henson*, 92 L. T. 805—Buckley, J.

Mortgage by Sub-demise without Consent—Issue of Writ by Lessor for Recovery of Possession—Distress by Receiver of Mortgagees on Goods of Tenant in Possession after Issue of Writ—Action for Wrongful Distress—Payment of Rent by Tenant after Issue of Lessor's Writ—Estoppel—Liability of Solicitors of Mortgagees.—A lease of land and buildings for thirty-five years made in 1896 contained a covenant that the lessee would not assign or under-let without the consent in writing of the lessor, which was not to be unreasonably withheld if the proposed assignee or under-tenant should be a respectable and responsible person, and also contained a proviso for re-entry upon a breach of any of the covenants therein. An assignee of the lease, having let the premises to a tenant from year to year, and mortgaged the premises by sub-demise without the consent of the lessor, was adjudicated bankrupt. On September 18, 1901, the lessor issued a writ for recovery of possession of the premises, without stating the ground of the claim. The tenant, while disclaiming any intention of defending the action, entered an appearance to it, and, in order to gain time, with the object of keeping possession of the premises, on October 15 paid the rent for the quarter ending September 29 to the receiver appointed by the mortgagees under the Conveyancing Act, 1881. The claim of the lessor was afterwards amended by alleging the breach of covenant by the mortgage without the consent of the lessor as the ground of forfeiture. On January 11, 1902, the solicitors for the mortgagees having written to the receiver that they would be glad to hear that a distress had been put in, the receiver distrained upon the goods of the tenant on the premises for the rent due on December 25, 1901. The tenant thereupon commenced an action for wrongful distress against the solicitors for the mortgagees and the receiver, at the hearing of which the jury returned a verdict for the tenant with damages. On March 20, 1902, the lessor obtained judgment by consent in the action for recovery of possession:—*Held*, upon an application for a new trial of the action for wrongful distress—first, that the mortgage by sub-demise was a breach of the covenant not to assign or underlet without the consent of the lessor; secondly, that the issue by the lessor of the writ to recover possession and service thereof on the lessee determined the lease; thirdly, that, in the circumstances, the tenant was not estopped by the payment of rent after the service of the lessor's writ from asserting that the lease was determined; fourthly, that, in the circumstances, the tenant was entitled to recover damages against the solicitors for the mortgagees. *Grimwood v. Moss* (41 L. J. C.P. 239; L. R. 7 C.P. 360) approved. *Serjeant v. Nash, Field & Co.*, 72 L. J. K.B. 630; [1903] 2 K.B. 304; 89 L. T. 112—C.A.

Mistake.—The defendants held certain rooms in a house as tenants to the plaintiffs under

an agreement in writing by which they contracted not to assign, under-let, or part with possession of the rooms or any part thereof without the consent in writing of the plaintiffs for that purpose first obtained, such consent not to be unreasonably withheld. The agreement contained a proviso for re-entry on breach by the defendants of its terms. The defendants asked for and obtained consent to let and did let one of the rooms. They then asked for and obtained consent to put a partition in another of the rooms dividing it into two parts, one of which they let, without asking for consent, to a responsible tenant, who was already tenant to the plaintiffs of an adjoining room. The plaintiffs' consent to this letting, if asked, could not have been withheld:—*Held*, that there was a breach of the contract not to under-let, and a consequent forfeiture, against which the Court would not grant relief. *Eastern Telegraph Co. v. Dent*, 68 L. J. Q.B. 564; [1899] 1 Q.B. 835; 80 L. T. 459—C.A.

Unreasonable Condition Attached to Licence—Declaratory Action.—Where a lessor attaches to a licence to assign the lease a condition which is in the opinion of the Court unreasonable, the Court can, in an action by the lessee asking for the declarations, make declarations that the lessor is not entitled to impose the condition in question as a condition of giving his licence, and that the lessee is entitled to assign his lease to the proposed assignee without any further consent of the lessor. *Young v. Ashley Gardens Properties, Ltd.*, 72 L. J. Ch. 520; [1903] 2 Ch. 112; 88 L. T. 541—C.A.

Covenant Against Sub-letting Without Consent—Assignment Without Consent.—A lease contained a covenant by the lessee not to let or demise the demised premises without the lessor's consent. The lessee sold the premises, and the lessor gave his consent, which was indorsed on the assignment. The assignee Doyle then put the premises up for sale, and O'Hara purchased them. O'Hara required the assignment to be made with the lessor's consent. Doyle refused to obtain such consent, and O'Hara refused to complete:—*Held*, that the covenant only restrained sub-letting without the lessor's consent, and that it was not necessary to obtain such consent to make title. *Greenaway v. Adams* (12 Ves. 395) distinguished. *Doyle and O'Hara's Contract, In re*, [1899] 1 Ir. R. 113—C.A.

Payment for Consent—Fine.—The effect of section 3 of the Conveyancing and Law of Property Act, 1892, is not to render the payment of money by the lessee to the lessor for giving his consent to an assignment illegal, but only to read into the lease the provisions of the section as a qualification of the covenant against assignment without consent. Where, therefore, the lessee has without protest paid money to the lessor for obtaining his consent to an assignment, no action lies by the lessee to recover it back. *Quere*, whether such an action would lie if the money were paid under protest. *Andrew v. Bridgman*, 77 L. J. K.B. 272; [1908] 1 K.B. 596—C.A.

Where a lessor refuses his consent to an assignment except upon terms inconsistent with the provisions of section 3, the lessee is

entitled to disregard the covenant and to assign as if such consent had been given, on the same principle as that on which *Treloar v. Bigge* (43 L. J. Ex. 95; L. R. 9 Ex. 151) was decided. *Id.*

Lease of Fishing—Covenant not to Assign the "said premises"—Omission of Words "any part of the premises"—Licence for Two Rods—Validity.—A lessor granted to a lessee for a term of years the exclusive right of fishing in certain portions of a river and taking away the fish so caught, and the lessee covenanted not to under-let or assign the "said premises" without the lessor's consent. The lessee subsequently agreed to grant a licence to another to fish upon the same water, and in like manner as in the lease provided, for the unexpired residue of the term, but so that no more than two rods should be used at any time under the licence. The lessor objected:—*Held*, that the grant of this licence was not a breach of the covenant. *Grove v. Portal*, 71 L. J. Ch. 299; [1902] 1 Ch. 727; 86 L. T. 350—Joyce, J.

Receiving Order—Proviso for Re-entry on Assignment or Bankruptcy.—The fact that a receiving order is made against a debtor, and that he is adjudicated bankrupt, even though it be in both cases on his own petition, does not constitute in either case a breach of a covenant not to assign leasehold property. *Riggs, In re; Trustee, ex parte*, 70 L. J. K.B. 541; [1901] 2 K.B. 16; 84 L. T. 428; 49 W. R. 624; 8 Manson, 233—Wright, J.

Tied House, as to.—See LICENSED PREMISES, *infra*, col. 1229.

(d) Cultivation of Farm.

Agreement to Consume Crops on Farm—Destruction by Fire—Liability in Damages.—The lessee of a farm contracted to cultivate the land in a good and husbandlike manner, and to stack upon the premises all the hay and corn arising from the farm, and to consume upon the farm all hay, straw, chaff, and turnips, and other green crops arising therefrom, and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom. Stacks of hay and corn were destroyed by accidental fire. In an arbitration under the Agricultural Holdings Acts the lessor claimed compensation for breach of contract in respect of the manurial value of the stacks so destroyed:—*Held*, that, according to the true construction of the clause, it only applied to things in existence which could be consumed on the farm, and that there had been no breach of contract by the lessee. *Hull and Meux (Ludys), In re*, 74 L. J. K.B. 252; [1905] 1 K.B. 588; 92 L. T. 74; 53 W. R. 389; 21 T. L. R. 220—C.A.

Lessor Tenant for Life—Covenant by Lessor and Assigns—Death of Lessor—Liability of Executors.—The plaintiffs were the executors of one Bath, and the defendants the executors of one Bowles, and the action was brought for the balance of compensation for certain crops, &c., pursuant to a covenant in a lease granted by Bowles to Bath. Bowles was tenant for life, and under the powers of the Settled Land Acts granted the lease, and by its terms it was

provided: "And the lessor hereby for himself and his assigns covenants with the lessee that he will pay the tithe rent-charge on the said premises, also that he the lessor or his assigns or the succeeding tenants will at the expiration or sooner determination of the said term take and pay for the growing crops and manure then upon the said demised premises and the unexhausted tillages and dressings according to the custom of the country at a fair valuation to be made by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers." After certain other provisions the lease proceeded: "Provided also that in the event of the lessor or his assigns at any time or times and from time to time desiring during the said term to resume possession of any of the lands (but not the house, garden, building, or yards) comprised in this demise for any purpose other than agriculture, it shall be lawful for him and them so to do upon giving to the lessee, his executors, administrators, or assigns, or leaving upon some part of the demised premises three calendar months' notice in writing of such desire, and thereupon at the expiration of such notice a reduction of" rent should be made, "and the lessor or his assigns shall . . . pay to the lessee, his executors, administrators, or assigns, for the growing crops," &c., "and for the unexhausted tillages and dressings the like amount as he or they would be entitled to upon quitting, pursuant to the covenant of the lessor in that behalf before contained." The lessor having died, the owners of the fee-simple sold a certain portion of the demised property to a limited company, subject to the tenancy and to the payment of compensation, &c., under the lease. The plaintiffs paid rent in respect of this portion to the company and, notice having been given by the company to the plaintiffs that they intended to resume possession, it was agreed that the company should pay the plaintiffs 50% in respect of the unexhausted improvements. The company being wound up, the plaintiffs could not obtain this amount, and they then sued the defendants on the covenant by Bowles in the lease:—*Held*, that the defendants were not liable. *Bath v. Bowles*, 93 L. T. 801—D.

Demise by Mortgagee "as agent"—Covenant by Tenant not to Sell off Hay or Fodder or Remove Manure—Right of Mortgagee's Assign to Enforce Covenant—Covenants Running with Reversion.—A mortgagee, under a mortgage created in 1873, who was not in possession, but collected the rent as agent of the mortgagors, executed an agreement under seal for a tenancy of a farm from year to year to the defendant. The agreement was expressed to be made between the mortgagee "as agent, hereinafter called the landlord," and the defendant, "hereinafter called the tenant." "The landlord" thereby let and "the tenant" took the premises. By one of the covenants the tenant agreed to consume on the premises all hay and fodder and to spread on the land all manure and compost produced on the farm, and not to sell off any hay or fodder, and to leave all manure and compost at the end of the tenancy. The mortgagee afterwards sold the farm, and his purchaser sought to enforce the above covenant by the defendant:—*Held*, that the question who was the lessor was one of

construction, in deciding which the Court could look at the surrounding circumstances, and that on the true construction of the agreement the demise was the demise of the mortgagee; that the words "as agent" were not, in a demise under seal, sufficient to prevent the demise operating on the legal estate vested in the mortgagee, and that the plaintiff as his assign could therefore enforce any covenant contained in the agreement the benefit of which ran with the reversion. *Held*, further, that the covenant in question touched and concerned the land, and that the benefit of it therefore ran with the reversion. *Chapman v. Smith*, 76 L. J. Ch. 394; [1907] 2 Ch. 97; 96 L. T. 662—Parker, J.

(e) *Dangerous or Noxious Trades.*

Not to Carry on Dangerous Trade—Increase of Premium for Fire Insurance—Under-lessee—Injunction.—By a lease dated December 20, 1897, D. demised certain premises to G., who covenanted for himself, his executors, administrators, and assigns (*inter alia*), not to use or occupy the same or any part thereof as a dwelling-house or sleeping-place, or to use the same so as to cause a nuisance, annoyance, or damage to the owners or occupiers of the offices or rooms in the same house or adjoining houses, and not to carry on any noisy or dangerous trade, and also not to do or suffer to be done upon the said demised premises or any part thereof anything which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for insurance. There was also a covenant not to assign without licence. In August, 1903, G. assigned to E. with the lessor's consent, and on October 18, 1904, E. sub-demised to D. On November 12, 1904, the lessor consented to the under-lease, but no explanation of what was intended to be done was given him, and no copy of the agreement was shewn. The sub-lessee exhibited and sold an incandescent lamp in which petrol was used. The insurance company at the expiration of the period for which the premises were insured refused to renew, and although negotiations were entered into for the renewal of the insurance at 12s. 6d. instead of 2s. per cent., they fell through. The lessor now applied for an injunction restraining the sub-lessee from breaking the covenants:—*Held*, that the defendant must be restrained by injunction from using the premises in a manner prohibited by the lease of which he had constructive notice. *Teape v. Douse*, 92 L. T. 319; 21 T. L. R. 271—Swinfen Eady, J.

Fish-Frying—Trade necessarily Offensive.—In an action to restrain a defendant from carrying on a fish-frying business in contravention of a covenant not to use his premises "for carrying on any offensive trade whatsoever,"—*Held*, that the business, although not necessarily offensive, must, having regard to its nature, the locality, and the manner in which it was carried on, be considered an offensive trade within the meaning of the covenant. *Devonshire (Duke) v. Brookshaw*, 81 L. T. 83; 63 J. P. 569—Kekewich, J.

Not to Permit Premises to be Used for Illegal

Purpose—No Act to be Done Tending to Annoyance.—A lessee of a house covenanted that she would not use or permit the premises or any part thereof to be used for any illegal or immoral purpose, and, further, that no act, matter, or thing should at any time be done on the premises which might be or tend to the annoyance of the lessor or superior landlord for the time being or the lessees or occupiers of neighbouring premises. There was a condition of re-entry on breach of any of the covenants:—*Held*, that the second part of the covenant in the original lease was not qualified by the word "permit" in the first part, but was an absolute covenant that if the act, matter, or thing specified was done by any one, there was a right of re-entry. *Pothero v. Bell*, 22 T. L. R. 370—*Jell, J.*

Sub-lease—Covenants Less Strict.—The lessee sub-let the house, and the sub-lessee covenanted that she would not carry on or permit to be carried on any noisome, or dangerous, or offensive trade or business, or anything that might be or cause an injury, nuisance, or annoyance to the sub-lessor or any of the neighbours. During the occupation of the sub-lessee an act was done on the premises which tended to the annoyance of the superior landlord:—*Held*, that the original lessee could not be said to have "permitted" the act complained of, simply because she had made a sub-lease without inserting therein covenants as strict as those in the original lease. *Id.*

Covenant by Landlord not to Allow Certain Trade on "Adjoining" Premises.—In a covenant by a lessor not to allow a certain trade to be carried on in the "adjoining premises," the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings, of which these formed part only. *Vale v. Moorgate Street and Broad Street Buildings*, 80 L. T. 487—*Cozens-Hardy, J.*

Covenant not to Let Adjoining Property for Specified Trades—Covenant with Lessor by Lessee of Adjoining Property—Right to Enforce Covenants.—A covenant by a lessor not to let adjoining property for the purposes of a trade, to which the lessee is restricted, is not broken by the user of such property for that trade by another lessee in breach of a covenant contained in his lease from the same lessor. The lessee under the first lease has no right to enforce, or compel the lessor to enforce, the covenant with the lessor contained in the second. *Kemp v. Bird* (46 L. J. Ch. 828; 5 Ch. D. 549, 974) followed. *Fitz v. Iles* (62 L. J. Ch. 258; [1893] 1 Ch. 77) discussed. *Ashby v. Wilson*, 69 L. J. Ch. 47; [1900] 1 Ch. 66; 81 L. T. 480; 48 W. R. 105—*Kekewich, J.*

Covenant not to Let Adjoining Property for Purpose of Trade Carried on by Lessee—Breach of Covenant—Remedies of Lessee.—By an agreement in writing dated October 30, 1901, T. agreed to let a shop in an arcade to the plaintiff for twenty-one years, and it was agreed that the lease should contain a covenant by the lessee "not to carry on upon the premises any other trade or business than that of a dealer in pictures . . . prints, engravings, photographs,

etchings and articles of vertu, artistic and heraldic stationery, frame maker, and dealer in photographic frames, artists' colours, and the accessories to the said trade or business"; and should also contain a covenant by the lessor "not to let any other portion of the said arcade for the trade or business herebefore mentioned to be carried on by the tenant." By an agreement in writing dated September 25, 1902, T. agreed to let to G. another part of the arcade on a yearly tenancy, and it was agreed that the tenant should "not carry on any business other than that of a librarian, newsagent, bookseller, or stationer, without the previous consent in writing of the landlord." The plaintiff alleged that G. was selling articles which came under the head of artistic stationery, and brought an action against T. and G. claiming an injunction restraining T. from letting or allowing to remain let, and G. from using the premises comprised in his agreement for any of the purposes of the trade or business mentioned in the plaintiff's agreement:—*Held*, on the evidence, that there had been a substantial breach of the agreement with the plaintiff; that the agreement being only against letting, not against using, the plaintiff had no remedy against G. in that action which treated the letting to G. as an existing letting; but as against T. he was entitled to a declaration that the letting to G. was a breach of T.'s agreement with the plaintiff, and an enquiry as to the damages sustained by the breach, with liberty to apply for an injunction in case there should be any attempt at any further letting such as that to G. The principle of *Kemp v. Bird* (46 L. J. Ch. 828; 5 Ch. D. 549, 974) applied. *Brigg v. Thornton*, 73 L. J. Ch. 301; [1904] 1 Ch. 386; 90 L. T. 327; 52 W. R. 276—*C.A.*

(f) To Insure.

Covenant to Insure—Sale by Tenant to Landlord.—*See* VENDOR AND PURCHASER.

(g) Licensed Premises.

Brewer's Lease—Covenant to Buy Beer from Lessor—Construction—Assignment of Reversion—Liability.—A lessor, described as a brewer, leased to the defendant's predecessors in title a beerhouse for a term of fourteen years, and the lessee covenanted that he, his executors, administrators, and assigns, and all other persons for the time being carrying on the business of a beer retailer or publican upon the premises, would during the term deal exclusively "with the lessor or his firm or his or their successors in business" for all beers, &c., sold upon the premises. The lease provided that, where the context allowed, the word "lessor" should include the executors, administrators, and assigns of the lessor. The reversion expectant on the lease became vested in the plaintiffs, who were brewers, and the lease became vested in the defendant. The firm of the original lessor were still carrying on business as brewers, and were willing to supply the defendant, who was willing to deal with them:—*Held*, that the context did not allow of the insertion of the words "executors, administrators, and assigns" after the word "lessor" in the covenant to deal

exclusively with the lessor, &c.] and that there was no breach of the covenant so long as the defendant dealt with the firm of the original lessor, and no obligation on him to take his bear from the plaintiffs. *Doe v. Reid* (8 L. J. (o.s.) K.B. 328; 10 B. & C. 849) and *Clegg v. Hands* (59 L. J. Ch. 477; 44 Ch. D. 503) considered. *Birmingham Breweries v. Jameson*, 67 L. J. Ch. 403; 78 L. T. 512—C.A. Reversing, 46 W. R. 375—Byrne, J.

Covenant to Insure Licence against "loss or forfeiture"—Non-renewal of Licence on Ground of Non-necessity.—By a lease of a public-house in 1898 it was provided that, if the licensing authority should for any cause whatsoever refuse to renew the licence, the lease should determine, but the above provision should not take effect unless and until the lessee should have effected an insurance of the demised premises in accordance with the covenant therein-after contained; and the lessee covenanted with the lessor to insure and keep insured against loss or forfeiture the licence of the premises in the sum of 400l. The lessee insured the licence, but excluded from the policy the risk of non-renewal, on the ground that the licence was not required by the necessities of the neighbourhood. In 1904 the licensing Justices refused the renewal of the licence upon the ground that it was not required by the necessities of the neighbourhood:—*Held*, that there had been a "loss" of the licence within the meaning of the covenant, and that the lessee had committed a breach thereof by not insuring against such loss. *Williams v. Lassell and Sharnman*, 22 T. L. R. 448—Lord Alverstone, C.J.

Covenant by Lessee for Himself and "Assigns"—Sub-lessee for Part of Term—Liability for Act of Sub-lessee.—By the lease of a public-house the lessee covenanted for himself and assigns not to wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses or be a reasonable ground for withdrawing or withholding the licence thereof. The lessee assigned the lease to the defendant, who sub-let the premises to a tenant, who became the holder of the licence, for a term expiring before the original lease. The sub-tenant while in possession was convicted of permitting drunkenness on the premises, and at the general annual licensing meeting the renewal of the licence was refused. In an action by the lessor against the defendant to recover damages for breach of covenant,—*Held*, that there had been no breach, as the sub-tenant was not an "assign" within the meaning of the covenant, and that the plaintiff was therefore not entitled to recover. *Bryant v. Hancock*, 67 L. J. Q.B. 507; [1893] 1 Q. B. 716; 78 L. T. 397; 46 W. R. 386; 62 J. P. 324—C.A.

Affirmed on the grounds that on the evidence and on the construction of a covenant by the tenant of licensed premises there had been no breach of the covenant. *Bryant v. Hancock*, 68 L. J. Q.B. 889; [1899] A.C. 442; 81 L. T. 96—H.L. (E.)

Covenant to "keep and conduct" Public-house in Proper Manner—Under-lessee Per-

mitting Drunkenness.—A lease of licensed premises contained a covenant by the lessees that they would at all times during the term keep and conduct the premises in a regular and proper manner in every respect, and would apply for and use their best endeavours when required to obtain a renewal of the existing licences, and would not knowingly or willingly do or suffer any act whereby the same might become indorsed or forfeited or whereby the renewal thereof might be refused, and would not commit any offence against the licensing laws for the time being in force. An under-tenant of the lessees having been convicted of permitting drunkenness upon the demised premises, the renewal of the licence was refused by the Justices at the next general annual licensing meeting:—*Held*, that there was an absolute obligation upon the lessees to keep and conduct the premises during the term in a regular and proper manner; that their obligation was not qualified by the later words of the covenant; and that there had been a breach of that obligation. *Bryant v. Hancock & Co.* (68 L. J. Q.B. 889; [1899] A.C. 442) distinguished. *Paethorpe v. Home Brewery, Ltd.*, 75 L. J. K.B. 555; [1906] 2 K.B. 5; 94 L. T. 871; 54 W. R. 489; 22 T. L. R. 505—C.A.

Covenant not to "suffer to be done" any Act whereby Renewal of Licence might be Withheld—Under-lease—Conviction of Under-lessee.—By the lease of a public-house the lessee for himself, his heirs, executors, administrators, and assigns covenanted that he would not suffer to be done on the premises any act whereby the renewal of the licence might be withheld. An assignee of the lease sub-let the premises to an under-tenant, who was convicted of an offence against the licensing laws in consequence of which the renewal of the licence was refused. In an action against the assignee of the lease by the assignee of the reversion for breach of the covenant,—*Held*, that the under-tenant was not the agent or servant of the assignee of the lease so as to make the latter liable upon the covenant for the act of the under-tenant. *Toleman v. Portbury* (39 L. J. Q.B. 136; L. R. 5 Q.B. 288) followed. *Bryant v. Hancock* (68 L. J. Q.B. 889; [1899] A.C. 442) distinguished. *Wilson v. Twamley*, 73 L. J. K.B. 703; [1904] 2 K.B. 99; 90 L. T. 751; 52 W. R. 529; 20 T. L. R. 440—C.A.

House Kept as an Inn—Exhibiting Notices Restricting Sale of Liquor.—The defendant expended money upon converting a village public-house into an inn with good accommodation for guests who desired to stay there. The plaintiffs, who were the owners of the house, gave him a lease thereof for a term of fifty years, and the defendant covenanted that he would not use the premises otherwise than as an inn, tavern, or licensed house, and that he would during the term, so long as the requisite licences could be obtained, keep the house open in due and proper course of business as an inn, tavern, or licensed victualling house during the greatest number of days and the greatest number of hours that should be allowed by law, and would conduct and manage the same in a lawful and proper manner, and would not do or suffer anything whereby the licences or any of them might be or become liable to be for-

feited or suspended, or the renewal thereof withheld, or whereby the trade or business, or the goodwill thereof, might be or be liable to be prejudicially affected, or break the laws affecting licensed victuallers either by act of commission or omission, and would not affix any advertisement or placard in the premises except trade advertisements. The defendant proposed to exhibit a notice in the house that no one would be served with refreshment on Sunday except visitors staying in the hotel and their guests and travellers, and that no one would be served with alcoholic drink more than once during any morning or afternoon or evening on any weekday:—*Held*, that the proposed mode of carrying on the business was a breach of the covenants in the lease. *Dartford Brewery Co. v. Till*, 95 L. T. 636; 70 J. P. 519; 22 T. L. R. 792—C.A.

Covenant not to Do or Suffer any Act—Sub-lease—Breach by Sub-tenant—Liability of Assignee of Lessee.—T. being the assignee of a lease which contained a covenant that the lessee would not do or suffer to be done on the premises any acts whereby the licence might be forfeited or indorsed, sub-leased to K., such sub-lease containing a covenant to the same effect. K. committed a breach of the licensing laws and the Justices refused to renew the licence. In an action against T. by the lessor to recover damages for breach of the covenant,—*Held*, that T. had not suffered the act to be done, and was not liable. *Wilson v. Twamley*, 88 L. T. 808—Kennedy, J.

Covenant by Lessee for Himself and Assigns—Sub-lessee for Part of Term—Liability for Act of Sub-lessee.—Where a lease of a public-house contains a covenant whereby the lessee for himself and his assigns covenants with the lessor and his assigns in manner following—that is to say, “The lessee will at all times during the continuance of this demise use and keep open the said premises as a licensed public-house for the sale of ale wine beer and spirits therein and will so conduct and manage the same as to afford no reasonable or lawful ground or pretence for the Justices refusing to renew endorsing or objecting to renewal of the licences now attached to the said premises for the sale of ale wines and spirituous liquors and which licences are hereby agreed and declared to be the property of the lessor but any endorsement which may be made on the said licences shall not be deemed a breach of the covenant contained in this clause if the conviction in respect of which such endorsement shall have been made is reversed or annulled on appeal”—the covenant is an absolute one that the licence shall not be endangered by any one, and therefore if a sub-lessee by demise of the public-house is convicted of opening the house in prohibited hours the covenant is broken, and the lessee and his assigns will be liable at the suit of the lessor for the breach. The judgments in *Bryant v. Hancock* (67 L. J. Q.B. 507; [1898] 1 Q.B. 716; 68 L. J. Q.B. 889; [1899] A.C. 442) explained. *Mumford v. Walker*, 71 L. J. K.B. 19; 85 L. T. 518—Ridley, J.

Lease—Licence to Assign—Tied House—“Fine or sum of money in the nature of a fine.”—The lease of licensed premises contained a provision that the lessee should not assign or under-let

the premises without the consent in writing of the lessor unless such consent should be unreasonably withheld. The lessee, being desirous of assigning the lease, sought to obtain the consent of the lessor to an assignment to a particular brewery, but the lessor, while willing to consent unconditionally to an assignment to a private person, declined to consent to an assignment to any brewery unless the rent was increased by 25l. per annum and the length of the term extended. His reason for this was that an assignment to a brewery would turn the premises into a tied house, and would in his opinion cause the value of his reversion to be depreciated:—*Held*, that the imposition of such a condition contravened the provision contained in section 3 of the Conveyancing and Law of Property Act, 1892, and that in seeking to impose an illegal condition the defendant must be taken to have withheld his consent unreasonably, and the lessee was therefore at liberty to assign the premises to the particular brewery without obtaining any further consent of the lessor. *Jenkins v. Price*, 76 L. J. Ch. 507; [1907] 2 Ch. 229; 23 T. L. R. 608—Swinfen Eady, J. See in C.A., *infra*.

The lease of a public-house contained covenants on the part of the lessee to reside on the premises, and personally conduct the business, and not to assign without the consent of the lessor unless such consent was unreasonably withheld. The lessee proposing to assign the lease to a limited company,—*Held*, that the lessor could reasonably withhold his consent, a limited company being unable to perform the covenant to reside on the premises and personally conduct the business. *Jenkins v. Price*, 77 L. J. Ch. 41; [1908] 1 Ch. 10; 24 T. L. R. 70; 97 L. T. 734; 14 Manson, 343—C.A.

Decision of SWINFEN EADY, J. (76 L. J. Ch. 507; [1907] 2 Ch. 229), reversed on this ground, the Court expressing no opinion upon the points decided in the Court below. *Id.*

Covenant to Assign and Transfer Licence at End of Term to Landlord—Death of Tenant—Executrix Declining to Carry on Business and Closing Premises—Loss of Licence.—J. W. was tenant of a licensed house under an agreement which contained covenants by him first, not to do or suffer any act whereby the licence might be forfeited or affected prejudicially, or the renewal might be withheld; secondly, that he would do all acts necessary to procure a renewal of the licence, and not to assign or sub-let without consent; and thirdly, at the expiration of the term to do all acts necessary for assigning and transferring the then existing licence to the landlord's nominee. J. W. died on October 26, 1902, and by his will appointed the defendant, his widow, sole executrix. J. W. had a licence for the year ending October, 1902, and had obtained a certificate from the magistrates at the licensing sessions for a renewal, but had not paid the duty. A few days after his death, B., one of the plaintiffs, was told by the defendant that she would not carry on the business, and intended to surrender the premises. The defendant agreed to pay the duty, and gave B. the amount of same, which he agreed to pay for her. B. paid the duty, and took out the licence in J. W.'s name, handing same to M., a solicitor who had

J. W. was in his possession; but M. was not retained or instructed by the defendant. On November 29, 1902, M., without instructions from the defendant, obtained an interim transfer of the licence to the defendant. The defendant refused to open the premises, and on January 31, 1903, removed the stock-in-trade, and sent the keys to the plaintiffs, who took possession next day. The plaintiffs took no steps to obtain an interim transfer or a new licence, although the defendant offered to do everything necessary to transfer the licence. The licence was lost:—*Held*, that the defendant as executrix was not bound to take out a licence pending a surrender of the licensed premises, and that her omission to take it out and to carry on the publican's business was not an act done by her, by which the existing licence was forfeited. *Brown v. Watson*, [1904] 2 Ir. R. 218—C.A.

(h) *To Maintain Road.*

Until "taken to" by Local Authority.—The defendant in the course of developing certain building land, in the year 1888, formed a road on the boundary between his property and land belonging to the plaintiff, and laid a sewer under it. The plaintiff contributed to the expense, and the defendant on his part covenanted that "the said J. M. [the plaintiff] his heirs or assigns, or his or their tenant, shall not be under any liability to contribute to the maintenance or repair of the said roadway and sewer and main drain or any works connected therewith; but on the contrary the same and every part thereof shall be wholly and solely maintained by the said J. W. T. [the defendant] his heirs, executors, administrators, or assigns, unless and until the same shall be taken to by the parish, or some other local or public authority." In 1901 the local authority made the road up under the Public Health Act, at the expense of the frontagers, and afterwards declared it a highway repairable by the inhabitants at large:—*Held*, that the plaintiff was not entitled under the covenant to recover from the defendant the share of the expense of making up the road apportioned on the plaintiff, as the covenant only imposed an obligation on the defendant to contribute towards the cost of maintaining and repairing the roadway as constructed by the defendant in 1888, and did not extend to sums expended by the local authority in converting the roadway into a street of a different character. *Moore v. Todd*, 68 J. P. 43; 2 L. G. R. 376—C.A.

To Pay a Proportionate Share of Repairing and Maintaining a Road until Undertaken by Local Authority—Standard of Repair.—The plaintiff, in developing a building estate, granted a lease of one piece of land and conveyed another piece of land to the defendant, the property all abutting on a newly made and incomplete road. The lease and the conveyance both contained covenants by the defendant, in similar but slightly different language, to pay a proportionate share, to be fixed by the plaintiff's surveyor, of repairing and maintaining the road until undertaken by the local authority. For three years the defendant paid small contributions in common with other frontagers; but

when the plaintiff, by arrangement with the local authority, in order that the road might be taken over by them, expended a large sum on extensive works on the road, the defendant declined to pay his apportioned share of the outlay:—*Held*, that the defendant's covenants did not extend to the work done, which was practically a reconstruction of the road, to which the defendant was not liable to contribute; and that as the plaintiff declined to amend his claim by asking for an enquiry as to what part of the work could be called repairs, the action must be dismissed with costs. *Scott v. Brown*, 69 J. P. 89; 4 L. G. R. 103—C.A.

(i) *To Pay "Outgoings."*

"All impositions and outgoing"—Bakehouse—Certificate of Suitability—Alterations—Apportionment of Expenses.—By a lease made in 1903 premises were let for a term of twenty-one years at a yearly rent of 50l. as an underground bakehouse. The lease contained a covenant that the lessee would during the term "pay all existing and future taxes, rates, duties, assessments, impositions and outgoing of every description for the time being payable either by landlord or tenant in respect of the premises respectively (except landlord's property tax)." The certificate of suitability required by section 101 of the Factory and Workshop Act, 1901, could not be obtained unless structural alterations were made in the premises:—*Held*, that the expenses of the alterations were "impositions and outgoing" within the meaning of the covenant, and therefore that they must be borne by the lessee. *Monk v. Arnold* (71 L. J. K.B. 441; [1902] 1 K. B. 761) considered. *Goldstein v. Hollingsworth*, 73 L. J. K.B. 826; [1904] 2 K.B. 573; 91 L. T. 85; 68 J. P. 383; 2 L. G. R. 879; 20 T. L. R. 550—D.

Bakehouse—Certificate of Suitability—Alterations—Apportionment of Expenses.—By a lease granted in 1899 premises were let for a term of twenty-one years at a yearly rent of 70l. as an underground bakehouse. The lease contained a covenant by the tenant to pay "all existing and future taxes, rates, assessments and outgoing of every description whether parliamentary parochial or otherwise for the time being payable either by the landlord or tenant in respect of the said premises (except landlord's property tax)." As a certificate of suitability of the bakehouse could not otherwise be obtained certain structural alterations were made in the premises. The expenses of the alterations having been paid by the tenant, the magistrate made an order under section 101, sub-section 8 of the Factory and Workshop Act, 1901, apportioning part of the expenses upon the landlord:—*Held*, that the expenses were "outgoings" within the meaning of the covenant; that as there was an express covenant applicable to the expenses, the magistrate had no jurisdiction under the sub-section to take into account the other circumstances of the case; and therefore that the magistrate was wrong, and the expenses must be borne by the tenant. *Goldstein v. Hollingsworth* (*supra*) explained and followed. *Morris v. Beal*, 73 L. J. K.B. 830; [1904] 2 K.B. 585; 91 L. T. 486; 68 J. P. 542; 2 L. G. R. 1171; 20 T. L. R. 682—D.

Underground Bakehouse—Expenses of Structural Alterations Required by Local Authority before Granting Certificate.]—A lease of an underground bakehouse contained a covenant by the lessee to pay and discharge "all burdens, duties, assessments, outgoings, and impositions rated, taxed, charged, assessed, or imposed" on the premises:—*Held*, that the tenant was liable under the covenant to pay the whole of the expense of structural alterations required by the local authority under section 101 of the Factory and Workshop Act, 1901, notwithstanding that the work had been done by the landlord after the date of a magistrate's order apportioning the expense between the landlord and tenant. *Goldstein v. Hollingsworth* (73 L. J. K.B. 826; [1904] 2 K.B. 578) and *Morris v. Beal* (73 L. J. K.B. 830; [1904] 2 K.B. 585) followed. *Stuckey v. Hooke*, 3 L. G. R. 633; 69 J. P. 119—*Warrington, J.*

"All rates, taxes, assessments, and outgoings"—Expenses Incurred by Landlord under Notice to Abate Nuisance.]—A lessee, under a covenant to pay outgoings in respect of the demised premises, is not liable to pay for structural works executed by the landlord, in compliance with a notice from the sanitary authority requiring him to execute such works for the purpose of abating a nuisance, if the works are of such a character that it could not have been within the reasonable contemplation of the parties that the tenant should pay for them. Accordingly the lessee of a cottage in London let from year to year at 20l. a year is not liable, under a covenant to pay "outgoings," to pay expenses incurred by the landlord in reconstructing drains or paving a yard under notice from the sanitary authority requiring him to abate a nuisance, as, in view of the shortness of the term and the small value of the property, it could not have been in the contemplation of the parties that the tenant should bear such expenses. But the tenant is liable for the expense of providing a supply of water to a water-closet, as, having regard to section 37, sub-section 3 of the Public Health (London) Act, 1891, it might, even in the case of property of small value let from year to year, be in the contemplation of the parties that the tenant should bear such expense. *Valpy v. St. Leonard's Wharf Co.*, 1 L. G. R. 305; 67 J. P. 402—*Farwell, J.*

"Outgoings"—"In respect of the premises"—Agreement.]—In an agreement for the tenancy of a house for a term of three years and then from year to year, at a yearly rent of 55l. free from deductions except landlord's property tax, the tenant agreed to pay all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they became due (landlord's property tax only excepted as aforesaid). The tenant also agreed to keep and leave the premises in as good condition as they were at the date of the agreement (reasonable wear and tear excepted); to keep pipes, water-closets and cisterns clean; and to repair internal pipes and taps. While the tenant was in occupation under this agreement the sanitary authority served on the landlord a notice to reconstruct the drainage:—*Held*, that the expenses of doing the work were "outgoings" within the meaning of the agreement and the contemplation of the

parties, and that the tenant was bound to pay them. *Stockdale v. Ascherberg*, 73 L. J. K.B. 206; [1904] 1 K.B. 447; 90 L. T. 111; 52 W. R. 289; 68 J. P. 241; 2 L. G. R. 529; 20 T. L. R. 235—*C.A.*

"Outgoings imposed on or payable in respect of the premises"—Reconstruction of House Drainage.]—A covenant by a lessee that he will pay "... all sewers rates and all other rates, taxes, outgoings, and assessments whatsoever ... imposed or assessed upon or payable in respect of the premises," includes the cost of works amounting to a reconstruction of the house drainage rendered necessary in order to comply with a notice to abate a nuisance on the premises. *Antil v. Godwin*, 63 J. P. 441—*Bruce, J.*

Abatement of Nuisance by Landlord—Liability of Tenant under Covenant.]—A lease of a house for a term of years at the yearly rental of 70l. contained a covenant by the tenant to pay all "outgoings in respect of the premises." On the expiration of the lease the lessee continued to occupy the premises and pay the rent, a yearly tenancy being thus created:—*Held*, that the covenant would not be imported into the yearly tenancy so as to render the lessee liable for an expense of 70l. incurred by the lessor in abating a nuisance on the premises pursuant to a notice from the sanitary authority under the Public Health (London) Act, 1891, as, in view of the shortness of the term and the amount of the rent, it was inconsistent with the presumed intention of the parties that the lessee should be liable for so great an expense. *Valpy v. St. Leonard's Wharf Co.* (1 L. G. R. 305) applied. *Stockdale v. Ascherberg* (73 L. J. K.B. 492; [1903] 1 K.B. 873) distinguished. *Harris v. Hickman*, 73 L. J. K.B. 31; [1904] 1 K.B. 13; 89 L. T. 722; 68 J. P. 65; 2 L. G. R. 1; 20 T. L. R. 18—*Wright, J.*

Where a lessor of premises incurs expense voluntarily and not under any legal obligation in abating a nuisance thereon, he cannot recover such expense from the lessee under a covenant by the latter to pay all "outgoings in respect of the premises." *Ib.*

Paving Expenses Paid by Landlord—Liability of Tenant.]—The plaintiff demised to the defendants certain premises for a period of twenty-one years at an annual rent, the defendants covenanting to pay "all rates taxes and outgoings now payable or hereafter to become payable" in respect of the demised premises. The local authority having, under the provisions of section 150 of the Public Health Act, 1875, executed certain paving works on a road upon which the demised premises abutted, the plaintiff paid to the local authority her proportion of the expenses incurred by them in executing the works, and brought an action against the defendants to recover the amount:—*Held*, that the paving expenses were "outgoings" payable in respect of the demised premises, and that the plaintiff was entitled to recover. *Greaves v. Whitmarsh, Watson & Co.*, 75 L. J. K.B. 633; [1906] 2 K.B. 340; 95 L. T. 425; 70 J. P. 415; 4 L. G. R. 718—*D.*

New Rate—To be Borne by Landlord—Agreement to the Contrary.]—A tenant from year to year agreed to pay all outgoings. In the course

of the tenancy a new rate was imposed, to be paid by the tenant, who could deduct it from the rent, apart from any agreement to the contrary:—*Held*, that the tenant could deduct it, as the agreement between him and his landlord did not apply to such a new rate, and that there was no agreement to the contrary. But that it could only be deducted from the current rent, and that past rates which the tenant had paid could not be deducted, but only that for the current year. *Mile End Old Town Vestry v. Whitty*, 78 L. T. 80—Wright, J.

All "Present and future" Rates and "Outgoings" Charged on Premises—Sub-lease between Completion and Final Apportionment—Covenant by Sub-lessee to Keep his Lessor Indemnified against Covenants of Superior Lease.]—A covenant in a lease whereby the lessee covenants to "pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the" demised "premises or the owner or occupier in respect thereof without any deduction except for landlord's property tax" does not cover a charge in respect of the expenses of private street works executed under the Private Street Works Act, 1892, which works were completed before the making of the lease, although the final apportionment of the expenses was not made until afterwards. *Stock v. Meakin* (69 L. J. Ch. 401; [1900] 1 Ch. 683) followed. *Surtees v. Woodhouse*, 72 L. J. K.B. 302; [1903] 1 K.B. 396; 88 L. T. 407; 51 W. R. 275; 67 J. P. 232; 1 L. G. R. 227—C.A.

Covenant to Pay Outgoings—Escape in Case of Fire—Factory—Recovery of Expenses.]—See *Horner v. Franklin*, 74 L. J. K.B. 291—C.A.; *post*, MASTER AND SERVANT.

Covenant to Pay Charges Imposed—Paving Expenses—Payment to Local Authority of Rent Due to Landlord—Distress.]—See *Skinner v. Hunt*, 73 L. J. K.B. 680—C.A.; *post*, METROPOLIS.

(j) For Quiet Enjoyment.

Implied Covenant for—"Agrees to let."]—A covenant for quiet enjoyment is implied by law from the use in a tenancy agreement of the words, "agrees to let," or any equivalent words creating the relationship of landlord and tenant. *Budd-Scott v. Daniel*, 71 L. J. K.B. 706; [1902] 2 K.B. 351; 87 L. T. 392; 51 W. R. 184—D. *And see* CONTRACT.

Temporary Obstruction of Access—Railway—Statutory Powers—Injury to Land—Action in High Court—Compensation—Jurisdiction.]—An action will not lie against a railway company for breaches of covenant committed by them in the exercise without negligence of their statutory powers. The only remedy for such breaches is compensation under section 68 of the Lands Clauses Act, 1845. *Manchester, Sheffield, and Lincolnshire Railway v. Anderson*, 67 L. J. Ch. 568; [1898] 2 Ch. 394; 78 L. T. 821—C.A.

A temporary inconvenience caused by the interference of the lessor with the access of his tenant to the demised premises, but which does not affect the estate or title or possession of the tenant, is not a breach of a covenant for quiet enjoyment. *Sanderson v. Berwick-upon-Tweed (Corporation)* (53 L. J. Q.B. 559; 13 Q.B. D. 547) explained. *Ib.*

Erection by Lessor of Flats on Adjoining Property Causing Lessee's Chimneys to Smoke.]—

A lessor granted to the lessee a lease for twenty-one years of a certain house for the purpose of carrying on his profession of physician and surgeon. The lease contained the usual covenant for quiet enjoyment. At the date of the lessee entering into possession the lessor was erecting on adjoining property a large block of flats which he subsequently completed. The flats were carried to a height which considerably exceeded that of the lessee's house, and the effect of this was to cause the smoke to be driven down the plaintiff's chimneys by the impact of the wind on the flats, and thereby to render some of the rooms at times practically uninhabitable:—*Held*, that what had been done by the lessor, although it did not affect the title to or possession of the house, was a substantial physical interference with its enjoyment, and therefore constituted a breach of the covenant for quiet enjoyment. *Tebb v. Cave*, 69 L. J. Ch. 282; [1900] 1 Ch. 642; 82 L. T. 115; 48 W. R. 318—Buckley, J.

Denmett v. Atherton (41 L. J. Q.B. 165; L. R. 7 Q.B. 816), *Sanderson v. Berwick-upon-Tweed Corporation* (53 L. J. Q.B. 559; 13 Q.B. D. 547), and *Manchester, Sheffield, and Lincolnshire Railway v. Anderson* (67 L. J. Ch. 568; [1898] 2 Ch. 394) considered. *Ib.*

Assignment of Reversion—Subsequent Purchase of Adjoining Property by Assignee—Nuisance on Adjoining Premises—Liability of Assignee.]—In 1897 the plaintiff took a lease of offices for fourteen years, with a covenant for quiet enjoyment in the ordinary form against eviction or disturbance by the lessor or any person lawfully claiming under him. In 1898 the defendants purchased the lessor's reversion, and in 1900 they purchased from a stranger the house adjoining the house in which the plaintiff's offices were. They pulled down this house, and built on the site of it a new house, which was higher than the old one, and caused the plaintiff's chimneys to smoke, so as to interfere with the enjoyment of his offices:—*Held*, that the defendants were not liable as for breach of the covenant for quiet enjoyment. *Davis v. Town Properties Investment Corporation*, 72 L. J. Ch. 589; [1903] 1 Ch. 797; 88 L. T. 665; 51 W. R. 417—C.A.

Per ROMER, L.J., and COZENS-HARDY, L.J.—*Quære*, whether *Tebb v. Cave* (69 L. J. Ch. 282; [1900] 1 Ch. 642) was rightly decided on the ground of breach of covenant for quiet enjoyment. *Ib.*

Per COZENS-HARDY, L.J.—Section 11 of the Conveyancing Act, 1881, has not altered the old law as to the class of covenants the burden of which will run with the reversion. *Ib.*

Liability of Landlord for Acts of Assignee or Reversion.]—Where a lessor covenants that the lessee shall peaceably enjoy the demised premises without any interruption by the lessor or any person claiming under him, the effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the act, but he is not responsible for wrongful or negligent acts which he

has not authorised. *Sanderson v. Berwick-upon-Tweed Corporation* (53 L. J. Q.B. 559; 13 Q.B. D. 547) followed. *Williams v. Gabriel*, 75 L. J. K.B. 149; [1906] 1 K.B. 155; 94 L. T. 17; 54 W. R. 379; 22 T. L. R. 217—Bray, J.

Restrictive Covenant in Original Lease—Implied Contract or Covenant for Quiet Enjoyment of Title by Under-lessee.—By an agreement in writing, not under seal, which operated as an immediate demise, the defendant let to the plaintiff, who agreed to take, the lower part of certain premises for the term of three years certain. The defendant held the premises for an unexpired term under a lease which contained a covenant against carrying on any trade or business upon the premises. The plaintiff was not aware of the existence of this covenant in the superior lease, and the agreement with the defendant contained no covenant against carrying on business. The plaintiff entered into possession under the agreement, and carried on his trade or business therein. The defendant's lessors in an action against both the plaintiff and the defendant obtained an injunction restraining the plaintiff from carrying on his trade or business. In an action by the plaintiff to recover damages for breach of contract for quiet enjoyment, —*Held*, that whatever contract or covenant could be implied by the use of the word "let," an unlimited contract or covenant for quiet enjoyment against acts of persons not claiming under the lessor could not be implied, and consequently that the defendant was not liable for the interruption by title paramount. *Baynes v. Lloyd* (64 L. J. Q.B. 787; [1895] 2 Q.B. 610) discussed. *Jones v. Lavington*, 72 L. J. K.B. 98; [1903] 1 K.B. 253; 88 L. T. 223; 51 W. R. 161—C.A.

Sub-lease—Action of Ejectment by Superior Landlord against Lessee—Consent to Judgment.—In a sub-lease by the defendant to the plaintiff, the defendant covenanted for quiet enjoyment by the plaintiff "without interruption by him or any person lawfully claiming through him." The superior landlord, to whom the reversion on the defendant's lease had been assigned after the sub-demise to the plaintiff, sued the defendant to recover possession of the premises for a breach of a condition not to assign or sub-let by the sub-lease to the plaintiff. The defendant consented to judgment in that action, and the plaintiff was turned out of possession:—*Held*, that the interruption of the enjoyment of the plaintiff was caused by the direct act of the defendant in consenting to judgment in the action by the superior landlord, and that there was a breach of the covenant for quiet enjoyment. *Kelly v. Rogers* ([1892] 1 Q.B. 910) distinguished. *Cohen v. Tannar*, 69 L. J. Q.B. 904; [1900] 2 Q.B. 609; 83 L. T. 64; 48 W. R. 642—C.A.

Residential Flats—Express Covenant for Quiet Enjoyment—General Scheme—Implied Obligation—Nuisance.—The plaintiff was the tenant of a flat under an agreement with C. which contained the usual covenant for quiet enjoyment. The adjoining flats in the same building were held by other tenants under similar agreements, in all of which there was a stipulation by the tenant that he would not permit the premises to be used for any unlawful or immoral purpose, but, on the contrary, would

as much as possible contribute to the respectability of the building and keep the premises as a private dwelling-house or residential chambers. C. contracted to sell the building, but no actual assignment of the lease had been executed, when the plaintiff brought an action against the ultimate purchasers, as the equitable assignees of the reversion, on the ground that the flat adjoining his own was being used for immoral purposes. He complained that a nuisance was thereby created and damage sustained by him; and he claimed a declaration that the defendants were bound by the covenant for quiet enjoyment, and an injunction to restrain them from permitting the adjoining flat to be used so as to interfere with the quiet enjoyment by the plaintiff of his flat; and from permitting any act inconsistent with the terms of the agreement. The defendants counter-claimed for arrears of rent, and submitted that no cause of action against them was disclosed. The points of law were first argued. It was decided by Buckley, J., that the covenant for quiet enjoyment related only to freedom from disturbance by adverse claimants extending to physical interference with the use by the plaintiff of his flat as distinguished from its comfortable enjoyment; that the case must go on to trial on this point; that the defendants were not liable for the acts of persons acting adversely to them; but that it might be shown at the hearing that such acts were impliedly authorised by continued receipt of rent from the offending tenant; and, further, that the plaintiff could rely on there being a general scheme for the use of the flats. The defendants appealed:—*Held*, that, on the grounds stated by Buckley, J., it was impossible at the present stage of the proceedings for the Court to say that there might not be a cause of action capable of proof; that whether that was so or not must depend upon what took place at the trial of the action; and that therefore the case must go to trial. *Jaeger v. Mansions Consolidated, Ltd.*, 87 L. T. 690—C.A.

(k) *For Renewal.*

"At the cost of the lessee"—Determination by Arbitration of Fine Payable by Lessee—Costs of Reference and Award.—Where a lease contains a covenant "that the lessors their heirs or assigns will at any time during the said term, upon the request and at the costs of the lessee his executors and administrators or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired and the full improved annual value of the premises at the time of such renewal (such value to be determined by the said surveyor or at the option of the lessee by the award of two referees or their umpire) renew or cause to be renewed the said term for a further term . . . at the like rent and subject to the like covenants and conditions as are herein reserved and contained including this present covenant for renewal," the costs of renewal include the costs of an arbitration properly entered upon for the purpose of determining the fine payable by the lessee. *Fitzsimmons v. Mostyn (Lord)*, 73 L. J. K.B. 72; [1904] A.C. 46; 89 L. T. 616; 52 W. R. 337; 20 T. L. R. 134.—H.L. (E.)

Lease for Three Lives.—A lease for three lives contained a covenant by the lessor that he would, upon the dropping of any of the lives which should first happen within a specified term, on the payment of a fine by the lessee, and on the nomination by the lessee of a new life within six months after the death of the person so happening, first to die, add such new life in lieu of the person so happening first to die, and that he would in like manner from time to time successively, upon the failure of any and every other life in the said lease nominated and thereafter, to be successively nominated, on the like nomination and like payment of a fine, successively thereafter during the same term add the life or lives so successively nominated in the place and stead of each and every of the several persons so successively happening to die as aforesaid:—*Held*, that upon the true construction of this covenant it prescribed as necessary for obtaining a renewal the condition that the lessee should renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and that if he failed so to renew within six months from the dropping of any life he lost his right of renewal. *Hussey v. Domville*, [1903] 1 Ir. R. 265—C.A.

Renewal of Lease—Constructive Trust.—See TRUST.

(1) *To Repair.*

Lessor's Covenant to Repair—Construction.—The principles of construction of covenants to repair laid down in *Lister v. Lane* (62 L. J. Q.B. 583; [1893] 2 Q.B. 212) and *Proudfoot v. Hart* (59 L. J. Q.B. 389; 25 Q.B. D. 42), cases which deal with the liability of lessees in respect of lessees' covenants, are applicable to covenants by the lessor. *Torrens v. Walker*, 75 L. J. Ch. 645; [1906] 2 Ch. 166; 95 L. T. 409; 54 W. R. 584—Warrington, J.

A covenant by a lessor to repair the external wall or any part of a building is a covenant to repair on notice and not otherwise. *Ib.*

Tenant, by—House out of Repair through Age.—If premises through their own inherent defects fall in the course of the tenancy into a particular condition, the results of their being in that condition are not within the tenant's covenant to repair. *Wright v. Lawson*, 68 J. P. 34—C.A.

Agreement of Lessee to Erect Building on Land—Building not Erected—Acquiescence of Lessor—Release of Covenant.—The lessee of a plot of land covenanted with the lessor to complete a coach-house and stable upon the land within six months to the satisfaction of the lessor, and to keep in repair the demised buildings. The lease contained a proviso for re-entry on breach of covenant. The plot was one of a number of building plots subject to a building scheme. The scheme was subsequently modified, and no coach-house or stable was ever built, the lessor approving and consenting to the alteration. Rent was paid for the land for nearly forty years. In an action by the assignee of the lessor to recover possession for

breach of the covenant to repair the coach-house and stable,—*Held*, that the true inference was that the parties intended to release the covenant to repair as regards the coach-house and stable. *Gibbon v. Payne*, 22 T. L. R. 54—A. T. Lawrence, J.

Demise by Under-lease of Part of Premises—Covenant with Under-lessee for Covenantor and Assigns to Observe as to Part not Demised—Covenant in Head-lease—Covenant Running with Land.—Certain premises were demised to a lessee who covenanted to repair buildings thereon subject to a clause of re-entry for breach. In an under-lease of part of these premises the lessee (who by reason of various mesne assignments was represented by the defendant) covenanted with the under-lessee (represented for the same reasons by the plaintiff) that he would observe and perform the covenant to repair in the head-lease as far as it related to or affected that part of the premises not so demised by the under-lease. The defendant committed a breach of this covenant to repair, whereupon the successors in title of the head landlord obtained judgment against him, and re-entered on the whole of the premises the subject-matter of the head-lease and ejected the plaintiff, who claimed damages from the defendant for breach of the covenant in the under-lease:—*Held*, that the covenant did not run with the land, and that the defendant was therefore not liable. *Doughty v. Bowman* (17 L. J. Q.B. 111; 11 Q.B. 444) discussed. *Dewar v. Goodman*, 76 L. J. K.B. 314; [1907] 1 K.B. 612; 96 L. T. 864; 23 T. L. R. 225—Jelf, J. Affirmed, 77 L. J. K.B. 169; 97 L. T. 885; [1908] 1 K.B. 94; 24 T. L. R. 62—C.A.

Covenant to Pay a Proportionate Share of Repairing and Maintaining a Road until Undertaken by Local Authority—Standard of Repair.—The plaintiff, in developing a building estate, granted a lease of one piece of land and conveyed another piece of land to the defendant, the property all abutting on a newly made and incomplete road. The lease and the conveyance both contained covenants by the defendant, in similar but slightly different language, to pay a proportionate share, to be fixed by the plaintiff's surveyor, of repairing and maintaining the road until undertaken by the local authority. For three years the defendant paid small contributions in common with other frontagers; but when the plaintiff, by arrangement with the local authority, in order that the road might be taken over by them, expended a large sum on extensive works on the road, the defendant declined to pay his apportioned share of the outlay:—*Held*, that the defendant's covenants did not extend to the work done, which was practically a reconstruction of the road, to which the defendant was not liable to contribute; and that as the plaintiff declined to amend his claim by asking for an enquiry as to what part of the work could be called repairs, the action must be dismissed with costs. *Scott v. Brown*, 69 J. P. 89—C.A. Affirming, 2 L. G. R. 441—Joyce, J.

To Pay Fair Share of Charge for Repairing Walls, Sewerage or Otherwise, Imposed by Virtue of an Act of Parliament.—In a lease of a factory for twenty-one years, the tenants

covenanted to pay "all rates and taxes, sewers rate, and main drainage rate, parish dues, and all other rates, taxes, and impositions and outgoings whatsoever, which were then, or should at any time thereafter, be assessed, charged, or in anywise imposed upon or in respect of the demised premises . . . by authority of Parliament or otherwise." Then followed a covenant for repairs. Then the tenant further covenanted to pay "a fair share and proportion of all costs and expenses which the lessors in respect of being owners and lessors of the premises demised . . . might be called upon to bear, pay, or contribute, or would be liable to, in or about every or any reparation, pulling down, rebuilding, or raising of every or any party wall, party fence, wall, timber, partition, or party arch, off incidental thereto, or in or about any drainage or sewerage or otherwise, by virtue of any Act or Acts of Parliament." During the term the lessors as owners of the demised premises were compelled to spend 710*l.* in constructing a fire-escape according to the requirements of section 7 of the Factory and Workshop Act, 1891. In an action to recover this expense from the tenant,—*Held*, that it was not an imposition or outgoing under the first covenant, and even if it was, the second covenant was to be read as a proviso on the first, and the words "expenses which the lessors . . . might be called upon to pay . . . by virtue of any Act or Acts of Parliament," aptly described it and took it out of the operation of the first covenant. The tenant was therefore liable to pay not all, but a fair share of such expense. *Arding v. Economic Printing and Publishing Co.*, 79 L. T. 420—D.

To Build and Repair—Forfeiture—Waiver—Notice.—The defendants covenanted, in the lease to them of lands, that they would pull down and rebuild certain messuages "within the space of 12 calendar months at the most from the date of these presents," and that they would repair "the said messuages and premises so to be erected as aforesaid." The lease contained a proviso for re-entry if there should be "any breach or non-observance of any of the lessees' covenants." The houses were not erected within the twelve months. More than four years after the date of the lease, the lessors served a notice under section 14 of the Conveyancing Act, 1881, referring to the lease and reciting the "covenant on the part of the lessees that the lessees would within the space of 12 calendar months at the most from the date of the said lease" erect certain buildings, and the breach alleged was that "no shop, messuage or dwelling-house has been erected on the said piece of land," and the lessees were required "to erect buildings on the said piece of land in the manner prescribed by the said covenant":—*Held*, first, that the covenant to build within the space of twelve calendar months was broken at the expiration of that period, but that the forfeiture was waived by the receipt of rent subsequently accrued; secondly, that the covenant to repair "the said messuages and premises so to be erected as aforesaid" involved a continuing obligation to build; and thirdly, that the notice under section 14 must be read as referring to the express covenant to build within twelve calendar months, and not to the implied covenant to build generally. *Jacob v. Dorn*, 69 L. J. Ch.

493; [1900] 2 Ch. 156; 83 L. T. 191; 48 W. R. 441; 64 J. P. 552—Stirling, J.

Agreement of Lessee to Erect and Keep in Repair Building on Land—Building not Erected—Acquiescence of Lessor—Release of Covenant.—By a lease in 1866 the lessee of a plot of land covenanted with the lessor to complete a coach-house and stable upon the land within six months to the satisfaction of the lessor, and to keep in repair the demised buildings. The lease contained a proviso for re-entry on breach of covenant. The plot was one of a number of building plots subject to a building scheme. The scheme was subsequently modified, and no coach-house or stable was ever built, the lessor approving and consenting to the alteration. In an action by the assignee of the lessor to recover possession for breach of the covenant to repair the coach-house and stable:—*Held*, that the true inference was that the parties intended to release the covenant to repair as regards the coach-house and stable. *Gibbon v. Payne*, 23 T. L. R. 250—C.A.

Death of Sole Covenantor during Continuance of Term—Occupation and Payment of Rent till Expiration of Term by another Party to the Deed who did not Covenant—Declaration by Covenantor that he held as Trustee for the other Party—Legal or Equitable Liability to Perform Covenants.—Beneficial interest in a lease of premises, accompanied by occupation and payment of rent by a widow, party to the lease, but whose husband, also a party, had alone entered into covenants to repair and had died before the expiration of the term, creates no contract between the widow and the lessor legally binding her to perform the covenants in the lease, nor does it create any like equitable liability, notwithstanding a declaration in the lease by the husband that he held the premises as trustee for his wife as part of her separate estate. *Ramage v. Womack*, 69 L. J. Q.B. 40; [1900] 1 Q.B. 116; 81 L. T. 526—Wright, J.

Premises Let to Tenant without any Agreement by Landlord to Repair Part of Premises Sub-let by Tenant—Occupation by Sub-tenant's Manager and Wife—Repairs Voluntarily Done by Landlord—Repairs Negligently Executed by Landlord's Servants—Injury to Wife during Tenancy in Consequence of Negligence—Non-liability of Landlord.—The defendants, who were the owners of certain premises, and also of adjoining property, let the premises to W. & Co., but did not enter into any agreement to repair the same. W. & Co. sub-let a part of the premises to a company, whose manager, together with his wife—the plaintiff and family, resided upon the part so sub-let. The defendants had erected on their property adjoining the premises in question, and in proximity thereto, engines and plant for the purpose of generating electricity to light their property. The part of the premises sub-let to the company contained a lavatory, in which was fixed a water tank which, as alleged by the plaintiff, had become unsafe and dangerous by reason of the vibration caused by the engines and plant. Complaints as to the vibration and as to the condition of the water tank were made by the plaintiff and her husband to W. & Co., who communicated them to the defendants. The defendants thereupon sent two plumbers

who were in their employment to repair the tank, and the plumbers put up a bracket to support the tank; but this bracket a few months afterwards fell upon and injured the plaintiff when using the lavatory. At the trial the jury found that the bracket fell by reason of the working of the engines, and that such working caused a vibration amounting to a nuisance; also that the defendants, in putting up the bracket and placing the tank upon it, did the work in such an improper and negligent manner as to leave the apparatus in a condition dangerous to any one using the lavatory, and that the plaintiff was injured in consequence thereof:—*Held*, that the plaintiff had no interest in the premises or any right of occupation in the proper sense of the term which gave her a cause of action based upon a nuisance against the defendants. *Held*, also, that in the absence of any contractual relation between the plaintiff and the defendants, the mere fact of their having voluntarily done the repairs to the tank—an act which was not done in the discharge of any duty to the plaintiff—gave the plaintiff no cause of action on the ground of negligence. *Malone v. Laskey*, 76 L. J. K.B. 1134; [1907] 2 K.B. 141; 97 L. T. 324; 23 T. L. R. 399—C.A.

Measure of Damages.—Certain premises were demised to the predecessors in title of the plaintiffs for sixty-one years from Michaelmas, 1837, subject to covenants to repair and deliver up in repair. The premises were sub-demised to the predecessors in title of the defendant subject to the same covenants. In 1894 an action was commenced by the plaintiffs against the defendant for damages for the breaches of the covenants, and 1,305*l.* was recovered, none of which was expended in repairing the premises. On September 19, 1898, the term of the underlease expired, and the plaintiffs claimed the sum that it would cost to put the premises into such state of repair as the defendant would be bound to leave them at the end of the term, making due allowance for the sum of 1,305*l.* they had received:—*Held*, that the true measure of damages for the breaches of covenant was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the said term, less the sum of 1,305*l.* and interest. *Ebbetts v. Conquest*, 82 L. T. 560—D.

Covenant for Maintenance of Buildings—Acquiring Lease Ultra Vires—Liability.—See *Batson v. London School Board*, col. 1260, *post*, LANDS CLAUSES ACT.

Covenant to Repair—Incidence of Costs.—See *TENANT FOR LIFE AND REMAINDERMAN*.

(m) To Pay Quit-Rent.

Payment for Years by Persons not Liable—Presumption of Lost Grant.—By indenture of June 23, 1703, the trustees of forfeited estates conveyed to D. the lands of Clonfad, Rattin, and Ballyoughter, in the county of Westmeath, in fee, subject to payment of the quit-rent of 12*l.* 13*s.* In 1708 H. (in whom D.'s interest in the lands was vested) granted to B. the lands of Clonfad, in fee, subject to the rent of 13*l.* over and above taxes, except quit-rent, which H. covenanted to pay. In 1710 H. granted to B.

the lands of Rattin, subject to the rent of 80*l.*, with the same provision as to quit-rent, which H. covenanted to pay. Since 1780, the quit-rent payable in respect of Rattin and Clonfad had been paid by the successive owners of the grantee's interest under the fee-farm grants of 1708 and 1710:—*Held*, that in the absence of any explanation of these payments being made by parties not liable thereto for so long a period, a lost grant must be presumed. *Bomford's Estate, In re*, [1904] 1 Ir. R. 474—C.A.

(n) To Pay Rates, Taxes, &c.

Lease of Portion of Large Building—Covenant by Lessor to Pay "Rates and taxes payable in respect of the demised premises"—Water Supplied under Water Company's Act.—A covenant by the lessor to pay "all rates and taxes payable in respect of the demised premises" will include the water rate in the case of a demise of a portion of a large building, to which at the date of the demise water is supplied for domestic purposes under a water company's Act incorporating the provisions of the Waterworks Clauses Act, 1847. *Direct Spanish Telegraph Co. v. Shepherd* (53 L. J. Q.B. 420; 13 Q.B. D. 202) followed. *Bourn & Tant v. Salmon & Gluckstein*, 76 L. J. Ch. 374; [1907] 1 Ch. 616; 96 L. T. 629; 71 J. P. 329—C.A.

Tenant's Covenant to Pay Rates, &c.—Private Street Works Executed before Date of Lease—Apportionment made after Commencement of Tenancy.—The share of the expenses of private street works executed under section 150 of the Public Health Act, 1875, for which the owner of any premises is liable, becomes a charge on the premises as from the completion of the works, though it is not payable till the apportionment has been made. Where, therefore, a lease of the premises is granted after the completion of the works, but before the apportionment, the landlord cannot recover the expenses from the tenant under a covenant on his part to pay all rates "taxes and assessments" in respect of the demised premises, whether or not such a covenant is wide enough to include expenses of the character. *Surtees v. Woodhouse* (72 L. J. K.B. 302; [1903] 1 K.B. 396) followed. *Lumby v. Faupel*, 90 L. T. 140; 2 L. G. R. 605; 68 J. P. 265; 20 T. L. R. 237—C.A.

Abatement of Nuisance Caused by Structural Defect—Incidence of Expense—Liability of Tenant to Indemnify Landlord.—Where a lessee has by his lease covenanted to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)," and the lease contains no covenant by the lessee or the landlord to repair, he is liable as between himself and his landlord to pay the expense of the abatement

of a nuisance arising from a defect of a structural nature which has been required by the sanitary authority under section 4 of the Public Health (London) Act, 1891. *Foulger v. Arding*, 71 L. J. K.B. 499; [1902] 1 K.B. 700; 86 L. T. 485; 50 W. R. 417—C.A.

Covenant by Tenant to Pay all "Rates, taxes, and assessments"—Expenses of Paving Street.—The expense of paving a street incurred by a landlord under section 150 of the Public Health Act, 1875, is not recoverable by him from a tenant under a lease by which the tenant covenants to pay all rates, taxes, and assessments whatsoever which then are or during the said term shall be imposed or assessed upon the premises, or the landlord or tenant in respect thereof, by authority of Parliament or otherwise. *Baylis v. Jiggins*, 67 L. J. Q.B. 793; [1898] 2 Q.B. 315; 79 L. T. 78—Channell, J.

Expenses of Paving Rate.—A covenant in a lease that the lessee would during the continuance "pay all taxes, rates, and assessments imposed or assessed upon the premises, or on the landlord or tenant in respect thereof, does not impose on the lessee the apportioned cost of paving the road in front of the premises in respect of work done by the local authority under section 150 of the Public Health Act, 1875, where the work was done before, but the apportionment was made after, the granting of the lease. *Baylis v. Jiggins* (67 L. J. Q.B. 793; [1898] 2 Q.B. 315) followed. *Foulger v. Arding* (71 L. J. K.B. 499; [1902] 1 K.B. 700) distinguished. *Lumby v. Faupel*, 88 L. T. 562; 51 W. R. 522; 67 J. P. 202; 1 L. G. R. 493—D.

"Rates, taxes, assessments, and outgoings"—Paving Expenses.—Apportioned paving expenses under the Public Health Act, 1875, which the landlord has paid, can be recovered from the tenant, where the latter has covenanted to pay all rates, taxes, assessments, and outgoings payable, or to become payable, whether by the landlord or tenant, in respect of the premises. *Weld v. Clayton-le-Moors Urban Council*, 86 L. T. 584—D.

Rates, Taxes, and "Demands"—Requirements of Local Authority as to Escape in Case of Fire.—A covenant on the lessee's part, in a lease of a factory granted in 1886, to pay rates, taxes, and all demands which shall or may be laid, imposed, or payable in respect of the premises, includes expenses incurred by the lessor in providing means of escape in case of fire in compliance with the requirements of the local authority under section 7 of the Factory and Workshop Act, 1891 (now replaced by provisions in section 14 of the Factory and Workshop Act, 1901). *Foulger v. Arding* (71 L. J. K.B. 499; [1902] 1 K.B. 700) followed. The lessor may recover the expenses from the lessee in an action on the covenant in the High Court, notwithstanding the provisions in the section giving the County Court jurisdiction, on the application of the owner of a factory, to make such order as appears just and equitable requiring the occupier to bear or contribute towards expenses incurred by the owner in complying with the requirements of the local authority. *Monk v. Arnold* (71 L. J. K.B. 441; [1902] 1

K.B. 761) distinguished and commented on. *Semble*, that the provisions giving this jurisdiction to the County Court are intended to apply only where there is no contract between the owner and lessee as to the expenses. *Shepherd v. Barber*, 1 L. G. R. 157; 67 J. P. 238—Lawrance, J.

"Duties"—Reconstruction of Drains—Incidence of Expense.—Where a lessee has by his lease covenanted to pay "all taxes, rates, duties, and assessments whatsoever which now are or hereafter may become payable for or in respect of" the demised property, he will be liable as between himself and his landlord to pay the expense of reconstruction of a drain which has been required by the vestry under the Metropolis Local Management Act, 1855, s. 85. *Brett v. Rogers* (66 L. J. Q.B. 287; [1897] 1 Q.B. 525) approved and followed. *Farlow v. Stevenson*, 69 L. J. Ch. 106; [1900] 1 Ch. 128; 81 L. T. 589; 48 W. R. 213—C.A.

All "Impositions"—Notice from Sanitary Authority to Repair Drains—Liability.—A tenant under an agreement for three years, who has covenanted to pay the rent "free and clear from all deductions whatsoever" and to pay "all rates taxes assessments or impositions whatsoever whether Parliamentary parochial or otherwise which may become due or be assessed" in respect of the premises, is liable to pay the costs of repairs of drains and other sanitary work required by the sanitary authority, as such repairs may be considered to have been reasonably within the contemplation of both parties when entering into the agreement. *Stockdale v. Asherberg* (72 L. J. K.B. 492; [1903] 1 K.B. 873) followed. *Warriner, In re; Brayshaw v. Nimis*, 72 L. J. Ch. 701; [1903] 2 Ch. 367; 88 L. T. 766; 67 J. P. 351; 1 L. G. R. 765—Swinfen Eady, J.

All Charges—Repair of Defective Drain by Lessee by Order of Local Authority—Liability of Lessee.—A lease for years, granted by the plaintiff to the defendant, contained a covenant by the lessee to pay during the term "the sewers rate and all other taxes, rates, charges, and assessments whatsoever, Parliamentary, parochial, or otherwise, which then were or hereafter should be imposed, charged, or assessed upon or in respect of the premises, or payable by either the owner or occupier in respect of the same." The lease also contained a covenant by the lessee to repair and keep in repair. In compliance with a notice given by the local authority, under section 94 of the Public Health Act, 1875, the plaintiff did the work necessary to abate a nuisance caused by a defective drain upon the premises, and brought this action to recover the cost of that work:—*Held*, that the expenses of doing this work came within the terms of the covenant as a "charge imposed upon or in respect of the premises or payable by either the owner or occupier in respect of the same"; and that the lessee was therefore liable to pay the expense thereof himself. *George v. Coates*, 88 L. T. 48—C.A.

Covenant by Lessor to Pay Land Tax—Building Agreement—Increase in Annual Value of land—Proportion of Land Tax Payable by Lessor.—In pursuance of a building agreement

the owners of a piece of land granted to a builder, on the completion of a certain house on the land, a lease of the house at a ground rent. By the lease the lessee covenanted to pay the rent and all outgoings except land tax and landlord's property tax, and the lessors covenanted to pay the land tax chargeable on the demised premises. The annual value of the land was increased when the houses were erected on the land:—*Held*, that the lessors were only liable to pay the proportion of the land tax based on the rent received by him, and not the land tax payable on the improved annual value of the land. *Watson v. Home* (7 B. & C. 285) and *Smith v. Humble* (15 C. B. 321) followed. *Mansfield v. Relf*, 71 J. P. 556—C.A.

"Assigns" of Lessee—Under-lease—Merger—Privity of Contract—Right of Action.]—By a lease of a portion of a freehold house the lessee covenanted to pay one-third of the water rate payable in respect of the whole house, and the lessor covenanted with the lessee, "his executors, administrators, and assigns," to pay all rates, taxes, assessments, and outgoings whatsoever other than the water rate to the extent covenanted to be paid by the lessee. The lessee sub-demised to the plaintiffs the premises held by him for the remainder of the term for which he held, less three days, and the plaintiffs, who had notice of the superior lease, covenanted to pay one-third of the water rate. The whole of the premises were at first included in one assessment by the local authority, but the ground floor demised and the other portions were subsequently separately assessed for the purposes of rates and taxes. The defendant, who had purchased both the freehold reversion and the superior lease, refused to pay the rates and taxes in respect of the grant comprised in the lease and under-lease. The plaintiffs, having been compelled by a threat of distress to pay these rates and taxes, brought an action to have it declared that their portion of the premises was free from such payments, except one-third of the water rate:—*Held*, that the plaintiffs, as under-lessees, were not "assigns" of their lessor, so as to be entitled to sue the defendant in respect of the positive covenant by the ground landlord in the original lease. *South of England Dairies v. Baker*, 76 L. J. Ch. 78; [1906] 2 Ch. 631; 96 L. T. 48—Joyce, J.

Held, also, that, there being no privity of contract or of estate between the under-lessee and the original lessor, the plaintiffs had no right of action at law and no equity to compel their immediate lessor to sue the ground landlord on the covenants in the original lease or to lend his name for that purpose in the absence of any provision to that effect in the under-lease. *Ib.*

Taxes, Charges, Rates, Duties, and Impositions—Cost of Paving New Street.]—The expense of paving a new street incurred by a landlord under section 77 of the Metropolis Management Amendment Act, 1862, is recoverable by him from a tenant under a lease by which the tenant covenants to "pay and discharge all taxes charges rates duties tithes and tithe rentcharge assessments and impositions whatever which are now or may at any time hereafter be taxed charged rated assessed or imposed upon the said

premises or any part thereof or upon the landlord or tenant in respect thereof (the landlord's property tax only excepted)." *Wix v. Autson*, 68 L. J. Q.B. 298; [1899] 1 Q.B. 474; 80 L. T. 168—Bruce, J.

Payment of "impositions and outgoings." Charged on Demised Premises—"Fair share and proportion" of Expenses Paid by Lessor in Reparation or Otherwise by Virtue of any Act of Parliament.]—A lease contained (*inter alia*) two covenants by the tenant—one was to pay "all rates and taxes, sewers rates, and main drainage rate, parish dues, and all other rates, taxes, and impositions, and outgoings whatsoever," which might be in any wise imposed upon or in respect of the demised premises or upon the landlords in respect thereof by authority of Parliament or otherwise howsoever; the other was to pay a fair share and proportion of all costs and expenses which the lessors, in respect of being the owners of the demised premises, might, during the continuance of the term, be called upon to pay in or about "any reparation . . . or in or about any drainage or sewerage or otherwise by virtue of any Act or Acts of Parliament already made," or thereafter to be made. During the continuance of the term the landlords were compelled, under the Factory and Workshop Act, 1891, to spend money in making structural alterations on the demised premises. In an action by the landlords to recover from the tenant the whole of the amount so spent,—*Held*, that upon the true construction of the two covenants the tenant was liable to pay, not the whole, but only a fair share and proportion of the amount so spent. *Arding v. Economic Printing and Publishing Co.*, 79 L. T. 622—C.A.

Land Tax—Covenant to Pay.]—See *Mansfield v. Relf*, 77 L. J. K.B. 145; [1908] 1 K.B. 71; 97 L. T. 745; 24 T. L. R. 79—C.A.

(c) Restrictive Covenants.

Right to Enforce by Injunction—Change in Character of Neighbourhood.]—The right of a person to enforce a restrictive covenant by injunction cannot be defeated by mere change in the character of the neighbourhood, unless there is an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction. *Craig v. Greer*, [1899] 1 Ir. R. 258—C.A.

As to User of Adjoining Property—Covenant by Lessor for Self, Heirs, Executors, Administrators, and Assigns—Liability of Subsequent Lessee of such Property—Notice.]—A bargain against particular user of land retained on sale or lease of part of an estate may be enforced by any person entitled in equity to the benefit of the bargain against any person bound in equity by notice of it, either express or to be imputed at the time of acquisition of his own title. This right does not depend upon the existence of a covenant running with the land or of any right to relief under the common law. *Holloway v. Hill*, 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201—Byrne, J.

The lessee of a person bound by a restrictive

covenant may be sued in respect of a breach of such covenant whether assigns are therein mentioned or not. *Ib.*

Where a lease of certain shops contained a covenant by the lessor for himself, his heirs, executors, administrators, and assigns not to permit or suffer to be carried on upon adjoining property the business of a general clothier and tailor, and the lessor subsequently demised an adjoining shop and permitted the lessee thereof (who had notice of the existence of some restrictive covenants) to carry on the business of a tailor, an injunction was, in an action by the first lessee against the lessor and the subsequent lessee, granted restraining such subsequent lessee from carrying on the business of a tailor on the premises demised to him. *Ib.*

The authorities on the subject reviewed. *Kemp v. Bird* (46 L. J. Ch. 828; 5 Ch. D. 549, 974) is not inconsistent with *Fitz v. Iles* (62 L. J. Ch. 258; [1898] 1 Ch. 77). *Ib.*

(p) *Covenant Running with Land.*

Underlease—Demise by Underlessee—Covenant by Underlessee if Term Extended to Grant New Lease—Personal Covenant—Rule against Perpetuities—Assign of Reversion.—Where a lessor who was himself an underlessee covenanted with his lessee that if he should obtain from the freeholder any extension of his term he would grant a new lease to his lessee, it was held on the construction of the covenant that it was personal only to the lessor, and was not binding on his assign; that the covenant was not one for renewal strictly so called, and therefore did not run with the land; and that according to the statute 32 Hen. 8, c. 34, s. 2, the covenant was limited to the reversion with which it ran—that is, the reversion which was vested in the covenantor at the time he entered into the covenant. *Brereton v. Tuckey* (8 Ir. C. L. R. 190), *Kent v. Stoney* (9 Ir. Ch. R. 249), and *Coe v. Pascoe* ([1899] 1 Ir. R. 125) followed. *Muller v. Trafford*, 70 L. J. Ch. 72; [1901] 1 Ch. 54; 49 W. R. 132—Farwell, J.

Tied House—Lessee's Covenant to Buy Beer from Landlord and His Successors in Business and not Elsewhere—Assigns not Mentioned.—A covenant by a tenant of a tied house that he "will at all times during his tenancy purchase from the landlords and their successors in business all beer, ale, porter, &c., whether sold or consumed on or off the demised premises, and that he will not at any time directly or indirectly sell or dispose of on the premises any beer, ale, &c., other than such as shall have been so bona fide purchased," is a covenant which will run with the land and be enforceable by the purchasers of the reversion and the landlord's brewery business, although the purchasers have at the time of action brought ceased to carry on such business at the original landlord's brewery. *Manchester Brewery Co. v. Coombs*, 70 L. J. Ch. 814; [1901] 2 Ch. 603—Farwell, J.

Lease Executed by Lessee only—Sale of Landlord's Business—Enforcement of Covenant by Purchaser—Specific Performance—Yearly

Tenancy.—Where an agreement for a yearly tenancy containing such a covenant has been executed by the lessee only, but the lessor or his assigns are in a position to compel the acceptance by the tenant of a duly executed lease, either of them can enforce performance of such a covenant, notwithstanding that the agreement is not a lease by deed within 32 Hen. 8, c. 34. *Walsh v. Lonsdale* (52 L. J. Ch. 2; 21 Ch. D. 9) and *Swain v. Ayres* (57 L. J. Q.B. 428; 21 Q.B. D. 289) followed. *Clayton v. Illingworth* (10 Hare, 451) distinguished. *Ib.*

Assignment of Reversion—Liability of Original Lessor.—A covenant running with the reversion, entered into by a lessor with his lessee, remains binding on the lessor, notwithstanding that he has assigned the reversion. *Dictum in Eccles v. Mills* (67 L. J. P.C. 25, 31, 32; [1898] A.C. 360, 371) approved and followed. *Stuart v. Joy & Nantes*, 78 L. J. K.B. 97; [1904] 1 K.B. 362; 90 L. T. 78; 20 T. L. R. 109—C.A.

Lease Executed by Lessee only—Assignment of Reversion—Tied House—"Successors in business"—Specific Performance.—In 1902 the defendant executed under seal an agreement with B., Lim., to take a yearly tenancy of the M. Hotel, and covenanted with B., Lim., that he would at all times during the tenancy purchase of B., Lim., or their successors in business all ale, beer, &c., sold or consumed either on or off the premises. The document was executed by the defendant alone. In 1899 B., Lim., sold all their property, including the M. Hotel and the goodwill of their business, to the plaintiffs. The defendants refused to purchase beer, ale, &c., from the plaintiffs and bought from others. On an injunction by the plaintiffs to restrain the defendants from committing a breach of the covenant, it was—*Held*, that the plaintiffs were "successors in business" of B., Lim.; that, although the plaintiffs could not before the Judicature Acts have sued in covenant or in *assumpsit*, yet, as the defendant would have no defence to an action by the plaintiffs for specific performance to compel the defendant to take the legal estate, the plaintiffs could bring this action (*Walsh v. Lonsdale*, 21 Ch. D. 9, considered); that in the circumstances of this case the plaintiffs might have succeeded on the new contract implied from the conduct of the defendant and the plaintiffs. *Manchester Brewery Co. v. Coombs*, 82 L. T. 347—Farwell, J.

Lease.—It is doubtful whether the word "lease" in section 10 of the Conveyancing Act, 1881, includes an "agreement for a lease." *Ib.*

17. ASSIGNMENTS.

Equitable Lease—Personal Arrangement.—Where premises are let upon the terms, "We hereby agree to let you keep peaceable possession . . . for ten years on condition that you commit no nuisance and pay . . . rent thereof. You to pay local board rates . . .," it is only a personal arrangement between the parties, and no estate passes. *Duxbury v. Sandiford*, 78 L. T. 230—D.

Underlease by Assignee by way of Mortgage—

Underlessee in Possession of Demised Premises—Payment by Lessee of Rent Reserved by Lease—Liability of Underlessee to Indemnify Lessee.]

—An underlessee, who is a mortgagee by way of demise from an assignee of a lease, and who is in possession of the demised premises, is not liable to indemnify the lessee in respect of rent which such lessee has been compelled to pay to the lessor under a covenant to pay the rent reserved by the lease. *Moule v. Garrett* (41 L. J. Ex. 62; L. R. 7 Ex. 101) discussed. *Bonner v. Tottenham and Edmonton Permanent Investment Building Society*, 68 L. J. Q.B. 114; [1899] 1 Q.B. 161; 79 L. T. 611; 47 W. R. 161—C.A.

Negative Covenants—Covenant by Assignee to Observe and Perform Covenants in Lease—Breach of Covenants—Injunction by way of Specific Performance—Indemnity.]—A covenant in the usual form by an assignee of leasehold premises with the lessee to observe and perform the covenants contained in the lease under which the premises are held and to keep indemnified the lessee from all claims and demands on account of the same is a covenant of indemnity only. Consequently, where the lease contains a covenant not to make any alterations in the demised premises without the previous approval of the lessor, and the assignee has made certain alterations contrary to this negative covenant, but the lessor has taken no proceedings against the lessee in respect of the same, the lessee suing the assignee on his covenant is not entitled to specifically enforce the negative covenant contained in the lease. *Poole and Clark's Contract, In re* (73 L. J. Ch. 612; [1904] 2 Ch. 173), considered, and observations therein applied. *Harris v. Boots Cash Chemists*, 73 L. J. Ch. 708; [1904] 2 Ch. 376; 52 W. R. 668; 20 T. L. R. 623—Warrington, J.

Semble,—The covenant entered into by the assignee, in terms an affirmative covenant, is not a negative covenant within the strict rule which binds the Court to enforce by way of injunction specific performance of such a covenant. *Id.*

Successive Assignments—Covenant by Ultimate Assignee to Indemnify Assignor for Breach of Covenants in Lease—Liability of Assignee to Indemnify Assignor for Breach Prior to Assignment.]—The defendants were the executors of an assignee by mesne assignments of a lease containing a covenant to repair and keep in repair. The plaintiff, as reversioner expectant on the termination of the lease, gave the defendants notice under the Conveyancing Act, 1881, of breaches of the covenant and required them to remedy the same. On the same day as such notice was given the defendants agreed to assign the residue of the term to one Davis at the same rent as that reserved by the lease and subject to the lessee's covenants therein contained, and the agreement further provided that "the purchaser doth hereby covenant with the vendors that he will henceforth pay the rent by the said lease reserved and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively will keep indemnified the vendors." The notice given by the plaintiff not having been complied with, he recovered judgment against the defendants for damages for breach

of the covenant contained in the lease.—*Held*, that Davis, who had been brought in as a third party, was liable under the covenant in the assignment to indemnify the defendants in respect of the damages recovered by the plaintiff against them for breaches of the covenant contained in the lease prior to the assignment. *Gooch v. Clutterbuck*, 68 L. J. Q.B. 808; [1899] 2 Q.B. 148; 81 L. T. 9; 47 W. R. 609—C.A.

Assignment of Lease—Covenant to Indemnify—Assignment by Trustee.]—See BANKRUPTCY.

18. WASTE.

Lease of Land for Reservoir—Sub-Lease for Rubbish-Shoot—Injury to Inheritance—Injunction—Damages.]—In determining whether an act of waste has been committed by a lessee on the demised premises, the test is whether the act complained of by the lessor is an act which alters the nature of the thing demised. *West Ham Central Charity Board v. East London Waterworks Co.*, 69 L. J. Ch. 257; [1900] 1 Ch. 624; 82 L. T. 85; 48 W. R. 284—Buckley, J.

The plaintiffs' predecessors in title demised to the defendant company a plot of marsh land, for the term of ninety-nine years, for the purpose of constructing a reservoir. The defendant company never constructed the reservoir, but for some time used the demised premises for the purposes of grazing. The defendant company subsequently sub-demised the land to the defendant B. for a rubbish-shoot. The defendant B. shot large quantities of rubbish on the land, with the result that the surface of the land was raised about ten feet above its ordinary level, and the condition thereof materially altered. The plaintiffs claimed an injunction to restrain the defendants from bringing or permitting to be brought on the land any rubbish, earth, or material, or otherwise committing waste thereon, and damages for what had been done.—*Held*, that there had been such an alteration of the level of the land, and such an alteration of the thing demised, as amounted to waste; that the company in authorising B. to do what he had done were equally responsible with B.; that it was no answer to the plaintiff's claim to allege that the value of the land for building purposes had been increased by the raising of its level; and that an injunction must therefore be granted against both defendants, and an enquiry as to damages. *Id.*

19. OTHER MATTERS.

Contract—Statute of Frauds.]—See CONTRACT.

Easement—Right to—Prescription—Common Ownership.]—See EASEMENT.

Ejectment—Public-house—Licence in Jeopardy—Appointment of Receiver.]—See PRACTICE.

Lease—Costs of.]—See SOLICITOR.

Leasing—Powers of—Exercise of.]—See POWERS.

— — — Mortgagee and Mortgagor.]—See MORTGAGE.

Mining Lease.—*See* MINES.

Mortgagor—Lease by.—*See* MORTGAGE.

Possession of Premises—Action to Recover—Costs Unnecessarily Incurred.—*See* COSTS.

Rent and Covenants—Receiver—Order to Pay.—*See* *Hand v. Blow*, col. 436; *ante*, COMPANY (DEBENTURES).

Reservation of Mines.—*See* MINES.

Specific Performance of Covenant in Lease.—*See* SPECIFIC PERFORMANCE.

Sporting Rights.—*See* GAME.

LAND REGISTRY.

See col. 1177.

LAND TAX.

See REVENUE.

LANDS CLAUSES ACTS.

1. *The Acts*, 1253.
2. *Notice to Treat*, 1254.
3. *Lands and Easements Taken*, 1257.
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5. *Compensation*, 1260.
 - (a) *Generally*, 1260.
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 - (d) — *by Jury*, 1271.
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6. *Conveyance of Property Acquired*, 1272.
7. *Costs of Making Title and Conveyance*, 1272.
8. *Purchase-money*, 1273.
 - (a) *Application of*, 1273.
 - (b) *Interim Investment*, 1274.
 - (c) *Costs of Re-investment*, 1274.
 - (d) *Payment out of Court*, 1275.
9. *Superfluous Lands*, 1277.
10. *Other Matters*, 1277.

1. THE ACTS.

"Special Act"—Meaning of.—The Military Lands Act, 1892, which provides for the acquisition of lands for military purposes, incorporates the Lands Clauses Act, 1845, and enacts that "in the construction of this Act and of the incorporated Acts, this Act shall be deemed the special Act"; it also enacts that the provisions of the incorporated Acts with respect to compulsory purchase shall not be put in force until a provisional order has been made and sanctioned by Parliament;—*Held*, that a literal construction could not be given to the words of the Military Lands Act, 1892, deeming it to be the "special Act," and that the special Act within the meaning of the Lands Clauses Act,

1845, s. 123 (which limits the time for the compulsory purchase of lands, if no period is prescribed, to three years after the passing of "the special Act"), was the Military Lands Act, 1892, together with the statute confirming a provisional order made thereunder. *Hill v. Haire*, [1899] 1 Ir. R. 87—M.R.

2. NOTICE TO TREAT.

Effect of Notice Bad in Part—Successive Notices.—If a notice to take land given by a railway company is invalid *quoad* part of the land specified, it is invalid *quoad* the whole. Where the company has given notice to take land, it is not precluded from superseding that notice by another notice to take the same land. It is not incompetent for a railway company which desires to take land from the owner thereof to divide that land into two parts, and to serve a separate notice with respect to each part. *Coats v. Caledonian Railway*, 6 F. 1042—Ct. of Sess.

Deposited Plan—"Delineated."—A notice to take land served by a railway company was held to be invalid in respect that one of the plots of ground which it was proposed to take was not delineated on the deposited plan, no boundary-line on one of the four sides of the plot being shown on the plan. *Ib.*

Withdrawal—Fresh Notice in Respect of Same Land.—Where promoters of an undertaking with compulsory powers of purchase of land have validly and properly withdrawn a notice to treat given by them under the Lands Clauses Consolidation Act, 1845, they can, provided that the time limited for the exercise of their powers has not expired, give a fresh notice to treat in respect of the same land. *Ashton Vale Iron Co. v. Bristol Corporation*, 70 L. J. Ch. 290; [1901] 1 Ch. 591; 83 L. T. 694; 49 W. R. 295—C.A.

Effect of Notice upon Building Agreement—Part of Land Comprised in Notice.—Notice to treat was given by a local authority in respect of part of the land comprised in a building agreement;—*Held*, that the building agreement was still binding in respect of the land not included in the notice to treat, *Burness and Willesden Urban Council*, 70 J. P. 25; 22 T. L. R. 52—Farwell, J.

Right of Owner to Sell Land after Notice to Treat.—Decision of Ridley, J. (19 T. L. R. 130), who held that while no new interest in land could be created by an owner upon whom notice to treat for the land had been served under the Lands Clauses Act, 1845, the owner might transfer his interest *in toto*, compromised on appeal. *Sevell v. Harrow and Uxbridge Railway*, 20 T. L. R. 21—C.A.

For Part of Building—Particulars of Claim Subject to Apportioned Rent—Summons to Apportion Rent at Less than the Sum Claimed—Notice to Take Whole.—In May and November, 1901, respectively notices to treat for part of a manufactory were served upon the owner and lessees of premises. Before the end of January, 1902, they had forwarded claims and particulars subject to an apportioned rent of 200% per

annum. The parties negotiated at considerable expense with regard to the amount of the apportioned rent, and ultimately, after a summons issued under section 119 of the Lands Clauses Consolidation Act, 1845, on March 18, 1904, the claimants agreed to an apportionment at 100l. per annum. An offer of considerably less than the amount claimed having been made to the lessees at this apportioned rent, they required the whole manufactory to be taken under section 92. In their action the plaintiffs moved for an interim injunction to restrain further proceedings under the notices to treat:—*Held*, that the mere lapse of time standing alone counted for nothing, as the compensation asked had never been agreed to provided the reduction in the apportioned rent was consented to, and that the claimants had not forfeited their right to insist on the whole manufactory being taken by simply making their claim. *Lavers v. London County Council*, 93 L. T. 233; 69 J. P. 362; 3 L. G. R. 1025; 21 T. L. R. 695—*Keke-wich, J.*

Soil of Private Road—Part of "House."—A railway company proposed to take part of a private road leading to a mansion house with the object solely of carrying a bridge over the road for the purposes of their railway at a spot a quarter of a mile from the house. The owner claimed an injunction to restrain them from so doing without purchasing the whole property:—*Held*, that such part of the private road would not pass on a conveyance of the "house" by that description, and was therefore not a part only of the house, within the meaning of section 92 of the Lands Clauses Act, 1845, and that the injunction ought not to be granted. *Allhusen v. Ealing and South Harrow Railway*, 73 L. T. 396; 46 W. R. 483—C.A.

Land Required by Local Authority—Part Required—Claim Sent in for Part—Meeting of Surveyors—Negotiations as to Compensation—Right to Have Whole Taken.—In October, 1904, notice to treat for part of a butcher's shop was served upon the lessee of the premises. The lessee thereupon sent in a claim for compensation in respect of his interest, which was not accepted by the council, and in September, 1905, the surveyors for both parties met, and a sum for compensation was agreed between them. The solicitors then prepared a formal agreement on the lines of this arrangement, but could not agree as to certain clauses. On May 18, 1906, the lessee's solicitors served on the council a counter-notice stating that the plaintiff declined to sell part only of the premises comprised in the notice to treat, and that he was willing and able to sell the whole of his interest in the premises, and required the defendants to purchase all his interest therein. In his action the plaintiff moved for an interim injunction to restrain further proceedings under the notice to treat:—*Held*, that the arrangement made by the surveyors did not amount to an agreement, and would not bind the principals until they accepted it; and that the plaintiff was not estopped from claiming his rights under section 92 of the Lands Clauses Consolidation Act, 1845. A counter-notice need not be very specific provided it identifies the property. *Pollard v. Middlesex County Council*, 95 L. T. 870; 71 J. P. 85; 5 L. G. R. 37—*Parker, J.*

Compulsory Power to Cease after Expiration of Three Years from Passing of Private Act—Service of Notice—Computation of Time.—By section 29 of the West Metropolitan Railway Act, 1899, the powers of a railway company for the compulsory purchase of lands for the purpose of the Act "shall cease after the expiration of three years from the passing of this Act." The Act received the Royal assent on August 9, 1899. On August 9, 1902, the defendants served on the plaintiffs a notice to treat for the purchase of part of the plaintiffs' land:—*Held*, that the notice to treat had been served in time, as the day on which the Act received the Royal assent must be excluded in the computation of time within which the powers of the defendants under the Act to compulsorily purchase land were to exist. *Goldsmiths' Co. v. West Metropolitan Railway*, 72 L. J. K.B. 931; [1904] 1 K.B. 1; 89 L. T. 428; 52 W. R. 21; 68 J. P. 41; 20 T. L. R. 7—C.A.

Lease of Adjoining Land by Landowner before Compensation Assessed—Land so Leased Injuri-ously Affected—Claim of Lessee against Railway Company.—Where notice to treat has been served by a railway company on a landowner, and after the notice, but before the award of compensation, the landowner grants a lease of adjoining land, which is injuriously affected by the extension of the railway works, the lessee is not entitled to claim from the railway company compensation for the injurious affecting, inasmuch as the compensation paid to the landowner includes all claims for injury caused to his adjoining land. *Mercer v. Liverpool, St. Helens, and Lancashire Railway*, 73 L. J. K.B. 960; [1904] A.C. 461; 91 L. T. 605; 53 W. R. 241; 68 J. P. 533; 20 T. L. R. 673—*H. L. (E.)*

Boundary Defined by "Proposed road"—Description not Grant of Easement.—Where a proposed road is mentioned in the particulars scheduled to a notice to treat for the compulsory purchase of land—for example, as the site for a board school—as one of the boundaries of such land, the same must be regarded as descriptive merely, and not as passing any right to have the road constructed, or any right over land adjacent to the land so compulsorily acquired. A school board gave notice to F., the owner of certain property which he contemplated developing as a building estate, to treat for the purchase of part thereof as the site for a school. In the particulars scheduled to the notice the land required was described as land with frontages to A. Road, B. Road, "and a proposed road leading therefrom." At the inquisition to determine the purchase-money and compensation a verdict was taken by consent for 8,000l. "for the purchase of the estate and interest of F. in the land and hereditaments" in the warrant for the summoning of the jury mentioned; "also, by way of compensation, for all damage sustained by severance, or otherwise by reason of the exercise of the powers of" the school board. In the warrant the land was described by reference to the schedule to the notice to treat which was set out in the warrant. Subsequently to the inquisition F. informed the school board that it was not intended to form the proposed road shewn on the scheduled plan, and suggested a modification of the boundary, his reason being that the road was part of his original scheme

for developing his property as a building estate, but that under the altered circumstances it would not be worth his while to construct the road. A summons, under the Vendor and Purchaser Act, 1874, was taken out by the school board asking for a declaration that they were entitled to a conveyance of the piece of land specified in their notice to treat with frontages to A. Road, B. Road, and a proposed road leading therefrom, and shewn on the plan to such notice according to the draft conveyance submitted to F.:—*Held*, that the school board had not obtained any right over F.'s land adjacent to the site which they had purchased; that they had no right to acquire an easement over adjacent land under their compulsory powers, which did not extend to the compulsory acquisition of easements, but only the right to acquire the land itself; that the reference in the notice to treat to the proposed road was merely descriptive; and that the proposed road could not be regarded as an actually made road. *London School Board and Foster, In re*, 87 L. T. 700—C.A.

Chose in Action—Damage Done in Exercise of Statutory Powers—Assignment of Right to Compensation—Validity of.—A right to compensation for damage, arising directly by reason of a notice to treat given by a railway company under section 68 of the Lands Clauses Act, 1845, and which damage might be done in the lawful exercise of statutory powers conferred upon the company, is a legal *chose in action* within the meaning of sub-section 6 of section 25 of the Judicature Act, 1873, and is capable of being assigned under that sub-section. *Dawson v. Great Northern and City Railway*, 74 L. J. K.B. 190; [1905] 1 K.B. 200; 92 L. T. 137; 69 J. P. 29; 21 T. L. R. 114—C.A.

3. LANDS AND EASEMENTS TAKEN.

Entry on Land—Land not Included in Notice to Treat—Omission or Inadvertence—Subsequent Notice as to Omitted Portion—Costs.—The defendant company gave the plaintiff notice to treat in respect of his land. They entered on the land included in the notice, and also on an additional piece not included. At the beginning of November, 1903, the plaintiff notified the defendants of this fact. The defendants at first did not admit this, but on November 21 they knew it. On November 25 the plaintiff issued a writ in respect of the trespass to this piece of land, and claimed an injunction. On November 27 the defendants gave notice to treat for this piece of land:—*Held*, that the defendants had no right to enter on November 23 on land for which they did not give notice to treat till November 27, and that therefore they were liable for the costs of the action. *Cardwell v. Midland Railway*, 20 T. L. R. 364—Byrne, J. Affirmed, 21 T. L. R. 22—C.A.

Statutory Right to Erect Post "in, over, or under any street"—Erection of Electric Post.—By section 51 of the Newport Corporation Act, 1900, with which the Lands Clauses Act, 1845, was incorporated, the corporation might, for the purpose of working their tramways, construct and erect "on, in, over, or under any street or road" poles and posts. For the purpose of

working their tramways the corporation erected an iron pillar, about ten inches in diameter, upon the plaintiff's land, which by dedication, subject to a user by the plaintiff, formed part of the street, such pillar being sunk about six feet in the ground:—*Held*, that this was not a "taking of land" within the Lands Clauses Act, but was an exercise of the statutory powers of the defendants under their private Act. *Escott v. Newport Corporation*, 73 L. J. K.B. 693; [1904] 2 K.B. 369; 90 L. T. 348; 52 W. R. 543; 68 J. P. 135; 2 L. G. R. 779; 20 T. L. R. 158—D.

"House"—Paddock.—In section 92 of the Lands Clauses Act, 1845, the word "house" must be taken in the same sense as it would be in the case of a grant—that is, it must be taken to mean not merely the actual building, but everything that would pass by a grant of the house. A paddock situated at the back of a house and garden and occupied therewith held to be included in the term "house." *Low v. Staines Reservoirs Joint Committee*, 64 J. P. 212—C.A.

Common Lands—Compensation for Commonable Rights—Apportionment—Action by Commoner to Ascertain Interest—Jurisdiction.—Common lands were compulsorily taken by a local authority. Meetings of statutory committees of the commoners were held, pursuant to the Lands Clauses Consolidation Act, 1845, and agreements were come to with the local authority as to the compensation to be paid for the extinction of the commonable rights. Under these agreements certain monies were paid to the committees of commoners of two parishes. By section 15 of the Inclosure Act, 1854, a majority of a committee might apply to the Commissioners to call a meeting of the persons interested in the compensation money to determine whether it should be apportioned; and by section 17 of the same Act the Inclosure Commissioners or any assistant commissioner appointed for the purpose were directed to ascertain, determine, and award the names of the parties entitled to interests in the commonable lands, and the amount or value of their interests therein. The committees were willing to act under these statutory powers, but had not yet done so. An action was brought by a plaintiff, who claimed to be the sole person entitled to commonable rights, for the payment to him of the whole of the compensation money:—*Held*, upon the construction of section 104 of the Lands Clauses Consolidation Act, 1845, and sections 15 and 17 of the Inclosure Act, 1854, that proper machinery was provided to determine who were the parties entitled, and the amount of their interests, and therefore the Court had no jurisdiction to interfere at the present stage. *Richards v. De Winton. Richards v. Evans*, 70 L. J. Ch. 719; [1901] 2 Ch. 566; 84 L. T. 831; 50 W. R. 87; 65 J. P. 696—Kekewich, J. Compromised on appeal, 72 L. J. Ch. 269; [1903] 1 Ch. 507; 88 L. T. 333—C.A.

Grant of Easement—Powers of Executors.—Where a corporation obtains a private Act of Parliament enabling persons empowered by the Lands Clauses Consolidation Acts to sell and convey or release lands to grant to such corporation an easement required for the purposes of the Act, an executor of a will which, after

charging real estate with payment of debts and legacies, contains an executory devise thereof, is nevertheless not empowered by the joint operation of section 7 of the Lands Clauses Consolidation Act, 1845, and the enabling clause of the private Act to grant an easement to the corporation. *Farrow-in-Furness Corporation and Rawlinson's Contract, In re*, 72 L. J. Ch. 233; [1903] 1 Ch. 339; 87 L. T. 724; 51 W. R. 248—Kekewich, J.

Private Purchase of Land by Railway Company before obtaining Act—Exercise of Compulsory Powers against Tenant—"Lands"—Tenant's Interest—Notice to Treat—Lands "required for the purposes of the special Act."

—On May 11, 1900, a railway company who were promoting a bill in Parliament purchased from the owner, who had full power to sell, 23 acres of land required for their undertaking. The lands were under a lease for a term of years. The company thereafter, on August 6, 1900, obtained their Act, and on August 22 they served a notice on the tenant to treat for 13 out of the 23 acres, that being all the land of which they proposed to take immediate possession. The tenant claimed to have the company interdicted from taking proceedings under the notice, on the ground that, having acquired the whole 23 acres, they were bound to compensate him for his interest therein and not only in the 13 acres:—*Held*, first, that the 23 acres could not be regarded as property acquired by the railway company under their Act, as they had acquired it by private agreement, from a person entitled to sell, before the Act was passed; and secondly, that they were entitled to exercise their compulsory powers to dispossess the tenant from time to time of such ground as they required, and that the tenant was not entitled to call upon them to treat for his interest in the whole 23 acres at once. *Stevenson v. North British Railway*, 4 F. 224—Ct. of Sess.

4. SUMMARY TAKING.

"Speedy possession"—Deposit in Bank—Bond—Conveyance—Payment out of Deposit—Evidence of Payment of Purchase-money to Persons Entitled to Land.—Where a company on entering into possession of land under section 85 of the Lands Clauses Consolidation Act, 1845, before the compensation to be paid by them has been assessed, deposit in the bank the estimated value of the land, and give to the person claiming to be entitled to convey a bond conditioned to be void if the company pay to the person to whom the bond is given, or deposit in the Bank of England for the benefit of the persons interested in the land, the purchase-money and interest, and the company afterwards, with the concurrence of the person to whom the bond was given pay the purchase-money to the persons claiming and petition for repayment of the deposit, and the person to whom the bond was given concurs in the petition, the Court can order repayment, and has no duty to enquire whether the person to whom the bond was given, or the persons to whom the company have paid the money, were the persons really entitled to receive the purchase-money. *Midland Railway, Ex parte*, 73 L. J. Ch. 64; [1904] 1 Ch. 61; 89 L. T. 545; 20 T. L. R. 72—C.A.

Land Acquired for Ultra Vires Purpose—Land Entered upon and Used—Liability for Breach of Covenant.—A school board proposed to provide at the cost of the school fund buildings for the purpose—that is, that of a pupil teachers' centre—upon which, as was subsequently held, a school board has no power to expend that fund—*Dyer v. London School Board* (72 L. J. Ch. 10; [1902] 2 Ch. 768). With this object the Board acquired the leasehold interest in certain premises under a lease containing covenants for the maintenance of the existing buildings, with a proviso for re-entry on breach. The Board then obtained compulsory powers for the acquisition of the land, served notice to treat for the freehold, and made a deposit and gave a bond under section 85 of the Lands Clauses Consolidation Act, 1845, so that, had the purposes for which they proposed to acquire the land been legitimate, they would have been entitled to enter upon and use the land; but the freehold interest was never conveyed to them. The Board took possession of the premises, pulled down the existing buildings, and disregarded a notice from the freeholders, under the Conveyancing and Law of Property Act, 1881, complaining of the pulling down of the buildings as a breach of the covenants in the lease:—*Held*, that as the object for which the Board were endeavouring to acquire the land was *ultra vires*, they had not obtained any right to possession of the land by their proceedings under section 85 of the Lands Clauses Consolidation Act, 1845, and, the lease being forfeited for breach of covenant, the freeholders were entitled to possession of the premises. The Board were not, even on the supposition that the proceedings were a mistake on their part, entitled to treat the land as superfluous land acquired under the Lands Clauses Acts. Nor was the fact material that their property was, under the Education (London) Act, 1903, about to be transferred to a body who would have power to provide a pupil-teachers' centre. *Held*, also, that, although the purposes for which the leasehold interest was acquired were *ultra vires*, the Board were bound by the covenants in the lease, and were liable in damages for the breach thereof. *Batson v. London School Board*, 2 L. G. R. 116; 20 T. L. R. 22; 67 J. P. 457—Channell, J.

Tiverton Railway v. Loosemore (53 L. J. Ch. 812; 9 App. Cas. 480) distinguished. *Ayres v. South Australian Banking Co.* (40 L. J. P.C. 22; L. R. 3 P.C. 548) distinguished on the first point and followed on the second. *Id.*

5. COMPENSATION.

(a) Generally.

Person in Possession as Owner—Prima Facie Right to Compensation.—A person in possession of land in the character of owner, and having therefore a good title against all the world but the rightful owner, has a *prima facie* claim to compensation for the compulsory taking of such land under statutory powers. *Doe d. Carter v. Barnard* (18 L. J. Q.B. 306; 13 Q.B. 945) doubted. *Perry v. Clissold*, 76 L. J. P.C. 19; [1897] A.C. 73; 95 L. T. 890; 23 T. L. R. 232—P.C.

"Lands or any interest therein"—Free and Exclusive Right to Sell Refreshments, Programmes, &c., at Theatre—Licence.]—An "interest" in land within the meaning of section 68 of the Lands Clauses Act, 1845, so as to give a right to compensation for "lands or any interest therein" taken or injuriously affected, is not created by an agreement under which is granted and let the free and exclusive right to sell refreshments at a theatre, together with the necessary use of the refreshment-rooms and bars, cloak-rooms and wine-cellars, and the free access during the usual hours to and from all parts of the premises as might be necessary and was usual and proper according to the custom of theatres, and also the free and exclusive right of supplying programmes, &c., and of providing cloak-rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak-rooms and on all programmes used and offered for sale at the theatre. Such an agreement shews merely an intention to confer a licence and not to create an interest in land. *Warr v. London County Council*, 73 L. J. K.B. 362; [1904] 1 K.B. 718; 90 L. T. 368; 52 W. R. 405; 68 J. P. 335; 2 L. G. R. 723; 20 T. L. R. 346—C.A.

Reservation of Minerals—"Interests omitted to be purchased"—Period at which Claim to Compensation is Excluded.]—By section 117 of the Lands Clauses Consolidation (Scotland) Act, 1845 (identical with section 124 of the English Act, 8 & 9 Vict. c. 18), in the case of omitted interests in lands which an undertaking is authorised to purchase, the promoters are to remain in the undisturbed possession of such lands for a period not exceeding six months "after the right thereto shall have been finally established by law in favour of the party claiming the same," and then the undertakers are to pay compensation for such interest:—*Held*, that the six months do not run from a judgment referring the matter to arbitration, but from the award in the arbitration itself. *Caledonian Railway v. Davidson*, 72 L. J. P.C. 25; [1903] A.C. 22; 87 L. T. 602—H.L. (Sc.)

Expropriation of Private Property for Public Purposes—Compensation—Construction.]—The intention of authorising the taking of private property without compensation cannot be attributed to a Legislature unless it be expressed in unequivocal terms; and if an enactment is in terms susceptible of two constructions—either that such power is reserved or that powers already existing are simply transferred to a newly constituted body—the latter is the preferable construction. *Commissioner of Public Works v. Logan*, 72 L. J. P.C. 91; [1903] A.C. 355; 88 L. T. 779—P.C.

By a Proclamation of 1813 power was reserved to the Government of taking without compensation the lands therein described for the making and repair of roads. By an Act of 1858 the powers of the Government in respect of road-making were transferred to a Chief Commissioner, upon whom powers were conferred of taking land "generally for any of the objects of this Act," including other objects than road-making. It was not expressly stated that no compensation was to be given for such land:—

Held, that the Act did not confer a new power of expropriation without payment, and the owner of lands required for such other purposes was entitled to compensation. *Ib.*

Free and Exclusive Right to Supply Refreshments—Estate and Interest.]—An agreement which grants, and lets the free and exclusive right to sell refreshments in a theatre, together with the necessary use of the refreshment-rooms, bars, and cellars, and the right of free access to and from all parts of the premises as might be necessary, and of supplying and providing programmes, &c., and cloak-rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak rooms and on all the programmes, does not create an estate or interest within section 68 of the Lands Clauses Act, 1845. *Warr v. London County Council*, 88 L. T. 689; 67 J. P. 403—Wright, J.

Limited Owner—Personal "injury, inconvenience, and annoyance"—Glebe Land—Payment of Compensation out of Court.]—Where the construction of a new railway and other works upon glebe land, acquired by a railway company under agreement with the rector, seriously interfered with the comfort and amenities of the rectory house, the Court, under the power conferred upon it by section 73 of the Lands Clauses Consolidation Act, 1845, ordered payment of 100% to the rector out of the purchase-moneys in Court, by way of compensation for the injury, inconvenience, and annoyance sustained by him personally. *Saunderton Glebe Lands, &c. v. The Rector, ex parte*, 72 L. J. Ch. 276; [1903] 1 Ch. 480; 88 L. T. 267; 51 W. R. 522—Farwell, J.

Chance of Renewal of Lease.]—The mere probability of the continuance of a tenancy without disturbance is not a ground for claiming compensation under the Lands Clauses Act. *Farlow, Ex parte* (2 B. & Ad. 341), commented on. *Lynch v. Glasgow Corporation*, 5 F. 1174—Ct. of Sess.

Customary Tenements Taken for Undertaking Enfranchisement—Right to Intermediate Fines.]—On enfranchisement of customary tenements acquired by a company under the Lands Clauses Consolidation Act, 1845, the lord is entitled to require the company to pay, or to take into account in estimating the compensation payable to him, all fines arising by reason of the deaths of tenants on the rolls, or of their customary heirs, between the date fixed by the Act for compulsory enfranchisement and the actual enfranchisement. *Leconfield (Lord) v. London and North-Western Railway*, 76 L. J. Ch. 33; [1907] 1 Ch. 38; 95 L. T. 672; 23 T. L. R. 31—Swinfen Eady, J.

Adaptability of Land in Conjunction with Adjoining Land for Purposes of Reservoir—Assessment of Different Parcels.]—Certain land in respect of which notice to treat had been given was not by itself adaptable as the site for a reservoir, but in conjunction with two adjoining parcels of land of other owners was so adaptable. The arbitrator in assessing compensation had regard to the natural character and position of the land, to its proximity to the

other parcels of land, and to the probability that if a demand should arise for the three parcels of land for the purpose of one entire reservoir site, each owner would, by reason of the adaptability of the three parcels for a reservoir, obtain some enhanced value for the parcel belonging to him, but he came to the conclusion that the extent of such enhancement would not be the same in each of the three cases, and that the same value per acre should not be put on each of the three parcels of land:—*Held*, that the arbitrator was right in so holding. *Tynemouth Corporation and Northumberland (Duke), In re*, 89 L. T. 557; 67 J. P. 425—Wright, J.

Expense of Establishment &c. of School for Children of Workmen Engaged on Reservoir—Remoteness.—A claim for compensation in respect of expense likely to be incurred in the establishment and maintenance during the period of the construction of the reservoir—a period of probably five years—of a voluntary school for the children of the workmen, in order to avoid the compulsory establishment in the township of a public elementary school by the statutory education authority was held to be too remote and too uncertain to form a ground for compensation. *Ib.*

Deposit of Plans—Extent of Incorporation—Basis of Compensation—Modification of Plans.—Prior to the passing of a Provisional Order Confirmation Act empowering the defendants to acquire compulsorily from the plaintiff and others certain lands for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening, opening, enlarging, and otherwise improving certain streets and roads in Bray, plans of the lands to be taken, one of which shewed a ground plan of forty-five cottages proposed to be built, a proposed “playground,” and a proposed approach fifty feet wide, were duly deposited with the Local Government Board and in Parliament. Section 1 of the Provisional Order in question, which recited the deposit of the plans, described the lands to be compulsorily acquired as “the lands, easements, rights of way, and other premises described in the deposited plans and book of reference”; and the plans were referred to as “the plans showing the lands and premises required for the purposes aforesaid.” The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the defendants to carry out the works according to the plans. After the passing of the Act, the arbitrator appointed by the Local Government Board assessed the compensation to be paid to the plaintiffs for purchase-money and for injury to adjoining lands, and the amount awarded was paid. Subsequently, modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked “playground,” and the making of a twenty-foot instead of a fifty-foot approach, were prepared by defendants and approved by the Local Government Board, through whom the defendants were borrowing money for the carrying out of the works. On an application for an injunction to restrain the carrying out of the modified plans, —*Held*, that the only restriction on the use of the lands compulsorily acquired by the defendants was that

they should be used for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, enlarging, or otherwise improving the said streets and roads in Bray; that whilst observing such purposes the defendants were bound to adhere to the deposited plans; and that the plaintiff's claim for an injunction should be dismissed. *Bradshaw v. Bray Urban Council*, [1907] 1 Ir. R. 152—C.A.

Omitted Interest—Title—Ejectment.—The plaintiffs were authorised by a Provisional Order, and an Act of Parliament confirming same, to take by compulsory purchase certain lands, including those in dispute in this action. The lands required were the fee-simple property of G., and the defendant, who held adjoining lands from G. under a lease, encroached upon the lands of G., and had, prior to the date of the plaintiffs' Provisional Order, acquired a title under the Statute of Limitations to portion of the lands required by the plaintiffs for the residue of the term of his lease. This portion was included in the advertisements issued and the plans deposited by the plaintiffs under Schedule II. of the Housing of the Working Classes Act, all the provisions of which were duly complied with by the plaintiffs, save that the name of the defendant (of whose claim the plaintiffs were ignorant) did not appear in the schedule to the deposited plans or in the arbitrator's award as a person having an interest in the premises, nor was any notice of the publication of the award left at the defendant's premises or sent by post to him. No claim was ever made by the defendant to the plaintiffs in respect of any interest in the premises. In an action of ejectment brought by the plaintiffs against the defendant to recover possession of that portion of the lands to which the defendant had so acquired a title, —*Held*, that the plaintiffs were not entitled to recover possession. *Omagh Urban Council v. Henderson*, [1907] 2 Ir. R. 310—C.A.

Apportionment of Rent—Date from which Apportioned Rent is Payable.—Where rent is apportioned under section 119 of the Lands Clauses Act, 1845, whether by agreement between the parties or by the order of two Justices, the time from which the apportioned rent is payable runs from the date when the apportionment is made. *Secretary of State for War and Hurley's Contract, In re*, [1904] 1 Ir. 354—M.R.

Compensation—Land Taken for Defence Works.—*See ARMY AND NAVY.*

Sum Allowed as Compensation—Assignability.—*See Dawson v. Great Northern and City Railway*, 74 L. J. K.B. 190—C.A.

Surrender of Tenancy.—*See Zick v. London United Tramways*, 77 L. J. K.B. 316; [1908] 1 K.B. 611—Jelf, J.

(b) *Land “Injurious Affected.”*

Acts Done not on Lands Taken.—Where part of a claimant's land is taken under the powers of an Act incorporating the Lands Clauses Act, 1845, and the claimant claims compensation for

the injurious affection of his other land, it is not necessary, in order to entitle him to compensation, that the acts complained of should be done on the land which is taken from the claimants. *Dictum* of PHILLIMORE, J., in *Rex v. Mountford* (75 L. J. K.B. 1003; [1906] 2 K.B. 814) followed. *Dictum* of BIGHAM, J., in *Horton v. Colwyn Bay Urban Council* (76 L. J. K.B. 91; [1907] 1 K.B. 14) not followed. *London and North-Western Railway and Reddaway, In re*, 71 J. P. 150; 23 T. L. R. 279—Phillimore, J.

Tram-lines not Laid on Land Taken—Injurious Affection—Claim for Depreciation of Business through the Opening and Running of Tramways.]

—A tramway company were authorised by their Act to construct tramways along a certain street, and by a subsequent Act, which did not incorporate the former Act, obtained power to acquire a certain strip of land for the purpose of widening the street. No portion of the tram-lines was laid upon this strip. The owner of a long lease of the house from which the strip was taken claimed, in addition to the value of the strip, compensation for the damage done to his business as a dentist by reason of the road being brought nearer to his house and the noise arising from the passing tramcars. The jury awarded £60L. as the value of the strip, and in addition 400L. as depreciation in respect of his future practice from the change in the character of the district, and for loss of light and privacy consequent upon the opening and running of the tramways past his house:—*Held*, that the jury were not entitled to award compensation for such depreciation. *Rex v. Mountford*, 75 L. J. K.B. 1003; [1906] 2 K.B. 814; 95 L. T. 675; 70 J. P. 511; 4 L. G. R. 1058—D.

Mining Lease—Right of Lessee to Sink New Shaft subject to Lessor's Reasonable Approval.]

—A lease of a colliery with its pits and shafts, as well as of the minerals beneath the surface of a specified area of the adjoining land, contained a clause giving liberty to the lessee, if he should think it necessary or desirable, and on notice to the lessor, to sink a new pit in any part of such adjoining area, but so that the position of such pit should be subject to the reasonable approval of the lessor, his heirs or assigns:—*Held*, that the right of the lessee under the above clause was the subject-matter of compensation under the provisions of the Lands Clauses Act, 1845; and that the mere fact of purchase by a railway company of part of the adjoining area did not necessarily annul the right of the lessee to open a pit on the part purchased. *Masters and Great Western Railway, In re*, 70 L. J. K.B. 516; [1901] 2 K.B. 84; 84 L. T. 515; 49 W. R. 499; 65 J. P. 420—C.A.

Right of Way—Compulsory Powers—Obstruction.]—Motion by the plaintiff to restrain the defendant railway company and their contractors from obstructing and interfering with the right of way of the plaintiff over a certain occupation road, and from permitting any railway to continue upon, and from running trains or locomotives along the road. The defendants had laid down a line which passed along the occupation road, and ran trains thereon for the purpose of carrying the plant and necessary materials for the construction of the lines authorised by the Great Western Railway Act,

1899:—*Held*, that the plaintiff was not entitled to an injunction, but that he had his remedy by compensation under section 68 of the Lands Clauses Consolidation Act, 1845, because his property had been injuriously affected. *Bar-nard v. Great Western Railway*, 86 L. T. 798; 66 J. P. 568—Kekewich, J.

Restrictive Covenant Imposed on Land for Benefit of Adjoining Land—Breach by Execution of Works—Construction of Embankment.]

—A railway company purchased land on which restrictive covenants were imposed for the benefit of adjoining land with notice of the covenants, and constructed an embankment under statutory powers, thereby committing other breaches of the covenants which lessened the market value of the adjoining land:—*Held*, that the owner of the adjoining land was entitled to compensation by reason of his land being "injuriously affected" by the works, within the meaning of section 68 of the Lands Clauses Consolidation Act, 1845. *Long Eaton Recreation Grounds Co. v. Midland Railway*, 71 L. J. K.B. 837; [1902] 2 K.B. 574; 86 L. T. 873; 50 W. R. 693; 67 J. P. 1—C.A.

Site Compulsorily Purchased for Board School—Noise of School Children Outside Building—Adjoining Land Injuriouly Affected.]

—In assessing the compensation to be paid to the owner of land compulsorily purchased for the erection of a board school, the noise made by children outside a board school may be taken into consideration as injuriously affecting his adjoining land. *Reg. v. Pearce; London School Board, ex parte*, 67 L. J. Q.B. 842; 78 L. T. 681—D.

Covenant for Quiet Enjoyment—Assignment of Freehold to Company by Arrangement—Lessee Injuriouly Affected—Compensation.]

—Where a railway company acquires by an agreement the reversion expectant on the determination of a lease, but does not acquire the lessee's interest, and the lessee is afterwards injuriously affected by the company's workings, he has nevertheless no remedy under the covenants in his lease, but must obtain compensation under the Lands Clauses Consolidation Act, 1845. *Manchester, Sheffield, and Lincolnshire Railway v. Anderson*, 67 L. J. Ch. 568; [1898] 2 Ch. 394; 78 L. T. 821—C.A. Affirming, 46 W. R. 509—Byrne, J.

Obstruction of Pavement by Vans.]

—In 1860 L. P. Street was a highway for all purposes, and by a statute of that year the predecessors of the Great Eastern Railway were empowered to divert and stop up that street. A warehouse was constructed between 1860 and 1866 with three openings and flaps in that street, and the vans of the Great Eastern Railway Co. were backed up against the pavement with their tailboards let down so as to extend to the flaps and enable goods to be delivered from the floor of the warehouse into the vans. These loading operations had the effect of blocking the strip of pavement in L. P. Street and of occupying a very large part of the roadway, and besides this a large part of L. P. Street was stopped up and inclosed. This strip of pavement was not actually inclosed, but the user of such strip as above mentioned was never interfered with or objected to. Under the London County Council (Improvements) Act, 1897, the London County

Council were authorised to execute certain works in L. P. Street, the effect of which was to prevent the Great Eastern Railway Co. from delivering goods to their vans from the warehouse as set out above, which the company and their predecessors had enjoyed for more than forty years:—*Held*, that the Great Eastern Railway Co. had a legal right to compensation in respect of the damage suffered, by them owing to their being prevented from so delivering their goods to their vans. *Great Eastern Railway and London County Council, In re*, 95 L. T. 803; 71 J. P. 95; 5 L. G. R. 162—Kennedy, J. Affirmed, 97 L. T. 116; 72 J. P. 1—C.A.

(c) *Assessment by Arbitration.*

Basis of Assessment—Church to Remain in Situ—Easement of Use of Subsoil—Possibility of Lands becoming Available for Building Purposes—Severance—Injurious Affection of Adjoining Land.]—A railway company were authorised by their special Acts to take land adjoining a church, but not the church itself, and to enjoy an easement of using the subsoil under the church. In assessing the amount of compensation the arbitrator was to take into account the additional liabilities and expenses entailed on the company in constructing their works without removing the church:—*Held*, on the construction of the special Acts, that the arbitrator was entitled to assess the compensation on the basis that the site of the church might thereafter, by a scheme under the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), or otherwise, cease to be the site of a church and become available for building purposes, and to form his own opinion when that time was likely to arrive, and was also right in awarding damages in respect of the severance of the lands taken and injurious affection of other lands, in accordance with section 63 of the Lands Clauses Act, 1845. *City and South London Railway v. St. Mary Woolnoth and St. Mary Woolchurch Haw (Rector and Churchwardens)*, 74 L. J. K.B. 147; [1905] A.C. 1; 92 L. T. 84; 69 J. P. 101; 21 T. L. R. 127—H.L. (E.)

Lease—Yearly Rent—Clause of Surrender—Basis of Value.]—P., owner in fee, demised lands in 1887 to the Secretary of State for War for twenty-one years, at a rent of 43l., with clause of surrender at the end of seven or fourteen years. In 1898 the Secretary of State for War served notice to treat:—*Held*, that the compensation payable to P. in respect of the reserved rent should be assessed on the basis of a purchase at a point of time immediately before the notice to treat, and should be valued at the rent reserved upon a lease for the residue unexpired of a term of twenty-one years, taking into account the likelihood of the lease being sooner determined, and that all the circumstances of the case and the holding should be taken into consideration, and that the arbitrator should find the reasonable value of the rent to be purchased on the basis of what a purchaser would have given for it immediately before the notice to treat. *Athlone Rifle Range, In re*, [1902] 1 Ir. R. 433—M.R.

Semble, 20 per cent. is an unreasonable addition for compulsory taking. *Id.*

Lease—Yearly Rent—Subsequent Compulsory Acquisition.]—By an indenture dated May 29, 1839, the predecessor in title of the plaintiff granted to certain lessees, whose interest is now vested in the defendants, certain lands for a railway for twenty-one years at a yearly rent of 144l. 5s. The land in question now forms part of the North-Eastern Railway Co.'s system, and the rent has always been duly paid since the expiration of the lease. On October 3, 1890, the defendants served upon the plaintiff a notice to treat, and an arbitration took place under the Lands Clauses Act, 1845. The umpire in making his award considered the yearly rent of 144l. 5s. as a basis upon which to calculate the value of the lands:—*Held*, that he was entitled to do so. *Eldon (Earl) v. North-Eastern Railway*, 80 L. T. 723—Bruce, J.

Reservoir — Natural Adaptability of Land Taken.]—In estimating the value of land to be acquired by a water board under statutory powers for the purpose of constructing a reservoir, the natural adaptability of the land for the purpose of a reservoir is a proper matter for consideration as an element of value. In order to exclude such an element of value from being taken into consideration it must be shewn on the facts that there is no reasonable possibility of a market for the land apart from the particular scheme under which it is taken. *Gough and Aspatria, Silloth, and District Joint Water Board, In re*, 73 L. J. K.B. 228; [1904] 1 K.B. 417; 90 L. T. 43; 52 W. R. 552; 68 J. P. 229; 20 T. L. R. 179—C.A. And see *Lucas and Chesterfield Gas and Water Board, In re*, 77 L. J. K.B. 374; [1903] 1 K.B. 571; 98 L. T. 37; 72 J. P. 76; 6 L. G. R. 150—Bray, J.

— Adaptability of Land in Conjunction with Adjoining Land for Purposes of Reservoir — Assessment of Different Parcels.]—Certain land in respect of which notice to treat had been given was not by itself adaptable as the site for a reservoir, but in conjunction with two adjoining parcels of land of other owners was so adaptable. The arbitrator in assessing compensation had regard to the natural character and position of the land, to its proximity to the other parcels of land, and to the probability that if a demand should arise for the three parcels of land for the purpose of one entire reservoir site, each owner would, by reason of the adaptability of the three parcels for a reservoir, obtain some enhanced value for the parcel belonging to him; but he came to the conclusion that the extent of such enhancement would not be the same in each of the three cases, and that the same value per acre should not be put on each of the three parcels of land:—*Held*, that the arbitrator was right in so holding. *Tynemouth Corporation and Northumberland (Duke), In re*, 89 L. T. 557; 67 J. P. 425—Wright, J.

Expense of Establishment &c. of School for Children of Workmen Engaged on Reservoir—Remoteness.]—A claim for compensation in respect of expense likely to be incurred in the establishment and maintenance during the period of the construction of the reservoir—a period of probably five years—of a voluntary school for the children of the workmen, in order to avoid the compulsory establishment in the township of a public elementary school by

the statutory education authority was held to be too remote and too uncertain to form a ground for compensation. *Ib.*

Tied House—Compensation.]—In estimating the fair market value of the interest of a brewery company in a house which they let as a beer-house, and which is compulsorily taken under the powers conferred by the Housing of the Working Classes Act, 1890, the existence of a covenant tying the house is a proper subject to be taken into consideration. *Chandler's Wiltshire Brewery Co. and London County Council, In re*, 72 L. J. K.B. 250; [1903] 1 K.B. 569; 88 L.T. 271; 51 W. R. 573; 67 J. P. 119; 1 L. G. R. 269—Wright, J.

Defence Acts—"Interest" of Landowner—Arrears of Rent Due—"Incumbrance"—Costs of Prior Abortive Arbitration.]—Arbitrators appointed under the Lands Clauses Consolidation Acts for the purpose of assessing compensation to be paid for lands compulsorily taken for the defence of the realm held not entitled in assessing the value of the owner's (or reversioner's) interest to take into account the existence of arrears of rent due by lessees or tenants which that taking rendered irrecoverable; nor entitled to award to the owner as part of the costs of the arbitration, costs of a prior abortive arbitration purporting to be held under the Railways (Ireland) Acts. *Kilworth Rifle Range, In re*, [1899] 2 Ir. R. 305—Q.B. D.

Intention of Owner to Use Land for Particular Purpose—Special Adaptability of Land.]—Two ladies contracted to purchase a piece of land specially adapted to be the site of a girls' school, with the intention of building such a school thereon. A question subsequently arose as to the compensation to be paid to them pursuant to the Lands Clauses Acts by a railway company taking part of the land for injuriously affecting the remainder, and was referred to arbitration:—*Held*, that the arbitrator in assessing the compensation should take into account the intention of the ladies as well as the special adaptability of the land for the intended purpose. *Bailey and Isle of Thanet Light Railways (Electric) Co., In re*, 69 L. J. Q.B. 442; [1900] 1 Q.B. 722; 82 L. T. 713; 48 W. R. 589—D.

Duty to Take up Award.]—Where an arbitration between a railway company and an owner of property under the Lands Clauses Act, 1845, for the purpose of assessing the price to be paid for such property, has been entered into, though under protest by the railway company, and an umpire appointed by the Board of Trade has issued his award, the company is bound to take up the award, and to furnish a copy to the owner of the property, in accordance with the provisions of section 35, and may be compelled to do so by *mandamus*. Any question as to the rights of the parties must be settled subsequently by an action on the award. *London and North-Western Railway v. Walker*, 69 L. J. Q.B. 367; [1900] A.C. 109; 82 L. T. 93; 48 W. R. 384; 64 J. P. 483—H.L. (E.)

Finality of Scottish Award.]—By the law of Scotland the oversman, who is appointed in the terms of the deed of submission, is made Judge of law as well as of fact, and is not liable to

have his decision reviewed, reversed, or modified unless the parties shew either that he has been guilty of misconduct in his office or has exceeded the bounds of the jurisdiction conferred upon him by the terms of the submission. Consequently, where a railway company gives notice to treat for a portion of property of which the owner requires them to take the whole, and the arbitrator finds, notwithstanding an extended offer of the railway company, that such part cannot be severed without material detriment to the remainder of the property, the arbitrator's award is binding on the Court and cannot be appealed against. *Gonty v. Manchester, Sheffield, and Lincolnshire Railway* (65 L. J. Q.B. 625; [1896] 2 Q.B. 439) distinguished. *Caledonian Railway v. Turcan*, 67 L. J. P.C. 69; [1898] A.C. 256—H.L. (Sc.)

Personal Inspection by Arbitrator.]—In determining the amount of compensation to be paid to the occupier of land taken under the provisions of the Housing of the Working Classes Act, 1890, the arbitrator is not, by clause 7 of the second schedule, confined within the limit of the amounts at which the land was valued on behalf of the occupier and the local authority respectively. Therefore, where the arbitrator inspected the land and awarded as compensation a sum less than the value as appearing from the evidence given on behalf of the local authority,—*Held*, that he was at liberty to do so. *Crawford v. M'Swiney*, [1904] 2 Ir. R. 15—K.B. D.

Award of, for More than Sum Claimed for Particular Item—Awarding More than Total Sum Claimed.]—In assessing compensation under section 68 of the Lands Clauses Act, 1845, the jury may in a proper case award a sum in excess of the amount claimed in respect of a particular item properly brought to the notice of the promoters. Whether they can properly award a sum in excess of the total claim, *quære*. *Robertson v. City and South London Railway*, 68 J. P. 280; 20 T. L. R. 395—Channell, J.

Costs of Arbitration—Local Enquiry under Military Lands Act—Taxation.]—The words "costs of any such arbitration and incident thereto" in section 34 of the Lands Clauses Act, 1845, do not include the costs incurred by a landowner whose lands are declared suitable to be taken for military purposes in a local enquiry held under the provisions of the Military Lands Act, 1892. But as the function of the Taxing Master in taxing costs under the Lands Clauses (Taxation of Costs) Act, 1895, is ministerial merely, and not judicial, his certificate allowing the landowner the costs of such local enquiry cannot be quashed on *certiorari*. *Rees v. Goff*, [1905] 2 Ir. R. 121—K.B. D.

— On August 9, 1898, a railway company, after serving a notice to treat, entered into possession of lands by arrangement with the proprietor, the company undertaking to "pay interest at 5 per cent. per annum on the amount of his [the proprietor's] compensation when ascertained or agreed on from the date when possession was taken." On July 23, 1901, the company tendered to the proprietor's agent 1,300l. "in full of all your client's claims of every description, in respect of his right and

interest as proprietor in the land . . . taken." This tender was not accepted, and the question of compensation was referred to arbitration. On March 21, 1902, the umpire fixed the compensation at 1,265*l.*, with interest at 5 per cent. from August 9, 1898, until payment. No award was made as to costs. In an action by the proprietor against the railway company for payment of his costs in the arbitration,—*Held*, that the tender of 1,300*l.* on a sound construction included not only compensation for the land taken, but also for the interest which the company had undertaken to pay, and therefore, as the sum awarded by the umpire, with interest, exceeded the sum tendered by the company, that the company were liable for the pursuer's costs. *Riddell v. Lanarkshire and Ayrshire Railway*, 6 F. 432—Ot. of Sess.

Compensation for Unworked Coal—Basis of Assessment.]—See MINES AND MINERALS.

(d) *Assessment by Jury.*

Offer by Promoters of Undertaking—Time for Acceptance—Acceptance at Hearing before Jury.]—An offer of a sum of money by the promoters of an undertaking under section 38 of the Lands Clauses Act, 1845, may be accepted by the owner of the lands sought to be purchased at any time before the verdict of the jury is given assessing the amount of the compensation. *Rex v. Westminster High Bailiff*, 72 L. J. K.B. 600; [1903] 2 K.B. 189; 88 L. T. 834; 52 W. R. 10, 109; 1 L. G. R. 569; 67 J. P. 302—D.

Offer for Interest in Lands—Notice of Intention to Cause Jury to be Summoned—Notice of Desire to have Compensation Settled by Arbitration—Costs of and Incident to Arbitration.]—Section 34 of the Lands Clauses Consolidation Act, 1845, applies to an offer made by the promoters of the undertaking under section 38 of the Act, for the interest in lands sought to be compulsorily purchased by them, and for the damage to be sustained by the claimant by the execution of the works. Such offer by the promoters is not abrogated by a notice given by the claimant under section 23 of the Act of his desire to have the compensation settled by arbitration. Therefore if the sum offered by the promoters under section 38 is not less than that awarded to the claimant by the arbitrators, the claimant must bear his own costs incident to the arbitration. *Lascelles v. Swansea School Board*, 69 L. J. Q.B. 24—Ridley, J.

Notice to Settle Compensation by Jury—Appeal from Judge at Chambers.]—See APPEAL.

(e) *Assessment by Justices.*

Claim by Yearly Tenant—Determination of Compensation by Justices—Jurisdiction to Enquire into Claimant's Title—Demand of Possession—Condition Precedent.]—The jurisdiction of the Justices under section 121 of the Lands Clauses Consolidation Act, 1845, is limited to determining the amount of the compensation on the basis of the interest alleged by the claimant, and does not extend to enquiring whether that interest is his true interest. *Great Northern and City Railway v. Tillett*, 71 L. J.

K.B. 525; [1902] 1 K.B. 874; 86 L. T. 723; 50 W. R. 652; 66 J. P. 742—D.

On June 14, 1899, a railway company gave notice to treat to the tenants for a term of certain premises. On December 25, 1899, the term expired, but the tenants held over on a yearly tenancy. In March, 1900, the tenants ceased to occupy the premises, but retained the keys. On February 22, 1901, the company, having taken an assignment of the landlord's interest, pulled the premises down. The tenants claimed compensation on the basis of a yearly tenancy. In proceedings under section 121 of the Lands Clauses Consolidation Act, 1845, to have the amount of the compensation determined by two Justices,—*Held*, that it was a condition precedent to the right to proceed under the section that the tenant had been required to give up possession before the expiration of his term or interest; that the circumstances disclosed no requirement to give up possession within the meaning of the section; and that the Justices had no right to assess the compensation. *Id.*

6. CONVEYANCE OF PROPERTY ACQUIRED.

Duty of Promoters to Accept Conveyance.]—Local authorities or others, the promoters of an undertaking, having compulsorily acquired land or easements under a special Act incorporating the Lands Clauses Consolidation Act, 1845, are bound to take a formal conveyance if the vendor desire them to do so, and to have it settled by the Court in case of disagreement. *Cary-Elwes' Contract, In re*, 75 L. J. Ch. 571; [1906] 2 Ch. 143; 94 L. T. 845; 54 W. R. 480; 70 J. P. 345; 4 L. G. R. 888; 22 T. L. R. 511—Swinfen Eady, J.

7. COSTS OF TITLE AND CONVEYANCE.

Sale of Copyholds—Costs of Constituting a Proper Person to Convey—Fine and Fees on Admission of a Tenant to Surrender.]—On a sale under the Lands Clauses Acts the purchasers are liable to pay the costs and expenses of proceedings taken for the purpose of constituting a proper person to convey or assure the property to them, including the costs of procuring the admission of a tenant of copyholds in order that he may surrender to them. There is no distinction between the steward's fees and the fine, and the latter is as much part of the expenses of procuring a proper person to surrender as the steward's fees and legal expenses. *London United Tramways Act, 1900, In re*, 75 L. J. Ch. 223; [1906] 1 Ch. 534; 94 L. T. 608; 54 W. R. 328; 22 T. L. R. 286—Swinfen Eady, J. See also *Thames Tunnel Act, 1900, In re*, 77 L. J. Ch. 330; [1908] 1 Ch. 493—C.A.

Costs of Disentailing Deed.]—The costs of a disentailing deed, which is necessary in order to obtain payment of a fund in Court lodged by a railway company, are payable by the company, and a special order will be made as to such costs. *Navan and Kingscourt Railway Co. and Fingall, In re*, [1906] 1 Ir. R. 557—M.R.

Administration obtained, after Payment of

Money into Court, for the Purpose of Making Title—Colonial Administrator—Power of Attorney—Administration in Ireland—Estate Duty—Costs.—An urban district council compulsorily acquired a part of certain freehold lands to which K. was entitled in fee, subject to a life annuity charged thereon. The arbitrator awarded 385*l.* as compensation for the premises compulsorily taken. After the date of the award K. died in Australia, having by his will devised and bequeathed all his real and personal estate to a trustee in trust to sell and hold the proceeds of the sale in trust for an Australian charity. Administration of the estate of K. with the will annexed was granted in Australia. After K.'s death the sum of 385*l.*, representing the purchase-money of the premises compulsorily taken, was lodged in Court. Administration of the estate of K., with the will annexed, was granted to A. in Ireland, who had been appointed by the Australian administrator his attorney for the purpose of taking out administration in this country, and to collect the assets and other property of K. Estate duty was paid by A. on the unsold real estate of K., the fund in Court as representing the premises compulsorily purchased, and some book debts due to the deceased. On the application of A., it was ordered that the money in Court should be paid out to him, and that the urban district council should pay all costs properly and necessarily payable:—*Held*, that the costs of the power of attorney from the Australian administrator, the costs of the grant of administration in Ireland, and the portion of the estate duty applicable to the purchase-money of the lands compulsorily taken were properly payable by the urban district council. *Lurgan Urban Council, Ex parte; Kearns, in re*, [1902] 1 Ir. R. 157—M.R.

Delivery of Possession by Sheriff—Allowance of Fees out of Fund in Court.—Fees of sheriff on delivery of possession of property under section 91 of the Lands Clauses Act allowed to promoters out of money paid into Court. *Schwarz, in re*, 71 L. J. Ch. 219; [1906] 1 Ch. 326; 86 L. T. 71; 50 W. R. 245—C.A.

Defence Acts—Payment of Death Duties.—The War Department, for the purpose of erecting defence works on Bear Island in Bantry Bay, took by compulsory proceedings the tenants' interests in part of the island. The tenants had no title except occupation, and the War Department in some instances required representation to be taken out to former occupiers:—*Held*, that the War Department were liable to pay the death duties as well as the costs of taking out probate or letters of administration. *Bear Island Defence Works and Doyle, in re*, [1903] 1 Ir. R. 164—C.A.

8. PURCHASE-MONEY.

(a) Application of.

Repairs to Chancel—Parliamentary Costs.—The Court has jurisdiction to order purchase-money for a churchyard taken compulsorily under statutory powers to be applied towards the repairs of the chancel of the church and also towards payment of the rector's Parliamentary costs. *London County Council, in*

re; Pennington, ex parte, 84 L. T. 808; 65 J. P. 536—Kekewich, J.

(b) Interim Investment.

Purchase-money Paid into Court—Railway Securities—Brokerage—Costs—Incidence.—Where an interim investment of purchase-money paid into Court under the Lands Clauses Act, 1845, is made upon railway securities allowed by Order XXII, rule 17 for the investment of cash under the control of the Court, the promoters of the undertaking are, by virtue of section 80 of the Lands Clauses Act, liable for the costs of the investment, although the terms of the section apply only to the costs of investment "in Government or real securities." *Brown, in re* (59 L. J. Ch. 530), applied. *Gaselee, in re*, 70 L. J. Ch. 441; [1901] 1 Ch. 923; 84 L. T. 386; 49 W. R. 372—Buckley, J.

Costs—Condition as to Costs of Future Investment.—Where the purchase-money of land taken has, under the Lands Clauses Act, 1845, been paid into Court and invested in Consols, there is no rule of practice of the Court that, upon an application for a second interim investment, the Court in sanctioning that second investment will impose a condition that it is to be treated as a permanent investment, and that the promoters are not to be liable to pay the costs of any future investment. *Nepton's Charity, in re*, 22 T. L. R. 442—Warrington, J.

(c) Costs of Re-investment.

Charity—Real Estate—Official Trustee of Charity Lands.—Where the legal estate in lands belonging to a charity, taken by a corporation under the Lands Clauses Act, 1845, is vested in the official trustee of charity lands, he is not bound to receive the purchase-money if tendered. His refusal to receive such purchase-money is not "wilful refusal to receive" within the meaning of section 80, so as to relieve the corporation from the costs of re-investment. *Leeds Grammar School, in re*, 70 L. J. Ch. 89; [1901] 1 Ch. 228; 83 L. T. 499; 49 W. R. 120; 65 J. P. 88—Cozens-Hardy, J.

Re-investment in Purchase of Real Estate—Contract for Sale—Simultaneous Conveyance and Lease—Sanction of Court—Costs of Lease.—An order of the Court under section 80 of the Lands Clauses Consolidation Act, 1845, sanctioning the re-investment of moneys in Court in the purchase of real estate, directed that pursuant to that section, the promoters should pay to the purchasers their costs (including all reasonable charges and expenses of and incident thereto) of obtaining that order and of all proceedings relating thereto, such costs to be taxed by the Taxing Master in case the parties differed:—*Held*, that the order did not authorise the allowance on taxation of the costs of a lease which the purchasers had by the contract for sale agreed to grant to the vendors immediately upon the completion of the purchase, the purchasers bearing their own costs of such lease. *Thavie Estate (Trustees), Ex parte*, 74 L. J. Ch. 326; [1905] 1 Ch. 408; 92 L. T. 287; 53 W. R. 346—Farwell, J.

Purchase Beyond Money in Court—Form of Order for Costs.]—Where a fund in Court, the proceeds of land taken under the Lands Clauses Consolidation Act, 1845, is being re-invested under the direction of the Court in land of greater value, the excess being provided by the applicant, the proper order for costs payable under section 80 of the Act is that the promoters of the undertaking pay to the applicant his costs, charges, and expenses of the investment, with a direction that the Taxing Master is not to allow any portion of the said costs, charges, and expenses which may have been incurred by reason of the purchase-money exceeding the amount of the fund in Court, it being proper to leave to the Taxing Master, and not to bring before the Judge, details as to what costs ought to be allowed under the order. *Clark, In re*, 75 L. J. Ch. 325; [1906] 1 Ch. 615; 95 L. T. 143; 54 W. R. 385—Swinfen Eady, J.

Payment out of Small Balance—Costs.]—Money was paid into Court in respect of land taken by a company from the Vicar of S. and belonging to the benefice, under a private Waterworks Act of 1830, and also in respect of other land taken by them under the Lands Clauses Act, 1845:—*Held*, on a petition for re-investment of the money in Court in the purchase of lands to be settled to similar uses, that any balance not exceeding 20l. might be paid out to the vicar. *Held*, further, that the petitioner's costs in respect of both funds were payable by the company in accordance with the Lands Clauses Act, 1845. *Sheffield (Vicar), Ex parte*, 68 J. P. 313—Farwell, J.

Taxation of Costs—Jurisdiction of Chancery Taxing Master.]—See Costs.

(d) *Payment out of Court.*

Costs of Petition—Appeal—Discretion of Judge—Supreme Court of Judicature Act, 1890, s. 5.]—Where property has been taken under the powers of the Lands Clauses Consolidation Act, 1845, and the purchase-money paid into Court under section 76 of the Act by reason of the neglect of the owner of the property to make out a title thereto, the costs of and incidental to a petition presented by a person interested in the money to obtain payment out of Court are within the discretion of the Court under section 5 of the Supreme Court of Judicature Act, 1890, and no appeal will lie from the order made in exercise of that discretion. *Schmarr, In re*, 71 L. J. Ch. 219; [1902] 1 Ch. 326; 86 L. T. 71; 50 W. R. 245—C.A.

Assuming that the Court has no jurisdiction to deal with the costs in such a case under section 80 of the Lands Clauses Act, 1845, there is nothing in that section which amounts to a direction that in no circumstances are any costs whatever to be given in such a case, so as to be an express statutory provision taking the case out of section 5 of the Act of 1890. *Fisher, In re* (63 L. J. Ch. 235; [1894] 1 Ch. 450), applied. *Ib.*

Person Absolutely Entitled—Costs—Brokerage.]—Where an interim investment in stock has been made of moneys paid into Court under the Lands Clauses Act, and a person absolutely entitled petitions for payment out, the company

or party who paid the money in must pay the brokerage on sale of the investments. *Magdalen College, Oxford, In re*, 70 L. J. Ch. 821; [1901] 2 Ch. 786; 85 L. T. 479; 50 W. R. 90; 66 J. P. 23—Cozens-Hardy, J.

Charity—Payment Out—Consent of Charity Commissioners.]—Where the purchase-money of land, bought from charity trustees with power to sell with consent and give a discharge, has been paid into Court under the Lands Clauses Consolidation Act, 1845, it may be ordered to be paid out to the trustees as persons "becoming absolutely entitled" within section 69 of the Act, without the assent of the Charity Commissioners. *Hobson's Trusts, In re* (47 L. J. Ch. 310; 7 Ch. D. 708) followed. *Sheffield Corporation and St. William's Roman Catholic Schools, In re*, 72 L. J. Ch. 71; [1903] 1 Ch. 208; 88 L. T. 157; 51 W. R. 380—Byrne, J.

Payment out to District Council as Highway Authority—Parish Land—Land Allotted to Highway Surveyor for Getting Materials for Road Repairs.]—Land allotted by enclosure award of 1834 to the highway surveyors of a parish and their successors for the digging for and getting materials for the repairs of roads and ways was acquired by a railway company, under the compulsory powers of the Lands Clauses Acts, in 1864, and the purchase-money was paid into Court. The purchase-money was now ordered to be paid out to the district council, who were the highway authority for the district, subject to the approval of the Local Government Board being obtained, on the footing that the council, having obtained that approval, would be absolutely entitled to the money by virtue of their power of sale, with such approval, under the Exhausted Parish Lands Act, 1876. *Brumby and Frodingham Urban Council, In re*, 3 L. G. R. 258; 69 J. P. 96—Kekewich, J.

Termor—Adverse Possession—Reversioner Unknown.]—In 1810 a freehold house was demised, at a peppercorn rent, for two hundred years to secure an annuity of 100l., payable until the death of the survivor of nine named persons, upon which event the term was to cease. From 1829 to 1895, when the ninth life dropped, and from 1895 to December, 1900, the annuitant or his successors in title, the last of whom was the petitioner, had been in possession of the premises and in receipt of the whole of the net rent, which was never less than 120l. per annum, without any claim on the part of the reversioner, who was altogether unknown. In December, 1900, the premises were acquired compulsorily under the Lands Clauses Act, 1845, and the purchase-money paid into Court. On petition for payment out under section 79 of that Act, *Held*, that the petitioner was not at present entitled to immediate payment out to her of the capital money in Court within that section, but that the dividends or income on the investments of the fund might be forthwith paid to her until twelve years from the dropping of the ninth life, or until further order. *Harris, In re; London County Council, ex parte*, 70 L. J. Ch. 432; [1901] 1 Ch. 931; 84 L. T. 203—Joyce, J.

Consent of Local Government Board.]—See METROPOLIS.

9. SUPERFLUOUS LANDS.

Land Taken for Purpose of Future Doubling of Line.]—Land taken compulsorily by a railway company for the future doubling of a line of railway cannot be regarded as superfluous lands within the meaning of the Lands Clauses Act. *Brown v. North British Railway*, 8 F. 534—Ct. of Sess.

Negotiations for Sale Before and After the Expiration of Ten Years—Lease of Portion of Land.]—The mere facts that both before and after the expiration of the ten years limited by the 120th section of the Lands Clauses (Scotland) Act a railway company has negotiated for a portion of their land, without however effecting a sale, and has leased another portion, are not conclusive evidence that such portions have become "superfluous" within the statutory meaning of the word. *London and South-Western Railway v. Blackmore* (39 L. J. Ch. 718; L. R. 4 H.L. 610) distinguished. *Macfie v. Callander and Oban Railway*, 67 L. J. P.C. 58; [1898] A.C. 270; 78 L. T. 598—H.L. (Sc.)

Vesting of.]—Where under the provisions of section 127 of the Lands Clauses Act, 1845, superfluous lands become, in default of sale within the prescribed period, vested in the adjoining owners, the vesting takes place by force of a conditional limitation and not of a forfeiture. *Miller v. Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421—K.B. D.

10. OTHER MATTERS.

Light Railway.]—See ARBITRATION.

— **Compulsory Purchase under Light Railways Act—Taxation of Costs.]**—See RAILWAY.

Poor Rate—Deficiency in—Liability of Promoter.]—See POOR LAW.

Restrictive Covenant—Sale of Land Voluntarily Purchased by Railway.]—See RAILWAY.

Sewerage Works—Construction of by Local Authority—Compensation.]—See *Horton v. Colwyn Bay Urban Council*, post, LOCAL GOVERNMENT.

Waterworks—Compensation—Injurious Affection.]—See *Fletcher v. Birkenhead Corporation*, 76 L. J. K.B. 218; post, WATER.

LARCENY.

See CRIMINAL LAW.

LEASE.

See LANDLORD AND TENANT.

LEGITIMACY.

See HUSBAND AND WIFE.

LETTERS.

Property in—Right of Writer to Restrain Publication.]—The defendant H., who was the proprietor of a newspaper, published on October 2, 1897, a violent attack upon the plaintiff's conduct in certain Stock Exchange transactions some years ago, founded upon letters written by the plaintiff to B. The same supplement contained a threat to publish on January 1, 1898, proofs which the defendant had in his possession that the plaintiff had carried on similar transactions in later years. The plaintiff, who was also the proprietor and editor of a newspaper, published on October 7, 1897, an article dealing with and denying the defendant's charges, in which he wrote: "You may publish and republish my letters to B. as often as you please"; adding that he could restrain their publication by injunction if he chose, but that he had no intention of doing so. The plaintiff afterwards published a letter, alleged to have been written by the defendant to a third person, as proof that the defendant was a person wholly unworthy of confidence. The plaintiff afterwards discovered that the proofs referred to in the defendant's threat consisted wholly or partly of letters written by the plaintiff to S., and obtained by the defendant H. from S.'s widow. The plaintiff now moved to restrain the defendants H. and S.'s widow from publishing any letters written by the plaintiff to S., and from informing any one of the contents thereof:—*Held*, that the Court will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances—e.g. where the publication is necessary for the purpose of clearing the defendant's character; that there was nothing in the plaintiff's conduct to disentitle him to this relief, and the defendant had not shown that his purpose in publishing the letters was to clear his own character. The injunction was granted against publication of the letters from the plaintiff to S., but not against informing any one of the contents thereof. S.'s widow was not proved to have given the letters to H. for the purpose of publication, or to have colluded with him, and the action was dismissed against her with costs. *Labouchere v. Hess*, 77 L. T. 559—North, J.

Right to Use—Publication—Paraphrasing—Extracts from—Right to Publish Information Contained in Letters—Authority to Write Biography—Implied Authority to Use Letters.]—The recipient or possessor of letters is not entitled to publish them, nor paraphrases thereof, nor extracts therefrom, and, if they are written in confidence, he is not entitled to communicate their contents to third persons. But, subject to those exceptions, the lawful possession of a letter confers all the rights incident to property. *Philip v. Pennell*, 76 L. J. Ch. 663; [1907] 2 Ch. 577; 97 L. T. 386; 23 T. L. R. 718—Kekewich, J.

Accordingly, a person lawfully in possession of letters may make use of the information contained in them for the purpose of writing a biography without any express or implied authority from the writer. *Id.*

The right to use a letter does not depend upon the intention of the writer. *Ib.*

Semble, a person who has lawfully obtained possession of letters will not be restrained from using them merely because the addressee has been guilty of a breach of confidence in parting with them. Confidence does not run with the letters. *Ib.*

Semble, the observations of LORD ELDON in *Gee v. Pritchard* (2 Swanst. 402, at p. 416) apply to letters as well as to a book. *Ib.*

LIBEL.

See DEFAMATION.

LICENCE.

Excise.]—*See* REVENUE.

Intoxicating Liquors, for Sale of.]—*See* INTOXICATING LIQUORS.

Landlord and Tenant, between.]—*See* LANDLORD AND TENANT.

Marriage.]—*See* HUSBAND AND WIFE.

Music and Dancing.]—*See* LOCAL GOVERNMENT.

LIEN.

Agent, of.]—*See* PRINCIPAL AND AGENT.

Goods, on.]—*See* WORK AND LABOUR.

Maritime.]—*See* SHIPPING.

Solicitor, of.]—*See* SOLICITOR.

Vendor, of.]—*See* VENDOR AND PURCHASER.

LIFE INSURANCE.

See INSURANCE (LIFE).

LIGHT AND AIR.

See EASEMENT.

LIMITATION OF LIABILITY.

See COMPANY; SHIPPING.

LIMITATIONS, STATUTES OF.

1. *When Statutes begin to Run*, 1280.

(a) *Generally*, 1280.

(b) *Concealed Fraud*, 1280.

(c) *Express Trust*, 1282.

(d) *Disability*, 1283.

2. *Simple Contract Debts*, 1283.

3. *Specialty Debts*, 1288.

4. *Damages*, 1288.

(a) *Directors' Liability Act*, 1890, *under*, 1288.

(b) *Public Authorities Protection Act*, 1289.

5. *Real Property*, 1289.

6. *Mortgages and Charges*, 1295.

7. *Leaseholds*, 1300.

8. *Legacies and Personal Property*, 1300.

9. *Other Matters*, 1301.

1. *WHEN STATUTES BEGIN TO RUN.*

(a) *Generally.*

Alternative Remedies—Different Courts.]—If in an Act of Parliament power is conferred to take remedy in divers Courts, as a general rule that remedy will, in each Court, be subject to the *lex fori* of that Court, including the limitation of actions. *Blackburn Corporation v. Sanderson*, 71 L. J. K.B. 590; [1902] 1 K.B. 794; 86 L. T. 804; 66 J. P. 452—C.A.

Accrual of Right of Action.]—A testator who died in 1863 devised freeholds to his wife B. and his daughter J. to hold jointly during B.'s life, and after B.'s death to J. in fee "provided always that if my said wife (B.) should ever get married, she shall forfeit and lose all claim and title to any of my property on receiving the sum of 50*l.*" B. married again in 1874. J. came of age in 1879 and died intestate and unmarried in 1897. In 1898 the plaintiff (the heir-at-law both of J. and of the testator) tendered 50*l.* to B. and demanded possession of the land, and on B.'s refusal brought an action of ejectment against her and her husband:—*Held*, that the right of action only occurred in 1898 upon the tender of the 50*l.*, and that on lodging this amount in Court the plaintiff was entitled to recover possession of the land. *Connolly v. Leahy*, [1899] 2 Ir. R. 344—Q.B. D.

Forged Will—Revocation of Probate—Grant of Letters of Administration.]—The grant of probate of a forged will is made void *ab initio* by its subsequent revocation by the Court; and the established rule is that no action can be maintained in respect of a deceased person's estate except by a duly constituted administrator or executor. *Chan Kit San v. Ho Fung Hang*, 71 L. J. P.C. 49; [1902] A.C. 257; 86 L. T. 245; 51 W. R. 18—P.C.

Thus in a partnership action for account by the administrator of a deceased partner the Statute of Limitations begins to run not from the grant of probate of a will subsequently declared to be a forgery, but from the grant of administration made after and in consequence of the revocation of such will. *Ib.*

(b) *Concealed Fraud.*

"Concealed fraud," to bring into operation section 26 of the Real Property Limitation Act,

1833, must be the fraud of the person setting up the statute or of his predecessor in title. The section does not apply where neither the person sued nor his predecessors in title were party or privy to the fraud at the time when it was perpetrated. *McCallum, In re*; *McCallum v. McCallum*, 49 W. R. 129—C.A.

Concealed or Fraudulent Trespass—Ignorance.]—The Statute of Limitations is no answer to a claim in respect of a concealed and fraudulent trespass in the working of coal mines so long as the party defrauded remains in ignorance without any fault or *laches* of his own. *Ecclesiastical Commissioners v. North-Eastern Railway* (47 L. J. Ch. 20; 4 Ch. D. 845) disapproved. *Bull's Coal-Mining Co. v. Osborne*, 68 L. J. P.C. 49; [1899] A.C. 351; 80 L. T. 430; 47 W. R. 545—P.C.

Laches.]—The encroachment upon the bounds of, and abstraction of coal from, an adjoining mine by underground working, although tortious, does not, when the arbitrator finds mere negligence on the one side and no *laches* on the other, raise such an inference of fraud or concealment of fraud as to oust the operation of the Statute of Limitations. *Ecclesiastical Commissioners v. North-Eastern Railway* (47 L. J. Ch. 20; 4 Ch. D. 845) not followed. *Astley and Tyldesley Coal Co. and Tyldesley Coal Co., In re*, 68 L. J. Q.B. 252; 80 L. T. 116—D.

Real Property—Possession.]—The “concealed fraud,” which under section 26 of the Real Property Limitation Act, 1833, will prevent the running of the Real Property Limitation Acts against a plaintiff claiming real property must, according to the principles which have been always acted upon by Courts of equity, be the fraud of, or in some way imputable to, the person setting up the statutes, or of some one through whom that person claims (*RIGBY, L.J., dissentiente*). *McCallum, In re*; *McCallum v. McCallum*, 70 L. J. Ch. 206; [1901] 1 Ch. 143; 83 L. T. 717; 49 W. R. 129—C.A.

Per RIGBY, L.J.—Section 26 did not alter the old doctrine of the Courts of equity, which was that a suit might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued and those through whom he claimed had not been party or privy to the fraud at the time when it was perpetrated. *Ib.*

Per LORD ALVERSTONE, C.J., RIGBY, L.J., and KEKEWICH, J.—The intentional concealment by a mother of a conveyance of property by her to her daughter is a “concealed fraud” against the daughter, whatever the mother’s motive for concealment may have been. *Ib.*

Action in County Court—Subsequent Proceedings in Respect of same Cause of Action in High Court—Knowledge of Facts—Res Judicata.]—In 1890 the plaintiff effected a policy of insurance on his life with the defendants, relying upon the inducements of its agent that (*inter alia*) he would have to pay only a fixed periodical premium. In 1898 a claim was for the first time made on the plaintiff for payment of an increased premium. The plaintiff, being desirous not to forfeit his policy, paid the amount demanded under protest. In April, 1898, he issued

a plaint in the County Court to recover a sum as an overpayment, but the County Court Judge in May, 1898, decided that he was not entitled to succeed. Meetings of policy-holders were held from time to time in 1900, when it was resolved to bring an action in the name of the plaintiff against the defendants. But it was subsequently determined to await the decision of the Court in an action which had been instituted against the defendants by another policy-holder. That other action was tried before Kekewich, J., in July, 1902, when his Lordship held that the defendants had no right to increase the premiums as the age of the assured increased. The defendants appealed, and the Court of Appeal took a different view from that of Kekewich, J., but held that the policy was tricky and could be rescinded. The House of Lords in July, 1904, affirmed the decision of the Court of Appeal. In September, 1904, the plaintiff issued his writ in the present action, claiming rescission of his policy on the ground of misrepresentations:—*Held*, that the County Court Judge having in May, 1898, decided what was the true meaning of the policy, and his decision not having been appealed from, the plaintiff must be taken to have known at that date what was the nature of the contract between the defendants and himself, and all the facts which would have enabled him to bring an action for misrepresentation; and that the Statute of Limitations was therefore a bar to the present action, the period at which the statute began to run being that at which the plaintiff knew the facts, and not that at which he ascertained the proper construction to be placed upon them. *Molloy v. Mutual Reserve Life Insurance Co.*, 94 L. T. 756; 22 T. L. R. 525—C.A.

(c) *Express Trust.*

Moneys Entrusted to Agent for Special Purpose—Fraudulent Concealment—Statute of Limitations.]—The Statute of Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose and retained by him, where such agent is either in the position of an express trustee or guilty of fraudulent concealment in his accounts. *North American Land and Timber Co. v. Watkins*, 73 L. J. Ch. 626; [1904] 2 Ch. 233; 91 L. T. 425; 20 T. L. R. 642—C.A. Affirming, 52 W. R. 860—Kekewich, J.

Settlement—Term of Years—Money Charged upon Land—Lapse of Time.]—By a settlement of 1838 a freehold estate was vested in trustees for a term of years upon trust to raise two separate sums of 2,000*l.* in two specified events. The first sum became raisable in 1886, the second in 1890, but neither was raised. In 1898 an action was brought for a declaration that both sums should be raised. It was admitted at the trial that the Statute of Limitations did not bar the action as to the first-mentioned sum:—*Held*, that section 10 of the Real Property Limitation Act, 1874, was a bar to the raising of the second 2,000*l.*, as it was a sum secured upon land by an express trust within that section; and further, that the fact of the trustees being in a position to raise the first sum was not sufficient to entitle them to raise the second. *Williams v. Williams*, 69

L. J. Ch. 77; [1900] 1 Ch. 152; 81 L. T. 804; 48 W. R. 245—North, J.

Paving Expenses—When Time begins to Run.]—See *Hampstead Corporation v. Caunt*, 72 L. J. K.B. 440; *post*, METROPOLIS.

Trustees' Accounts.]—See *Davies, In re*, 67 L. J. Ch. 507; *post*, TRUST AND TRUSTEE.

(d) *Disability.*

Infancy—Real Property—Adverse Possession—Subsequent Accrual of Infant's Title.]—Where the title of an infant to real property vests in possession at a time when a stranger is in adverse possession as against the infant's predecessor, the Statute of Limitations will continue to run against the infant, notwithstanding his infancy. *Murray v. Watkins* (62 L. T. 796) followed. *Garner v. Wingrove*, 74 L. J. Ch. 545; [1905] 2 Ch. 233; 93 L. T. 131; 53 W. R. 588—Buckley, J.

2. SIMPLE CONTRACT DEBTS.

Loan Secured by Charge on Land.]—A simple contract debt though secured by a charge on land, is barred in six years by the Limitation Act, 1623. *Barnes v. Glendon*, 68 L. J. Q.B. 502, [1899] 1 Q.B. 885; 80 L. T. 606; 47 W. R. 435—C.A.

Part Payment by Tenant for Life—Order for Administration of Real Estate.]—Testator, who died on October 30, 1894, was at his death indebted to the plaintiffs as simple contract creditors. By his will the testator devised part of his real estate to a tenant for life, and subject thereto he devised his residuary real estate to other devisees in fee. In 1895, the plaintiffs made an arrangement with the executors and the tenant for life, under which they received payments on account of their debt and interest out of the rents of the real estate given to the tenant for life, and these payments continued until 1903. In 1905 the plaintiffs took out a summons asking for the administration of the real and personal estate of the testator:—*Held*, that the part payment by the tenant for life of the simple contract debt of his testator and of interest thereon was sufficient to keep the debt alive, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator. *Hollingshead, In re; Hollingshead v. Webster* (57 L. J. Ch. 400; 37 Ch. D. 651), followed. *Roddam v. Morley* (26 L. J. Ch. 438; 1 De G. & J. 1) and *Dibb v. Walker* (62 L. J. Ch. 536; [1893] 2 Ch. 429) applied. *Chant, In re; Bird v. Godfrey*, 74 L. J. Ch. 542; [1905] 2 Ch. 225; 93 L. T. 265; 53 W. R. 526—Warrington, J.

Acknowledgment of Debt—Conditional Promise to Pay.]—A debtor wrote to his creditor a letter in which he said he was willing to sell 5,230 shares in a certain company for the sum of 816l. 4s. 6d., and in the event of his doing so he would, with the money, pay the call due on 629 of the shares and the balance in settlement of his account with the creditor, amounting, at December 31 last, to 501l. 14s. 6d. This letter was written

before the expiration of six years after the debt was incurred. The sale of shares mentioned in the letter did not take place:—*Held*, that the letter was not in itself sufficient to take the case out of the Statute of Limitations. *Barrett v. Davies*, 91 L. T. 736; 21 T. L. R. 21—C.A.

—Acknowledgment that Accounts are Open.]—Within the period of limitation in respect of a debt the debtor filed a written statement, in an application for probate of his creditor's will, that he had for the past few years open and current accounts with the deceased:—*Held*, that this was an acknowledgment by the debtor that there was a right to have the accounts settled, from which a promise to pay the amount found due upon the accounts would be inferred so as to take the case out of the Statute of Limitations. *Maniram v. Seth Rupchand*, 22 T. L. R. 619—P.C.

— In October, 1898, a debt then being statute-barred, A. wrote to M.: "You may be quite sure I shall do all I can, and as soon as I can, but it is not much use making promises without some pretty good prospect of keeping them." On November 17 following he wrote to the plaintiff: "I had a letter from you four or five weeks ago, and wrote you in reply that I would do all in my power, but that it was useless for me to make promises I could not be fairly sure of keeping, and I really cannot say anything more definite." Later, in answer to a demand from M.'s solicitors, he wrote asking for particulars, and concluded: "Legal proceedings . . . would only result in my losing my present employment and the small salary I am able to earn, which would still further delay the possibility of payment. I trust your client will agree to accept some comparatively reasonable amount, and if you can give me the option of repaying by instalments I shall be glad." The required particulars were supplied by M.'s solicitors, and he was asked to state with what sum and in what manner he would settle the claim:—*Held*, that these letters did not constitute a promise to pay absolutely and unconditionally, and therefore did not amount to a sufficient acknowledgment to take the debt out of the Statute of Limitations. *Mowbray v. Appleby*, 80 L. T. 805—Bucknill, J.

—Promise to Pay when Able.]—The defendant, who owed money for goods supplied to him by the plaintiff's testator, wrote the following letter to the plaintiff: "I am sorry I cannot pay off anything of my account at present. . . . You have always treated me very well, and as soon as I have the money I shall forward you a cheque for the late account. . . . I hope you will express my regret to the executors, and explain that it is my intention to pay when I am in a position to do so, and I shall not try to get out of the debt by its becoming outdated":—*Held*, that this was a conditional promise to pay the debt; and, the condition not being fulfilled, the letter did not take the case out of the Statute of Limitations. *Lusher v. Hassard*, 20 T. L. R. 563—C.A.

—Letter—Whether Conditional or Not.]—The statement in a letter "I am really sorry to keep you so long waiting for your money, but I shall be taking some money next month, I think, without fail, and will then try and settle

with you," is sufficient admission to take a debt out of the Statute of Limitations, and is not conditional. *Fryke v. Hill*, 79 L. T. 738—D.

— **Letter to Managing Director of Company.**—A letter, written by the debtor to the managing director of a company to whom he owes money, stating: "I am willing to sell the 5,230 shares that I hold in the P. D. B. B. Company Limited for the sum of 816*l.* 4*s.* 6*d.*, and in the event of my doing so I will with the money pay the 10*s.* call due on 629 of the above shares, amounting to 314*l.* 10*s.*, and the balance in settlement of my account with R. B. and Son Limited, amounting at December last to 501*l.* 14*s.* 6*d.*," is sufficient acknowledgment to take the debt out of the Statute of Limitations, even although the sale of the shares does not take place. *Barrett v. Davies*, 90 L. T. 460; 52 W. R. 607; 20 T. L. R. 318—Phillimore, J. Reversed, 21 T. L. R. 21—C.A.

A general acknowledgment of a debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay, is sufficient to take a debt out of the Statute of Limitations. *Ib.*

— **Two Letters—Parol Evidence to Connect—Admissibility.**—Parol evidence is admissible to shew that a letter was written in answer to a former one, in order to read the two letters together that they may constitute an acknowledgment to take a debt out of the Statute of Limitations. *McGuffie v. Burleigh*, 78 L. T. 264—Bruce, J.

— **Affidavit for Probate.**—In a claim in an administration action for 2,000*l.* lent by a father to his son, no payment in respect of capital or interest had been made since 1898, so that the claim was *prima facie* statute-barred. In 1905 the son, as executor of his father's will, signed the Inland Revenue affidavit for probate, in which appeared an item of 2,000*l.* stated to have been lent to him by his father:—*Held*, that the item in the affidavit was an acknowledgment within Lord Tenterden's Act to take the debt out of the Statute of Limitations. *Emmett, In re; Jenkins v. Emmett*, 95 L. T. 755—Kekewich, J.

— **Promise to Pay Balance Found to be Due.**—A promise to pay the balance of an original debt which may be found to be due upon taking an account is a sufficient promise to take a case out of the Statute of Limitations. *Langrish v. Watts*, 72 L. J. K.B. 435; [1903] 1 K.B. 686; 88 L. T. 443; 51 W. R. 503—C.A.

In an action to recover a debt of 100*l.* barred by the Statute of Limitations, the plaintiff, in order to take the case out of the statute, relied upon certain letters written by the defendant, his nephew, in which he wrote: "I cannot satisfy myself as to the exact amount I was owing uncle [the plaintiff] when I left home the first time. I have some note of what I paid back; but to clear up the subject I shall be pleased if you can furnish me with particulars to check them with mine, and I will do my best to pay back what I owe"—"I am well aware that I did give uncle a note for 100*l.* originally but subsequently I gave him a cheque for 40*l.*, because I kept the stub of the cheque,

and I am almost positive I also gave him another cheque for 20*l.* reducing the amount at the time I left home to 40*l.* . . . Just at present I cannot lay my hand upon my bank book of that date or would be more positive on the subject. At present I have no money on hand having bought some houses out of the portion I got, but as soon as there is another division I will send uncle some." At the trial it was admitted that "another division" (that is, division of certain property, in which the defendant was to have a share) had taken place, but the defendant failed to prove that he had paid the 40*l.* and 20*l.* off the original debt as alleged:—*Held*, that the letters were not an acknowledgment of the original debt, but that they did amount to a promise to pay such sum as upon taking an account should be found to be due, that such a promise was a sufficient promise to take the case out of the statute, and that the defendant having at the trial failed to shew that any sums had been paid off the 100*l.* which was admitted to have been originally due, the plaintiff was entitled to judgment for the whole amount. *Ib.*

— **Part Payment—Account Containing Statute-barred Items—General Payment on Account—Appropriation.**—The promise to pay which is inferred from a part payment under the Statute of Limitations is a promise to pay only so much as was not then statute-barred, unless the payment was made expressly on account of the statute-barred debt. A solicitor, part of whose costs were statute-barred, pressed his client for payment, but the client declared his inability to find at the moment more than 20*l.*, which sum was accordingly paid:—*Held*, that this was an acknowledgment that more than 20*l.* was due, from which a promise to pay ought to be inferred, but that such promise was only to pay so much as was not then statute-barred. *Boswell, In re; Merritt v. Boswell*, 75 L. J. Ch. 234; [1906] 2 Ch. 359; 94 L. T. 243; 54 W. R. 306; 22 T. L. R. 247—Kekewich, J. Affirmed, 75 L. J. Ch. 658—C.A.

The client owed money to certain persons to whom he had given security. The solicitor on his behalf obtained the loan of a larger amount on the security, paid off the original creditors, and retained the balance on account:—*Held*, that the retention of this balance could not be treated as a part payment from which a promise to pay could be inferred. *Ib.*

The costs in question were really incurred for the benefit of all the creditors of a certain debtor, one of whom, recognising a moral obligation to contribute, sent 20*l.* to the solicitor:—*Held*, that this was in no sense a payment by the client from which a promise to pay could be inferred. *Ib.*

— **Payment by Agent on Account—Inference of Promise to Pay Balance.**—An agent who has authority to pay a debt of his principal has authority to promise to pay it; and where an agent acting within the scope of his authority makes a payment on account of a debt of his principal, and nothing more is said or done, a promise to pay the balance of the debt will be inferred so as to take the case out of the Statute of Limitations. *Hale, In re; Lilley v. Foad*, 68 L. J. Ch. 517; [1899] 2 Ch. 107; 80 L. T. 827; 47 W. R. 579—C.A.

Part Payment—Judgment—Levy of Part of Demand—Fi. Fa.—Co-debtors.]—Where a judgment was obtained in 1884 against A and B, and in 1886 part of the judgment debt was levied under an execution against A.—*Held*, that this was sufficient to keep the debt alive against A and B for a further period of twelve years, and that within such period the judgment creditor was entitled to an order for liberty to issue execution against B. *Brew v. Brew*, [1899] 2 Ir. R. 163—Q.B.D.

Partnership—Account containing Statute-barred Items—Payment on Account—Appropriation by Creditor—Promise to Pay.]—For many years F. & Co. had been employed as commission agents by E. & Co. to effect sales for them. The course of business was as follows: E. & Co. sent goods to the firm, who forwarded them to the purchasers, received the purchase-money, and accounted to E. & Co. for the same after deducting commission. On August 29, 1894, E. & Co. sent the firm a statement of account shewing a balance due to E. & Co. of 494*l.* 6*s.* 4*d.* This was arrived at by debiting F. & Co., first, with a series of items which, on the face of the account, had become due within six years from the date when the account was sent; and secondly, with certain items included in a "Consignment account." All the items under the heading "Consignment account" were in August, 1894, statute-barred with the exception of two. F. & Co. sent a cheque in September, 1894, for 300*l.* "on account," and stated that they would "thoroughly examine statements next week, and close up the affair altogether if possible." The 300*l.* so paid was by F. & Co. placed to the credit of the consignment account. Nothing further was done down to the death of one of the partners in F. & Co., against whose estate E. & Co. sought to prove for the balance due to them. The Statute of Limitations was relied on:—*Held*, that the existence of a fiduciary relation between the parties did not prevent the defence of the statute being set up. *Burdick v. Garrick* (39 L. J. Ch. 369; L. R. 5 Ch. 233) and *Soar v. Ashwell* ([1893] 2 Q.B. 390) distinguished. *Friend, In re*; *Friend v. Friend*, 66 L. J. Ch. 737; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139—Stirling, J.

Held further, that the appropriation by E. & Co. of the 300*l.* to the consignment account did not operate to take the case out of the statute, but that the payment was an acknowledgment by F. & Co. that there was pending between them and E. & Co. an account relating to the several items mentioned in the statement, including the consignment account, from which a promise to pay the balance of the account when ascertained ought to be inferred, and that consequently E. & Co. were entitled to prove in respect of the items in the consignment account. *Mills v. Fowkes* (8 L. J. C.P. 276; 5 Bing. N.C. 455) and *Nash v. Hodgson* (25 L. J. Ch. 186; 6 De G. M. & G. 474) distinguished. *Id.*

Action of Contract—Contract by Local Authority to Pay for Repair of Road if they were Liable—Action Instituted after Expiration of Six Months.]—The Public Authorities Protection Act, 1893, does not apply to actions for the price of goods sold and delivered or for work

and labour done. Where, therefore, owing to a landslip a portion of a road repairable by the defendant council fell on to the plaintiff's land and it was agreed between the council and the plaintiff that the latter should do the work of repairing the road, the question of liability for the repairs being left over, the plaintiff having done the repairs was held entitled to maintain an action for the cost, although more than six months had elapsed, inasmuch as section 1 of the Public Authorities Protection Act, 1893, had no application to such a case. *Milford Docks Co. v. Milford Haven Urban Council*, 65 J. P. 483—C.A.

3. SPECIALTY DEBTS.

Unclaimed Dividends—Reduction of Capital—Return of Moneys to Shareholders—Sanction of Court—Moneys not Claimed—Statutory Period of Limitation.]—The statutory period of limitation is twenty years in the case of dividends declared on ordinary shares in respect of which certificates have been issued under the seal of the company and referring in the usual way to the rules and regulations of the company, and also, in the case of moneys repayable to the shareholders under an order of the Court, sanctioning the reduction of capital by way of such repayment. *Smith v. Cork and Bandon Railway* (Ir. R. 5 Eq. 65) and *Drogheda Steam Packet Co., In re* ([1903] 1 Ir. R. 512), followed. *Artizans' Land and Mortgage Corporation, In re*, 73 L. J. Ch. 581; [1904] 1 Ch. 796; 52 W. R. 380; 12 Manson, 98—Byrne, J.

Deposit of Shares—Statute-barred Debt.]—The time at which a bar to an action for foreclosure arises under or by analogy to the Statute of Limitations is not that at which the personal remedy ceases, but that at which the remedy against the property which is the subject of the charge is taken away. *London and Midland Bank v. Mitchell*, 68 L. J. Ch. 568; [1899] 2 Ch. 161; 81 L. T. 263; 47 W. R. 602—Stirling, J.

There is no provision in any Statute of Limitations with reference to personal property similar to the provisions contained in the Real Property Limitation Act, 1833, whereby the title to land is extinguished after a certain period; so that, though a debt may be barred after six years by the Limitation Act, 1623, in the sense that no personal action can be brought to recover it, yet the debt is not at an end and a mortgagee's right to the property is not destroyed. *Id.*

4. DAMAGES.

(a) *Directors' Liability Act, 1890, under.*

Untrue Statement in Prospectus of Company.]—An action against directors and promoters of a company under the Directors' Liability Act, 1890, is not an action for "penalties, damages, or sums of money given to the party grieved" by a statute within the meaning of section 3 of the Civil Procedure Act, 1833, and is not subject to the limitation of two years imposed by that section. *Thomson v. Glanmorris (Lord)*,

69 L. J. Clk. 337; [1900] 1 Ch. 718; 82 L. T. 277; 48 W. R. 488; 8 Manson, 51—C.A.²

Per LINDLEY, M.R., and VAUGHAN WILLIAMS, L.J.—An action under the Directors' Liability Act, 1890, would under the old forms of pleading have been an action on the case for breach of duty, and by analogy to the old actions the period of limitation would be six years under section 3 of the Limitation Act, 1623. *Ib.*

Shareholder's Action for Compensation—Directors' Liability Act, 1890.]—The shareholder's cause of action under the Directors' Liability Act, 1890, arises when the shares are subscribed for. *Ib.*

Directors—Breach of Trust.]—See *Whitwam v. Watkin*, *ante*, COMPANY, col. 858.

(b) *Public Authorities Protection Act.*

Trustees of Loan Fund Society.]—The Public Authorities Protection Act, 1893, only applies to acts done and to neglects and defaults in the execution, or intended execution, of an Act of Parliament, or of a public duty or authority. It has no application in the case of trustees of a Loan Fund Society sued for breach and neglect of their duties as such trustees. *O'Brien v. Mitchelstown Loan Fund*, [1903] 1 Ir. R. 232—C.A.

Prance v. Sympton (Kay, 678), *Sidwell v. Mason* (26 L. J. Ex. 407; 2 H. & N. 306), and *Skeat v. Lindsay* (46 L. J. Ex. 249; 2 Ex. D. 814) followed. *Buckmaster v. Russell* (10 C. B. (N.S.) 745) approved. *Ib.*

Continuance of Injury or Damage—Public Authorities Protection Act, 1893.]—An action for personal injuries sustained by a person through the misfeasance of a local authority must be commenced within six months from the time of the accident; in such a case there is no continuance of injury or damage within the meaning of section 1 (a) of the Public Authorities Protection Act, 1893. *Carey v. Bernondsey Borough Council*, 67 J. P. 447; 2 L. G. R. 219; 20 T. L. R. 2—C.A.

Protection of Public Authorities.]—See PUBLIC AUTHORITIES PROTECTION.

5. REAL PROPERTY.

Accrual of Right of Action—Trustee—Cestui que Trust of Lessee—Accretion to Demised Property.]—The owner of two adjoining plots of land (called herein the foundry plot and the stable plot) in 1819 granted a lease of the former to one J. M. for ninety-nine years. In 1831 he granted to J. M. a similar lease for ninety-nine years of the stable plot, and J. M. used a strip of the stable property as a yard, in which he stored articles from the foundry. From 1843 the strip was always occupied with the foundry as a storage yard, and there was no access from it to the other part of the stable property except through the foundry. In 1842 J. M. assigned both leaseholds to a trustee to hold on such trusts as he should by deed appoint, and by a deed dated November 1846 he appointed the piece of land whereon he carried on his business

of an iron foundry upon trust to pay the rents and profits to his son John M., or to permit him to occupy the same during his life or until he should assign his interest, and afterwards upon trust to assign the same to the children of John M. He made no express appointment of the stable property, but appointed the residue of the properties upon trust to divide the rents and profits between a grandson and two daughters and afterwards for their children. J. M. died in 1848, and John M. carried on the foundry business, and died in 1853. His widow then carried it on, and afterwards his daughter Mrs. T. In 1856 both leases were renewed, the new leases being granted to the settlement trustees. John M. and afterwards his widow retained possession of the strip of the stable plot without payment of rent to the trustees. Subsequently to 1856 Mrs. T. succeeded to the interests of her brothers in the foundry property and carried on the business, occupying and using the disputed strip of land, and in 1890 a new lease of the foundry plot was granted to her by the old description, and she thereupon sold it to the defendants. In 1893 a partition action was commenced, and it was ordered that the lease of the stable property should be sold, and, the trustee having in 1894 taken a renewed lease, it was sold in 1896 to S., who afterwards took a new lease, and in 1901 assigned it to the plaintiffs:—*Held*, that the plaintiffs were entitled to recover possession of the strip of land, notwithstanding that the defendants or their predecessors had been in undisputed possession of it for more than fifty years, inasmuch as no right of entry had accrued to the lessor until the surrender of the stable lease in 1894, and it had passed under the subsequent lease of the stable plot. *East Stonehouse Urban Council v. Willoughby*, 71 L. J. K.B. 873; [1902] 2 K.B. 318; 87 L. T. 366; 50 W. R. 698—Channell, J.

Acts of Possession—Dispossession of True Owner—Right of Way—Equivocal Acts.]—In order to acquire a title to land under the Real Property Limitation Act, 1833, it is necessary to prove discontinuance of possession by the true owner or dispossession of the true owner. *Littledale v. Liverpool College*, 69 L. J. Ch. 87; [1900] 1 Ch. 19; 81 L. T. 564; 48 W. R. 177—C.A.

When dispossession has to be inferred from equivocal acts, the intention with which the acts are done is all-important. *Ib.*

The plaintiffs having a right of way for agricultural purposes over a strip of grass land belonging to the defendants leading from a public highway to the plaintiffs' field, put up gates at each end of the strip, which they kept locked, and grazed the grass and clipped the hedges of the strip:—*Held*, that these acts, being compatible with the intention of protecting and exercising the right of way rather than that of excluding the true owner, were insufficient to establish the plaintiffs' title to the strip of land under the Real Property Limitation Act, 1833. *Ib.*

Copyholds—Custom of Manor—Title—Possession—Married Woman—Disability—Husband Suing in Right of Wife—Will—Construction—

"Estate."—Upon the death of an intestate in 1869, the copyholds of which he died possessed passed by the custom of the manor to his widow, and not to his eldest son. The intestate's widow died in 1870, having by her will given all the share and proportion of her late husband's estate to which she was entitled on his decease to be equally divided between her two daughters, one of whom was the plaintiff M. H.; and the testatrix stated that this provision was made in lieu of the various copyhold and freehold lands of her late husband's, which descended to her son on the intestacy of her husband. At that time P. H. B., the eldest son of the intestate, was a minor, and was believed by every one to be entitled to the copyholds. In 1870 the husband of M. H. and a co-plaintiff entered into possession of the copyholds, and collected the rents until P. H. B. came of age in 1878, when he accounted to him and gave up possession, having in the meantime procured an enfranchisement in his favour. In 1888 it was first discovered that the widow was the customary heir of this property, which had been in the meantime enfranchised. P. H. B. remained in possession until his death in 1890, having by his will given all his real estate to the defendants upon trust for the two children of the plaintiffs. In September, 1901, M. H. and her husband in her right brought an action claiming declarations to establish the right of M. H. to a moiety of this property as devisee under the widow's will:—*Held*, that both plaintiffs were barred by the Real Property Limitation Act, 1874, inasmuch as P. H. B. had been in receipt of the rents and profits of the property since 1870, more than thirty years before action brought; and *semble*, that as the widow had no intention of passing this real estate, which she thought had descended to her son, the gift in her will of all her share and proportion of her late husband's estate was ambiguous and not sufficient to pass this property, having regard to the context. *Hounsell v. Dunning*, 71 L. J. Ch. 259; [1902] 1 Ch. 512; 86 L. T. 382—Joyce, J.

Foreshore—Dispossession—Acts of Ownership—Intention to Exclude Owner—Foreshore.—The predecessor in title of the defendant, who was the owner of land adjoining the foreshore, which had been conveyed by the Crown to the plaintiff more than twenty years before action brought, placed rocks and piles upon a certain part of the foreshore belonging to the plaintiff for the purpose of protecting a house upon his land from the encroachment of the sea:—*Held*, that the question of dispossession was one of intention; that the rocks were placed upon the foreshore by the defendant's predecessor, not in order to assert a title to the ownership of the soil, but as ancillary to the use by the defendant of his own property—namely, for its protection from the sea; that the plaintiff had never been dispossessed, and had therefore a right to the land in question, subject to the right of the defendant to an easement over the land for the purpose of protecting his house from the sea by means of rocks and piles placed on the land. *Philpot v. Bath*, 21 T. L. R. 634—C.A.

Tenancy at Will—Entry by Landlord to Repair.—Where a tenant at will remains in possession of the premises for more than twelve

years after the expiration of the first year of the tenancy, but pays no rent, and the landlord enters from time to time to do repairs, there being no evidence whether such entry was made with or against the consent of the tenant, the entry does not operate so as to constitute a resumption of possession by the landlord, and thereby to determine the tenancy at will, and the tenant therefore acquires a statutory title to the premises by virtue of section 7 of the Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1874. *Lynes v. Snaith*, 68 L. J. Q.B. 275; [1899] 1 Q.B. 486; 80 L. T. 122; 47 W. R. 411—D.

Determination—Creation of Fresh Tenancy.—A tenancy at will is determined by a mortgage of the premises by the landlord, such mortgage being brought to the knowledge of the tenant. Where the tenant remains in possession, the new tenancy, necessary to prevent the Statute of Limitations running against the landlord, is sufficiently created by estoppel, and the fact that he had by the mortgage parted with his reversion is immaterial. *Jarman v. Hale*, 68 L. J. Q.B. 681; [1899] 1 Q.B. 994—D.

Discontinuance of Possession—User of Land.—In 1819 a portion of the Bull of Clontarf, a sandy tract in Dublin Bay, was taken from V.'s predecessor by the Dublin Ballast Board, after an inquisition, and an award was made, containing a map on which the boundary between the land taken and V.'s land was stated. Some years afterwards three wooden posts were put by an officer of the board in a line considerably outside the boundary, as shewn on the map. As these posts decayed two walls, twenty-one feet long by eight feet high, were built on their site. These were the only physical marks of a boundary. V.'s cattle grazed beyond them without interruption. In 1865 a portion of the land between the boundary on the map and the walls, and which had been previously fenced off, was leased by the board to the Admiralty. In 1876 and 1884 the question as to the correct boundary was raised between the board and V. In 1884 V. commenced an action against the board, claiming damages for trespass, and an injunction. This action was never brought to a hearing:—*Held*, that there had been no discontinuance of possession by V., and that he was entitled to the land between the boundary on the map and the posts, except that portion leased to the Admiralty. *Vernon's Estate, In re*, [1901] 1 Ir. R. 1—Ross, J.

Possessory Title—Restrictive Covenants—Extinction—Notice—Constructive Notice.—A "squatter," who gains a possessory title to land by virtue of twelve years' uncontested adverse occupation, is not relieved from the burden of restrictive covenants affecting the land merely by lack of notice of the existence of such covenants during the period of his adverse occupation. Restrictive covenants constitute an equitable interest in the land, and this equitable interest is prior in validity to all equities on the land subsequently created, including the equity of a subsequent purchaser for value. The question of notice is only material as binding the conscience of a purchaser for value so as to prevent him from setting up possession of the legal estate. As a "squatter," however,

cannot even set up the preliminary plea of purchaser for value, it becomes immaterial, in this case, further to consider whether he can or cannot set up the additional plea of possession of the legal estate, and in his case, accordingly, it is also immaterial to consider whether he has or has not had notice of the existence of restrictive covenants. *Nesbit and Potts's Contract, In re*, 74 L. J. Ch. 310; [1905] 1 Ch. 391; 92 L. T. 448; 53 W. R. 297; 21 T. L. R. 261—Farwell, J.

Restrictive covenants are not extinguished by virtue of section 34 of the Real Property Limitation Act, 1833. *Ib.*

Subsequent purchasers for value from the "squatter" are not protected against restrictive covenants by lack of actual notice, unless they shew that they would not have been affected with actual notice had they searched the title for the usual period of forty years. It is not necessary for those who claim the benefit of the covenants to shew that the title, if searched, would have affected the purchaser with actual notice; the burden, on the contrary, is on the purchaser to prove the negative. *Ib.*

Tenant of Land—Adverse Possession—Arrears of Rent.—A testatrix gave her real and personal property to trustees upon trust for sale and to hold the proceeds for her four children; and she declared that all moneys owing to her at her death by any child, for rent or otherwise, should be taken towards satisfaction of that child's share. The testatrix had let a farm at the rent of 80*l.* a year to a son, who had paid no rent for over twelve years:—*Held*, that the title of the testatrix to the land having been extinguished by the Real Property Limitation Acts, all her rights as reversioner had come to an end, and no rent remained owing in respect of the land which could be deducted from the son's share. *Jolly, In re; Gathercole v. Norfolk*, 69 L. J. Ch. 661; [1900] 2 Ch. 616; 83 L. T. 118; 48 W. R. 657—C.A.

Bailiff for Infants—Change of Possession.—P. C., the owner of a farm held under a yearly tenancy, died intestate in 1864, leaving a widow and four children, minors, in possession. In 1866 the widow married T. M., who was accepted as tenant of the farm by the landlord. No administration was ever taken out to P. C. All of the children of P. C. left the farm prior to 1883; none of them ever returned, or asserted a claim to a share in P. C.'s assets, and no acknowledgment of title was ever made to any of them from the time they left. T. M. died in 1901, having bequeathed the farm to his widow for life, and after her death to his son, the vendor. In 1902 the widow assigned the farm to the vendor freed from her life estate, and in 1907 the vendor entered into a contract for sale of the farm to the purchaser, who required the interests of the children of P. C. to be accounted for. This the vendor refused to do:—*Held*, on the hearing of a vendor and purchaser summons, that, although the widow of P. C., and subsequently T. M., entered into possession of the farm as to two-thirds thereof as bailiffs for the minor children, their position as such was changed by the departure of the children without making any claims to their

shares; that the Statute of Limitations began to run against each child who left the farm on his or her attaining twenty-one years of age, and that, on proof that no claim had ever been made by, or acknowledgment given to, any of the children, a good title would be shewn. *Maguire and McClelland's Contract, In re*, [1907] 1 Ir. R. 393—C.A.

Next-of-kin Remaining in Possession of Chattel Real—Acquisition of Beneficial Interest—Joint Tenancy.—Where some of the next-of-kin of a tenant who died intestate continued in possession of his holding for a period sufficient to confer title under the Statute of Limitations,—*Held*, that they had thereby acquired a beneficial title under the statute, and that the character of the title was a joint tenancy. *Coyle v. M'Fadden*, [1901] 1 Ir. R. 298—Ross, J.

Part Payment—Payment under Foreign Bankruptcy.—A part payment to take a case out of section 8 of the Real Property Limitation Act, 1874, must be such a payment as implies an acknowledgment of liability and a promise to pay the residue; and therefore payment in bankruptcy proceedings is not sufficient to take a case out of the section. *Davies v. Edwards* (21 L. J. Ex. 4; 7 Ex. 22), *Topping, Ex parte* (34 L. J. Bk. 44; 4 De G. J. & S. 551), followed. *Semble, Jackson v. Fairbank* (2 H. Bl. 340) overruled. *Taylor v. Holland*, 71 L. J. K.B. 278; [1902] 1 K.B. 676; 86 L. T. 228; 50 W. R. 558—Jelf, J.

Payment "in the meantime."—A payment made more than twelve years after the cause of action first accrued, but less than twelve years before action brought, is a payment "in the meantime" within the meaning of section 8 of the Real Property Limitation Act, 1874, which will prevent the right of action being barred. *Clifden (Viscount), In re; Annaly v. Agar Ellis*, 69 L. J. Ch. 478; [1900] 1 Ch. 774; 82 L. T. 558; 48 W. R. 428—Byrne, J.

Land Tax—Redemption by Lessee—Money Paid as Consideration—Annual Sum Payable by way of Interest—Sum of Money "charged upon" Land—"Rent."—A lessee for years of land, under a lease which contained a covenant by the lessee to pay the land tax during the term, in 1874 redeemed the land tax thereon, and the land thereupon became chargeable under section 123 of the Land Tax Redemption Act, 1802, with the amount of the money paid as the consideration for the redemption, and with the payment of a yearly sum by way of interest thereon equal in amount to the land tax redeemed, for the benefit of such person, his executors, administrators, and assigns. In 1900 an assignee of the benefits arising under the certificate of redemption sued an assignee of the lease of the land, in whom the lease became vested in 1885, for one yearly sum payable in accordance with the section. No payment or acknowledgment in respect of the tax had been made or given by the defendant to the plaintiff or his predecessors in title:—*Held*, that either the yearly sum payable by way of interest on the consideration money was "rent" within the meaning of section 1 of the Real Property Limitation Act, 1874, or the money paid as the consideration for the redemption of the tax was "charged upon" the land within

the meaning of section 8 of that Act, and in either case the plaintiff's claim was barred. *Skene v. Cook*, 71 L. J. K.B. 446; [1902] 1 K.B. 682; 86 L. T. 319; 50 W. R. 506—C.A.

Land—Property—Possession.—See *Cussons, Lim., In re*, 73 L. J. Ch. 296; *ante*, COMPANY.

6. MORTGAGES AND CHARGES.

Money Secured by Charge upon or Payable out of Land.—The effect of section 8 of the Real Property Limitation Act, 1874, is to take out of section 3 of the Limitation Act, 1623, and for all purposes, all actions of debt secured by mortgage or otherwise charged upon or payable out of land, including cases of security by lien. *Barnes v. Glenton*, 67 L. J. Q.B. 731; [1898] 2 Q.B. 223; 79 L. T. 94; 47 W. R. 13—Lord Russell of Killowen, C.J.

Mortgage of Reversionary Estate in Realty—Action on Covenant—Period of Limitation.—An action by a mortgagee against a mortgagor on the covenant to repay in a mortgage of a reversionary estate in realty is within section 8 of the Real Property Limitation Act, 1874, although the estate is still reversionary at the date of the action. Therefore, in such an action the period of limitation is twelve years. *Sutton v. Sutton* (52 L. J. Ch. 333; 22 Ch. D. 511) followed. *Kirkland v. Peatfield*, 72 L. J. K.B. 355; [1903] 1 K.B. 756; 88 L. T. 472; 51 W. R. 544—Wright, J.

Foreclosure—Recovery of Land—Payment of Interest by Mortgagor or His Agent—Person Bound as between Himself and Mortgagor to Pay.—The words in section 8 of the Real Property Limitation Act, 1874, saving the rights of a mortgagee where interest has been paid "by the person by whom the same shall be payable or his agent," include any person who as between himself and the mortgagor is bound to pay the interest. *Bradshaw v. Widdrington*, 71 L. J. Ch. 627; [1902] 2 Ch. 430; 86 L. T. 726; 50 W. R. 561—C.A.

A father executed a mortgage to secure to the mortgagee the repayment of a sum of money with interest which he had borrowed for the benefit of his son. The son was not a party to the mortgage-deed, but immediately on the receipt of the money from the father he executed a bond conditioned to be void on the payment by him to the father of a sum equal to the principal sum secured by the mortgage and interest. By an arrangement between the father and the son the interest from time to time falling due on the bond was paid by the son to a firm of solicitors who acted as solicitors both for the mortgagee and the father and the son, and was by them debited in their books to the son, and was actually paid by them to the person from time to time entitled to the interest falling due under the mortgage. Subsequently to the date of the mortgage the mortgagor sold the property "free from incumbrances" to A., who continued in possession for more than twelve years without notice of the mortgage, without himself paying any interest on the mortgage, and without notice of the original arrangement between the mortgagor and his son:—*Held*, that the payments of

interest by the son were made "by the person by whom the same shall be payable" within the meaning of section 8 of the Real Property Limitation Act, 1874, and that the mortgage debt was thereby kept alive. *Ib.*

"Particular estate"—"Future estate or interest"—Reversion Expectant on a Term of Years—Surrender of Term—Accrual of Right of Entry.—A reversion in fee-simple expectant upon a lease for years is not a "future estate" within the meaning of section 2 of the Real Property Limitation Act, 1874. Where a lessee surrenders his lease to the lessor before the expiration of the term, the surrender does not affect a title acquired against the lessee by a third person under the Real Property Limitation Act, 1874. Therefore in such a case the right of entry does not accrue to the lessor until the expiration of the time for which the term was granted. *Walter v. Yalden*, 71 L. J. K.B. 693; [1902] 2 K.B. 304; 87 L. T. 97; 51 W. R. 46—D.

Foreclosure Action by Puisne Mortgagee—Entry of Prior Mortgagee during Running of Statutory Period—Future Estate or Interest—Suspension of Period.—The existence of a prior mortgage at the date of the creation of a mortgage does not make the mortgagor's interest a future estate or interest for the purpose of determining the time at which the statutory period of limitation commences to run against the puisne mortgagee; nor is the running of that period suspended by the prior mortgagee's entry into possession of the mortgaged property. *Dictum* of ROMER, J., in *Kibble v. Fairthorne* (64 L. J. Ch. 184; [1895] 1 Ch. 219) not followed. *Johnson v. Brock*, 76 L. J. Ch. 602; [1907] 2 Ch. 533; 97 L. T. 234—Parker, J.

Action for Recovery of Land—Mortgage—Payment of Interest by Mortgagor—Mortgagee and Trespasser.—The Real Property Limitation Act, 1837, is not confined to proceedings between a mortgagee and a mortgagor, or those claiming under him, but applies in favour of a mortgagee against a person claiming to have acquired a title by possession under the Statutes of Limitation, although such person may have acquired a good title as against the mortgagor and those claiming under him, provided that the mortgage be an existing one, and was executed before the commencement of the possession on which the person claiming to have acquired a title relies. *Ludbrook v. Ludbrook*, 70 L. J. K.B. 552; [1901] 2 K.B. 96; 84 L. T. 485; 49 W. R. 465—C.A.

Payment of Interest by Person Liable to the Mortgagor to Pay—Effect of.—The payment to the mortgagee of interest due upon the mortgage debt by a person who, as between himself and the mortgagor, is bound to make the payment, is a sufficient payment within section 8 of the Real Property Limitation Act, 1874, to prevent time running against the mortgagee under the statute. *Bradshaw v. Widdrington*, 49 W. R. 698—Buckley, J.

Payment by Person Liable to Pay "or his agent."—In the case of a mortgage of land and of a policy of assurance on the life of the mortgagor, the payment by the office issuing the policy of the surrender value of the policy to the mortgagee is not a payment by the

agent of the person liable to pay. *Harty v. Davis* (13 Ir. L. R. 23) followed. *Conlan's Estate, In re* (29 L. R. Ir. 199), dissented from. *Ib.*

Payment of Interest by Devisee—Effect of Payment—Other Specifically Devised Real Estate—Right to Administration.—Where real estate has been specifically devised subject to a mortgage containing the usual covenants for payment of principal and interest, continued payment of interest by the devisee prevents the Real Property Limitation Act, 1874, s. 8, from taking effect in favour of other specifically devised real estate of the testator not subject to the mortgage, and consequently, if the mortgaged property proves insufficient, the mortgagee will in respect of his debt, notwithstanding the lapse of time, be entitled to an order for the administration of the whole of the testator's real estate. *Lacey, In re; Howard v. Lightfoot*, 76 L. J. Ch. 316; [1907] 1 Ch. 330; 96 L. T. 306—C.A.

Roddam v. Morley (26 L. J. Ch. 438; 1 De G. & J. 1) and *Leahy v. De Moleyns* ([1896] 1 Ir. R. 206) applied. *Dickinson v. Teasdale* (32 L. J. Ch. 37; 1 De G. J. & S. 52) and *Coope v. Cresswell* (36 L. J. Ch. 114; L. R. 2 Ch. 112) discussed and not followed. *Bradshaw v. Widdrington* (71 L. J. Ch. 627; [1902] 2 Ch. 430) considered. *Ib.*

Payment of Interest by Continuing Trustees—Liability of Retired Trustee.—A trustee, together with his co-trustees, in 1882 executed a declaration of trust (in which they were not described as trustees) that certain moneys advanced to them should be a first charge upon certain mortgage securities transferred to the persons making the advance. There was no covenant, express or implied, for repayment of the money advanced. The trustee then retired from the trust and made no further payment on account or other acknowledgment of the debt. Payments of interest were made by the continuing trustees till 1896. In 1897 an action was brought against all the trustees to recover the balance of the loan and interest:—*Held*, that the action against the trustee who had retired was barred by section 8 of the Limitation Act, 1623. *Barnes v. Glenton*, 67 L. J. Q.B. 731; [1898] 2 Q.B. 223; 79 L. T. 94; 47 W. R. 13—Lord Russell of Killowen, C.J.

Administration of Real and Personal Estate—Claim upon Covenant in Mortgage-deed—Amount of Interest Recoverable.—In 1858 A borrowed a sum of money from the trustees of a settlement on the security of a charge on the lands of X. A having died in 1887, a decree for the administration of his real and personal estate was made in an action brought by B, his executrix, against C, his eldest son and one of his next-of-kin. No claim was made by the mortgagees in the action, which by consent was not proceeded with. Interest on the mortgage debt was paid out of the lands of X down to 1895 by B who died in 1892, and afterwards by C, who was executor of B and owner of the charge. The lands having proved insufficient to pay the interest, application to revive the action was made by the trustees of the settlement, in order to prove for principal and interest under the covenant.

C, the defendant, objected that the claim was barred by the Statute of Limitations:—*Held*, that, although the decree did not prevent the statute from running, the payment of interest kept the debt alive; but that only six years' arrears of interest was recoverable, it being a sum of money chargeable upon land within 3 & 4 Will. 4, c. 27, s. 42. An order was accordingly made to continue the action. *Thompson v. Hurly*, [1905] 1 Ir. R. 588—M.R.

"Acknowledgment of the right" to the Mortgage Money—Statutory Declaration by Mortgagor—Further Charge—"Present right to receive."—A mortgage of land was executed in 1875 to secure an advance, and in 1879 a deed of further charge on the land was executed as security for a further advance. The latter deed recited the mortgage of 1875, and that the date fixed for redemption had passed and contained a covenant by the mortgagor that he would, upon receipt of notice as mentioned in the mortgage of 1875, pay to the mortgagee the money advanced, with interest, and it declared that the power of sale and other powers contained in the earlier deed should extend to and be a security for the further advance and interest thereon. No interest was ever paid on these mortgages. In 1899 the mortgagee became of unsound mind, and his next-of-kin petitioned for an enquiry in lunacy and issued a summons for directions. Upon that summons the mortgagor made a statutory declaration as to the mortgage debts. The mortgagee having died, his executors sued the mortgagor to enforce the mortgages:—*Held*, that the statutory declaration was not an "acknowledgment of the right" to the money within section 8 of the Real Property Limitation Act, 1874, it being equally consistent with the intention to shew that the debt was statute-barred, nor was it given "to the person entitled thereto or his agent"; that, even if it was an acknowledgment, it was not effectual to take the case out of the statute, because at the time it was made both the remedy against the land and the personal remedy on the covenant were gone; and that, as regards the deed of further charge, there existed when it was executed a "present right to receive" the mortgage money within the meaning of section 8; and that therefore the action was statute-barred. *Hervey v. Wynn*, 22 T. L. R. 93—Swinfen Eady, J.

Protection of Security—Receiver Appointed by Mortgagee after Mortgagor's Death—His Authority to Pay Instalments of a Debt Incurred by Mortgagor—Effect of Such Payment.—Where a person has created a charge on a business to secure an annuity, and after his death the annuitant in exercise of a power given by reference to a mortgagee's power under the Conveyancing Act, 1881, appoints a receiver and directs him within the terms of the power "to manage and carry on the business as he may think fit," the receiver becomes the agent of the mortgagor's personal representative for the purpose of managing and carrying on the business. He has power to pay to a creditor the instalments of a debt incurred by the mortgagor in carrying on the business. An unconditional payment of such an instalment by the receiver amounts to an acknowledgment on the part of the mortgagor's personal representative

of the existence of the debt, and in the absence of rebutting circumstances raises the implication of a new promise to pay so as to prevent the Statute of Limitations barring the creditor's claim. *Hale, In re; Lilly v. Foad*, 49 L. T. 468—Byrne, J.

Arrears of Interest on Mortgage—Bar by Lapse of Time—Acknowledgment by One of Two Executors and Trustees.]—An acknowledgment in writing given to a mortgagee, by one only of two executors and trustees of the testator's real estate and residuary personal estate, that more than six years' arrears of interest are due upon the mortgage debt, is not sufficient to take the case out of the Real Property Limitation Act, 1833, s. 42, as regards the real estate, so as to entitle the mortgagee, in an action for foreclosure in which he does not ask for payment out of the personal assets, to recover more than six years' arrears. *Semble*, such an acknowledgment would be effectual in the case of a claim against the personal assets. *Bolding v. Lane* (32 L. J. Ch. 219; 1 De G. J. & S. 122), *Chinery v. Evans* (11 H.L. C. 115), *Putnam v. Bates* (3 Russ. 188), *Fordham v. Wallis* (22 L. J. Ch. 548; 10 Hare, 217), and *Coope v. Cresswell* (36 L. J. Ch. 114; L. R. 2 Ch. 112) applied. *Astbury v. Astbury*, 67 L. J. Ch. 471; [1898] 2 Ch. 111; 78 L. T. 494; 46 W. R. 536—Stirling, J.

Presumption of Payment of Interest—Owner of Portion of Lands being also Owner or Tenant for Life of Mortgage.]—A fictitious payment presumed to have been made by the owner of an undivided portion of lands charged with a mortgage to himself, as owner or tenant for life of the mortgage, is not sufficient to prevent the Statute of Limitations from running in favour of a third party, owner of the remaining undivided portion. *Finnegan's Estate, In re*, [1906] 1 Ir. R. 370—Ross, J.

Equity of Redemption—Freeholds, Copyholds, and Policy of Insurance.]—Where real property and a policy of insurance have been included in one mortgage-deed, to secure one indivisible amount, and all subject to one and the same proviso for redemption, and the mortgagee has been in possession of the property for more than twelve years without giving any acknowledgment of the title of the mortgagor, so that the right of the mortgagor to redeem the land has become barred by the Real Property Limitation Act, 1874, the right to redeem the policy will also be barred. *Charter v. Watson*, 68 L. J. Ch. 1; [1899] 1 Ch. 175; 79 L. T. 440; 47 W. R. 250—Kekewich, J.

Will—Money Charged on Land—Contribution between Specific and Residuary Devisees—Unity of Possession—Presumption of Payment of Interest on Charge by Tenant for Life.]—A testator devised his real estate to trustees upon trust to sell and to pay the income of the proceeds of sale to his wife during her life, except as to certain specified closes, which he devised to his wife for life, with remainders over. The whole of the real estate was subject to a charge created by the testator's predecessor in title; and in 1865 the trustees sold some of the real estate devised to them by the will, and out of the proceeds of sale paid off the charge. The widow received the income of the residue of the proceeds of sale, and also the rents of the unsold

land (including the specifically devised closes) until her death in 1895:—*Held*, that as the widow was not liable to pay and could not be presumed to have paid any interest on the charge, and no acknowledgment of liability had been given, the claim of the residuary devisees to require contribution from the specific devisees towards payment of the charge was barred by the Real Property Limitation Act, 1874, s. 8. *England, In re; Steward v. England* (65 L. J. Ch. 21; [1895] 2 Ch. 820), followed. *Allen, In re; Bassett v. Allen*, 67 L. J. Ch. 614; [1898] 2 Ch. 499; 79 L. T. 107; 47 W. R. 55—North, J.

Mortgage—Right of Action Barred—Money Paid into Court—Payment out to Mortgagor.]—See *Hazeldine's Trusts, In re*, 76 L. J. Ch. 416; *post*, MORTGAGE.

7. LEASEHOLDS.

Person in Possession of—Effect of Possession as against Lessee.]—The effect of the Statute of Limitations upon the position of a person in possession of leaseholds (not an assignee) is not to transfer to him the interest of the lessee, and make him bound by the covenants in the lease, but merely to give him the right of possession during the remainder of the lease against the lessee or those claiming under him. *Tichborne v. Weir* (67 L. T. 735) followed. *O'Connor v. Foley*, [1905] 1 Ir. R. 1—M.R.

Next-of-Kin remaining in Possession.]—The next-of-kin of an intestate, who remain on in possession of chattels real without taking out administration, acquire, under the Statute of Limitations, a joint tenancy in the shares of other next-of-kin who have remained out of possession for more than twelve years, although, in respect of their own original shares, they hold as tenants in common. *Smith v. Savage*, [1906] 1 Ir. R. 469—Barton, J.

Executor de Son Tort—Chattels Real—Next-of-Kin—Administrator.]—A person who has gone into possession of chattels real of a deceased, as executor *de son tort*, and remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, rely on the Statute of Limitations in answer to an action for the recovery of the lands brought by a person taking out administration to the deceased. *Doyle v. Foley*, [1908] 2 Ir. R. 95—K.B.D.

8. LEGACIES AND PERSONAL PROPERTY.

Action to Recover Legacy—From what Date Statute begins to Run.]—In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death. *Waddell v. Harshaw*, [1905] 1 Ir. R. 416—C.A.

Will—Express Trust.]—A testator bequeathed everything he possessed to his wife and children, and appointed his wife sole executrix. The plaintiff, who was the sole surviving child of the testator, attained twenty-one in 1876; and the Court found as a fact that she was told by her mother of her father's will, and had received a part of her share thereunder. In 1903 the plaintiff brought an action against

the executors and trustees of her mother, who died in 1885, and claimed a declaration that she was entitled to all the estate of her deceased father, and for an account:—*Held*, that what the plaintiff claimed was a legacy, and her mother was not an express trustee for her. The action was therefore barred by section 8 of the Real Property Limitation Act, 1874. *Mackay, In re; Mackay v. Gould*, 75 L. J. Ch. 47; [1906] 1 Ch. 25; 93 L. T. 694; 54 W. R. 88—Kekewich, J.

Administration—Executors—Right of One only of Several Executors to Receive and Give Discharge—Recovery of Fund.—The Law of Property Amendment Act, 1860, which, by virtue of section 13, begins to operate as a statute of limitations when “a present right to receive” personal estate of any person dying intestate “shall have accrued to some person capable of giving a discharge for or release of the same,” postulates not only a capability of giving a discharge, but a right to receive the legacy capable of being established by proceedings at law. A claim, therefore, to recover a fund is not barred by the statute, although made long after the twenty years thereby provided, where the person to be sued is a co-executor of the person having the “present right” to sue, such latter person being unable to recover possession of the fund from his co-executor into his own hands by an action. *Pardoe, In re; M’Laughlin v. Penny*, 75 L. J. Ch. 161; [1906] 1 Ch. 265; 94 L. T. 88; 54 W. R. 210—Kekewich, J. Reversed on facts, 75 L. J. Ch. 748; [1906] 2 Ch. 340; 95 L. T. 512—C.A.

9. OTHER MATTERS.

Adverse Possession—Will.—*See* ESTOPPEL.

Charge on Land.—*See* MORTGAGE.

Devastavit.—*See* EXECUTOR.

Fine Arbitrary.—*See* COPYHOLD.

Guarantee—Continuing—Advances More than Six Years before Action.—*See* PRINCIPAL AND SURETY.

Heir-at-Law—Next-of-Kin.—*See* TRUST AND TRUSTEE.

Husband, Advance to by Wife’s Trustees.—*See* HUSBAND AND WIFE.

Land Purchased for Undertaking—Adverse Possession by Stranger.—*See* Midland Railway v. Wright, 70 L. J. Ch. 411; *post*, RAILWAY.

Maintenance of Pauper Lunatic—Recovery of Arrears for.—*See* POOR LAW.

Mines—Wrongful Working of gives no Title to Seam of Coal.—*See* MINES AND MINERALS.

Nullum Tempus Act.—*See* COLONY.

Restrictive Covenants—Possessory Title to Land.—*See* VENDOR AND PURCHASER.

Trust—Breach of.—*See* TRUST AND TRUSTEE.

Vendor’s Lien—Interest.—*See* VENDOR AND PURCHASER.

LITERARY AND SCIENTIFIC INSTITUTION.

Literary Institution—Public or Private Institutions.—The Literary and Scientific Institutions Act, 1854, is not confined to institutions of a public or charitable nature, but includes private institutions established for the purposes of the Act. *Russell Literary and Scientific Institution, In re; Figgins v. Baghino*, 67 L. J. Ch. 411; [1898] 2 Ch. 72; 78 L. T. 588—North, J.

A literary and scientific institution founded and established by the issue of transferable shares, entitling their holders to the property of the institution, but bearing no dividend, was held an institution “founded or established by the contributions of shareholders in the nature of a joint-stock company” so as to escape the operation of section 30 of the Literary and Scientific Institutions Act, 1854, which forbids a distribution of the property among the members on a dissolution. *Id.*

Scientific Institution—Dissolution—Distribution of Property.—A horticultural society was constituted in 1844 under a deed which provided that any person who paid a certain fixed sum to the funds of the society should be a member and entitled to one share in the society, which was to be transferable by him or his legal personal representatives, and that each member should pay a fixed annual subscription, and should be entitled to admission for himself and family to the gardens of the society, but should not be entitled to any dividend or bonus, nor to any interest in the property of the society except the right to participate in the profits on a dissolution:—*Held*, that the society came within the exception in section 30 of the Literary and Scientific Institutions Act, 1854, and that upon dissolution the property of the society became distributable among the members. *Jones, In re; Clegg v. Ellison*, 67 L. J. Ch. 504; [1898] 2 Ch. 88; 78 L. T. 639; 46 W. R. 577—Stirling, J. *And see* col. 314.

Power of Trustees to Mortgage.—*See* Mansel v. Cobham (Viscount), 74 L. J. Ch. 327; [1905] 1 Ch. 568; 92 L. T. 230.

LLOYD’S POLICY.

See INSURANCE (MARINE), col. 1041.

LOCAL GOVERNMENT.

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- 11. *Appeals*, 1428.
- 12. *Other Matters*, 1428.

1. STATUTES.

Adulteration.—See *Food and Drugs*.

Advertisements.—7 Edw. 7 c. 27 is the *Advertisements Regulation Act*, 1907.

Alkali Works.—6 Edw. 7 c. 14 is the *Alkali &c. Works Regulation Act*, 1906.

Butter and Margarine.—7 Edw. 7 c. 21 is the *Butter and Margarine Act*, 1907.

County Council.—63 & 64 Vict. c. 13 is the *County Councils (Elections) Amendment Act*, 1900.

— **Bills in Parliament.**—3 Edw. 7 c. 9 is the *County Councils (Bills in Parliament) Act*, 1908.

Disqualification.—63 & 64 Vict. c. 46 is the *Members of Local Authorities Relief Act*, 1900.

District Councillors.—63 & 64 Vict. c. 16 is the *District Councillors and Guardians (Term of Office) Act*, 1900.

Fertilisers and Feeding-stuffs.—6 Edw. 7. c. 27 is the *Fertilisers and Feeding-stuffs Act*, 1906.

Food.—7 Edw. 7 c. 32 is the *Public Health (Regulations as to Food) Act*, 1907.

Food and Drugs.—62 & 63 Vict. c. 51 is the *Sale of Food and Drugs Act*, 1899.

General Powers.—7 Edw. 7 c. 53 is the *Public Health Acts Amendment Act*, 1907.

Hospitals.—1 Edw. 7 c. 8 is the *Isolation Hospitals Act*, 1901.

Housing of the Working Classes.—63 & 64 Vict. c. 59 is the *Housing of the Working Classes Act*, 1900.

Infection—Notification.—62 & 63 Vict. c. 8 is the *Infectious Diseases (Notification) Extension Act*, 1899.

— **Vessels.**—See 4 Edw. 7, c. 16.

London.—63 & 64 Vict. c. 29 is the *London County Council Electors' Qualification Act*, 1900.

Music and Dancing Licence.—See the *Baths and Washhouses Act*, 1899 (62 & 63 Vict. c. 29).

Oil in Tobacco.—68 & 64 Vict. c. 35 is the *Oil in Tobacco Act*, 1900.

Parish Councillors.—62 & 63 Vict. c. 10 is the *Parish Councillors (Tenure of Office) Act*, 1899.

Pollution of Rivers.—61 & 62 Vict. c. 34 is the *Rivers Pollution Prevention (Border Councils) Act*, 1898.

Qualification of Women.—7 Edw. 7 c. 33 is the *Qualification of Women (County and Borough Councils) Act*, 1907.

Small Dwellings Acquisition.—62 & 63 Vict. c. 44 is the *Small Dwellings Acquisition Act*, 1899.

Transfer of Powers.—3 Edw. 7 c. 15 is the *Local Government (Transfer of Powers) Act*, 1903.

Treasury Powers.—6 Edw. 7 c. 33 is the *Local Authorities (Treasury Powers) Act*, 1906.

2. COUNCIL AND OFFICERS.

Disqualification for—Absence from Meetings—“More than six months consecutively”—**Vacation of Office.**—For the purposes of section 46, sub-section 6 of the *Local Government Act*, 1894, which provides that if a member of a council to which the section applies “is absent from meetings of the council . . . for more than six months consecutively” (except as therein mentioned) “his office shall on the expiration of those months become vacant,” the period of six months begins to run not at the last meeting at which the member is present, but at the first subsequent meeting from which he is absent. *Kershaw v. Shoreditch Borough Council*, 95 L. T. 55; 4 L. G. R. 802; 70 J. P. 190; 22 T. L. R. 802—Warrington, J.

— **Member Acting when Concerned in Contract with Urban Council—Contract Completed at Time of Acting.**—On November 7, 1904, H. obtained a contract from an urban council for printing to be done in connection with the forthcoming council election. The election took place on January 16, 1905, and H. was elected a member. At the date of his election H. had completed the contract on his part, with the exception of the printing of the notice of the result of the election, but had not received payment of the contract price. On January 18 H. printed the notice of the result of the election, thus completing the contract on his part. On January 23 H. attended a council meeting, signed the declaration of acceptance of office, and acted in the proceedings. Before leaving he was paid the amount of his contract:—*Held*, that H. had acted as a member of the council when disqualified as being concerned in a contract with the council, and was consequently liable to the penalty for so acting. *Royse v. Birley* (38 L. J. C.P. 203; L. R. 4 C.P. 296) distinguished. *Cox v. Truscott* (21 T. L. R. 319) considered. *O’Carroll v. Hastings*, [1905] 2 Ir. R. 590—K.B. D.

— **“Interested in” a Contract with the**

Council.—A member of the Sydney Municipal Council, whose firm merely supplied materials to a person who was carrying out a contract which he had previously made with the council, without any previous understanding or arrangement with the contractor that the latter should buy the materials from him, was held not liable to a penalty under section 24 of the *Sydney Corporation Act*, 1902, as being “knowingly engaged or interested in” the contract with the council. *Norton v. Taylor*, 75 L. J. P.C. 79; [1906] A.C. 378; 94 L. T. 591; 70 J. P. 433; 22 T. L. R. 450—P.C.

Parish Council—Power to Sue—Action on Behalf of Inhabitants.—A parish council has no power to bring an action on behalf of the inhabitants of the parish, even for the purpose of restraining interference with their access to a pump properly erected by the council under the powers given by section 8, sub-section 1 of the *Local Government Act*, 1894. *Stoke Parish Council v. Price*, 68 L. J. Ch. 447; [1899] 2 Ch. 277; 80 L. T. 643; 47 W. R. 663; 63 J. P. 502—North, J.

Vestry—Qualification—Residence for Twelve Months—Temporary Absence—Intention to Return.—Temporary absence with an intention and right to return does not prevent a qualification for vestryman being obtained by residence during twelve months. *Stanford v. Williams*, 80 L. T. 490—D.

Officers—Abolition of Office—Dismissal without Notice—Compensation.—Where a Metropolitan borough council, in the exercise of their powers under section 30 of the *London Government Act*, 1899, abolish the office of an existing officer transferred to them by that section, and thereupon dismiss him from their employment, without notice, the officer, though, by the terms of his employment by the authority from whom he was transferred, entitled to notice before dismissal, has no right of action against the council, but is confined to his remedy by way of application for compensation. *Clarke v. Lewisham Borough*, 67 J. P. 195; 1 L. G. R. 63—Bigham, J.

— **Transference of Duties of Clerk of the Peace—Reduction in Fees—Existing Officer—Compensation**—“Not less salaries or remuneration.”—By section 119, sub-section 1 of the *Local Government Act*, 1888, “The officers and servants of the quarter sessions, or general assessment sessions, or justices, or any committee of such sessions or justices . . . who held office at the passing of this Act, and who by virtue of this Act become officers and servants of a county council (in this Act referred to as existing officers), shall hold their offices upon the same tenure and upon the same terms and conditions as if this Act had not been passed, and while performing the same duties, shall not receive less salaries or remuneration . . . than they would have if this Act had not been passed.” The plaintiff, by virtue of section 118, sub-section 10 of that Act, being clerk of the peace of Surrey, continued to be clerk of the peace at the quarter sessions held for the county of London at Newington, and for the purpose of the business at those sessions he was deemed to be clerk of the peace for the county of London. The Middlesex scale of fees, which

by section 115 was that taken in the county of London by the clerk of the peace, was lower than the Surrey scale, and the Middlesex scale was further reduced by the standing joint committee of the London County Council and the quarter sessions:—*Held*, that the plaintiff was only entitled, as clerk of the peace for the county of London for Newington, to the fees payable under the reduced scale in Middlesex; but that, by virtue of section 119, he was entitled to receive not less remuneration, whether by salary or by fees, than that to which he was entitled at the passing of the Local Government Act, 1888. *Wyatt v. London County Council*, 85 L. T. 629; 66 J. P. 325—Wright, J.

Dissolution of Poor Law Union or Rural District—Officer Entitled to Compensation—Solicitor to Guardians or District Council—Nature of Employment—Successive Retainers—Remuneration by Ordinary Charges.—On the dissolution of a poor law union and a rural district under the provisions of a local Act, a firm of solicitors, who had acted as solicitors to the board of guardians and to the rural district council, claimed compensation under a section of the Act which provided for the payment of compensation to officers of the guardians and the council for loss of office, and incorporated with certain modifications section 120 of the Local Government Act, 1888. The claimants were never formally appointed officers of the guardians or the council, but all legal matters which required to be submitted or entrusted to a solicitor were submitted or entrusted to them, and they were employed to deal with such matters from time to time as occasion arose. They did not receive any salary as solicitors, but they received the usual professional charges for work actually done:—*Held*, that the claimants were not officers, and were not entitled to compensation. *Carpenter and Bristol Corporation, In re*, 76 L. J. K.B. 1145; [1907] 2 K.B. 617; 97 L. T. 461; 71 J. P. 417; 5 L. G. R. 977; 23 T. L. R. 654—C.A.

Servant of Local Authority—Power to Dismiss without Notice.—A servant of a local authority—for example, the matron of an isolation hospital—with whom there is no special agreement as to notice to terminate the employment, may, by virtue of the power given to the local authority by section 189 of the Public Health Act, 1875, be dismissed at pleasure at any time and without reason assigned. *Wood v. East Ham Urban Council*, 71 J. P. 129; 5 L. G. R. 403—C.A.

Compensation for Loss of Fees.—*See* SCHOOLS.

Guardians—Board of.—*See* POOR LAW.

Overseer—Election of Assistant.—*See* POOR LAW.

Parish Council—Appeal against Poor Rate.—*See* POOR LAW.

3. ELECTIONS.

County Council Election—Death of Candidate between Nomination and Poll—Countermand of Notice of Poll—Duty of Returning Officer—Procedure—Mandamus.—Section 58 of the Municipal Corporations Act, 1882, incorporates section 1 of the Ballot Act, 1872, so that where

the death of one of the candidates nominated at an election of county councillors occurs before the day fixed for the poll, it is the duty of the returning officer to countermand the notice of poll and commence proceedings afresh, and he may be compelled to do so by prerogative writ of *mandamus*. *Westacott v. Stewart*, 67 L. J. Q.B. 421; [1898] 1 Q.B. 552; 73 L. T. 256; 46 W. R. 379; 62 J. P. 229—D.

Rural District Council Election—Nomination Paper—Signature.—The nomination paper of a candidate at an election of rural district councillors is not rendered invalid by the fact that it was signed by the proposer and seconder before the name of the candidate was filled in. *Cox v. Davies*, 67 L. J. Q.B. 925; [1899] 2 Q.B. 202—D.

Decision of Returning Officer.—The decision of the returning officer that a nomination paper is valid is final under rule 7 (2) of the Rural District Councillors Election Order, 1898. *Ib.*

Election Petition—Returning Officer—Costs.—Where a municipal election petition is dismissed with costs, if the money lodged in Court as security for costs is not more than sufficient to discharge the respondent's costs, the returning officer is not entitled to be paid any part of his costs and expenses incurred under the Local Government Act out of that fund, but must look to the petitioners for payment. *Ennis Election Petition, In re*, [1900] 2 Ir. R. 334—Q.B. D.

4. BY-LAWS.

Repugnancy to Statute—Use of Obscene or Offensive Language in Tramway Car—Omission of Words Importing Annoyance or Nuisance.—Section 46 of the Tramways Act, 1870, empowers the promoters of a tramway to make by-laws "for preventing the commission of any nuisance in or upon any carriage," provided such by-laws are not repugnant to the laws of that part of the United Kingdom where the same are to have effect. The promoters of a tramway in a city made a by-law which provided that "No person shall swear or use obscene or offensive language whilst in or upon any carriage," but contained no words importing that the language should be an annoyance to passengers, or a nuisance. Section 28 of the Town Police Clauses Act, 1847, which was in force in the city, provides that "Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers . . . uses any profane or obscene language," shall be liable to a penalty. A local Act in force in the city imposed a penalty upon every person who should "use any profane, indecent, or obscene language to the annoyance of the inhabitants or passengers":—*Held*, that the by-law was not *ultra vires*. *Gentel v. Rapps*, 71 L. J. K.B. 105; [1902] 1 K.B. 160; 85 L. T. 683; 50 W. R. 216; 66 J. P. 117; 20 Cox C.C. 104—D.

Indecent or Obscene Language—Room Opening on Street.—A by-law made by a county council under section 16 of the Local Government Act, 1888, that "no person shall in any house, building, garden, land, or other place abutting on or near to a street or public place, make use

of any violent, abusive, profane, indecent, or obscene language, gesture, or conduct to the annoyance of any person, in such street or place," is neither repugnant nor *ultra vires*; and any offence using such language in a room opening into a street with the door open is liable to be convicted of an offence against such by-law. *Manile v. Jordan*, 66 L. J. Q.B. 224; [1897] 1 Q.B. 248—D.

Width of Street—Action in High Court for Injunction, whether Maintainable.]—The Court has no jurisdiction to grant an injunction to restrain a breach of by-laws as to the width of a new street where special remedies for breaches are provided by the by-laws, for example, penalties to be recovered by summary proceedings and powers to remove, alter, and pull down any works done in contravention of such by-laws. *Grand Junction Waterworks v. Hampton Urban Council* (67 L. J. Ch. 603; [1898] 2 Ch. 331) and *Chartered Institute of Patent Agents v. Lockwood* (63 L. J. P.C. 74; [1894] A.C. 347) followed. *Devonport Corporation v. Tozer*, 71 L. J. Ch. 754; [1902] 2 Ch. 182; 86 L. T. 612—Joyce, J.

A local authority which has made by-laws in accordance with section 157 of the Public Health Act, 1875, which, among other things, prescribe the width of new streets, is not confined to the remedy thereby provided by way of penalty for breach thereof, but may apply to the High Court for an injunction to restrain such breach. In such a case the Attorney-General may sue as plaintiff at the relation of the local authority. *Att.-Gen. v. Ashbourne Recreation Co.*, 72 L. J. Ch. 67; [1903] 1 Ch. 101; 87 L. T. 561; 51 W. R. 125; 67 J. P. 73; 1 L. G. R. 146—Buckley, J.

Annoyance of Passengers in the Streets—Uncertainty.]—A by-law made by a municipal corporation for the good rule and government of their borough provided that "No person shall wilfully annoy passengers in the streets"; and other by-laws made at the same time dealt with particular kinds of annoyances in the streets:—*Held*, that the by-law was void for uncertainty. *Nash v. Finlay*, 85 L. T. 682; 66 J. P. 183; 20 Cox C.C. 101—D.

Discretion of Justices.]—*See* col. 1322.

Power of Local Authority to Sanction Contravention.]—*Yabbicomb v. King*, 68 L. J. Q.B. 560.

For subject-matter of By-laws, *see* TOPICS OF LOCAL GOVERNMENT, *infra*, col. 1312.

5. CONTRACTS.

Seal—Contract for Amount Exceeding 50l.—Subsequent Deliveries of Goods on Request—Implied Contract.]—An urban authority invited tenders for a supply of coal for a year, the amount of which would exceed 100l. The plaintiffs tendered, and their tender was accepted subject to the execution of the contract and bond required by section 174 of the Public Health Act, 1875. No such contract or bond was ever executed; but the plaintiffs supplied coal from time to time at the request of the urban authority. The value of the coal supplied in response to each separate request was below 50l. In an action by the plaintiffs to recover

the price of the coal so supplied,—*Held*, that the tender and acceptance did not constitute a contract at all, inasmuch as the acceptance was subject to a condition which was never performed; and that there was, therefore, nothing to prevent there being an implied contract on the part of the urban authority to pay for each parcel of coals delivered at their request, and accordingly that the plaintiffs were entitled to recover the price of the coals supplied. *Spencer, Whateley & Underhill v. Southall-Norwood Urban Council*, 3 L. G. R. 641; 69 J. P. 308—Warrington, J.

—Solicitor—Retainer by Corporation—Subsequent Confirmation under Seal—Provisional Order—Dissolution of Local Authority—Transfer of Liability for Costs to other Local Authorities.]—The Corporation of T. having presented a memorial to the Local Government Board asking for the inclusion within their borough of the Urban District of C., the District Council of C. resolved to oppose it, and by resolutions passed from time to time retained the plaintiffs, a firm of solicitors and Parliamentary agents, for that purpose. The resolutions were not under seal, but subsequently, and after the plaintiffs had done a considerable amount of work under them, the seal of the district council was affixed to the resolutions. An enquiry having been held, a provisional order was made by the Local Government Board, which was afterwards confirmed, the effect of which was to dissolve the C. district, and to add part of it to the borough of T. and the other part to the rural district of N. The plaintiffs' bill of costs in respect of the Parliamentary opposition to the confirmation of the provisional order was delivered to the District Council of C. and afterwards to the defendants. In an action brought by the plaintiffs to recover the amount of such bill from the defendants,—*Held*, that the confirmation under seal of the original retainers created an obligation binding upon the District Council of C. without any new consideration, and that it was not *ultra vires* for them to create such an obligation. *Held* also, that the costs in question were costs authorised by section 298 of the Public Health Act, 1875, and were not subject to the requirements of the Municipal Corporations (Borough Funds) Act, 1872, and that, upon the construction of the provisional order, the defendants were liable to pay them in such proportions as might be awarded under section 62 of the Local Government Act, 1888. *Brooks v. Torquay Corporation*, 71 L. J. K.B. 109; [1902] 1 K.B. 601; 85 L. T. 785; 66 J. P. 293—Walton, J. *And see* CORPORATION, col. 562.

Absence of Penalty Clause—Avoidance of Contract.]—Section 174, sub-section 2 of the Public Health Act, 1875, which, with regard to contracts made by an urban authority under the Act, requires that they shall specify some pecuniary penalty in case the terms of the contract are not duly performed, is directory only, and a contract of an urban authority containing no penalty clause is not void on that account. (VAUGHAN WILLIAMS, L.J., dissenting.) *Southill Upper Urban Council v. Wakefield Rural Council*, 74 L. J. Ch. 703; [1905] 2 Ch. 516; 93 L. T. 711; 3 L. G. R. 1208; 69 J. P. 447; 21 T. L. R. 766—C.A. Reversing, 91 L. T. 800—Swinfen Eady, J.

6. EXPENDITURE.

Costs of Promoting Bill in Parliament.]—A rivers board constituted for the purpose of enforcing the Rivers Pollution Prevention Act, 1876, its expenses being met out of a common fund contributed by the local authorities represented on the board, was restrained from applying any of its funds, until authorised by lawful authority so to do, in the preparation and promotion of a bill in Parliament for the extension of their powers, and from employing, at the expense or upon the credit of the board, any of the servants of the board for the purposes of the preparation, promotion, or otherwise in relation to the bill. *Att.-Gen. v. Yorkshire (West Riding) Rivers Board*, 69 J. P. 177; 3 L. G. R. 764—Buckley, J.

Ratepayers' Consent—Sanction of Local Government Board.]—An urban district council cannot apply the district rate towards payment of the expenses of opposing a local bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under section 4 of the Borough Funds Act, 1872, nor is section 3 of the Local Authorities (Expenses) Act, 1887, under which such expenses if incurred may be sanctioned by the Local Government Board, intended to prevent the Court from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Government Board has not been applied for. *Att.-Gen. v. Rickmansworth Urban Council*, 86 L. T. 521; 66 J. P. 410—Kekewich, J.

Costs of Action—Sanction of Action by Parish Meeting—Consent to Incur Expenses over Three-pence in the Pound.]—By section 11 of the Local Government Act, 1894, a parish council cannot, without the consent of the parish meeting, incur expenses or liabilities which will involve a rate above threepence in the pound for any year, and the sum raised by the council in any year is not to exceed sixpence. An action was brought by the parish council in which they were unsuccessful, and they incurred costs to the successful defendant amounting to 92l. 14s. 10d. A rate of threepence would realise 54l. 12s., and since March, 1899, when the financial year began, precepts had been issued for 52l., 25l. of which went to defray the council's costs, and the balance in parish expenses. After a rule *nisi* for a *mandamus* to the council to issue their precept to the overseers to pay the sum due to the defendant for costs, two parish meetings were called, but the necessary resolutions were not passed to raise the extra threepence owing to the small attendances:—*Held*, that as no information was forthcoming as to the proceedings before the action was commenced, it must be assumed consent was given, and the rule must be made absolute. *Reg. v. Stoke Parish Council*; *Price, Ex parte*, 82 L. T. 198; 64 J. P. 343—D.

Protection of Public against Obstruction of Right of Way—Transfer of Duties from District to County Council—Power of County Council to Contribute to Defence of Action against Members of the Public.]—Upon the true construction of section 26, sub-sections 1, 3, and 4 of the Local Government Act, 1894, a district council or,

upon their default, the county council may contribute to the costs of the defence of an action against members of the public who, relying upon a public right, have removed an obstruction in a pathway. The section does not restrict either council to taking or defending proceedings in their own name. *Reg. v. Norfolk County Council*, 70 L. J. K.B. 575; [1901] 2 K.B. 268; 84 L. T. 822; 49 W. R. 543; 65 J. P. 454—D.

Action on Behalf of Inhabitants by Parish Council—Property Vested in Parish Council—Joinder of Attorney-General—Costs of Plaintiff Wrongfully Joined.]—By an award under an Inclosure Act the herbage on an occupation road was sold by auction yearly by an auctioneer appointed by the inhabitants of the parish, or in default it was sold by the surveyor or surveyors of highways, and the money derived from such sale was, under the award, used in repairing the roads of the parish. An action was brought by the district council, as successors to such surveyors of highways, against the defendant for damages and an injunction for wrongfully depasturing his cattle on the said road, the Attorney-General being joined on their relation:—*Held*, that as the property in the said herbage was in the parish council, as representing the inhabitants of the parish, who had the beneficial interest in the said sale (which council, and not the district council, was held to be the proper plaintiff), and consequently only the interests of a small part of the community were involved and not those of the community at large, the Attorney-General could not be joined as a plaintiff. *Held*, further, that, although the plaintiffs had no right to bring the action, they were entitled to the costs of the issues upon which they had succeeded at the trial before the jury, on the ground that the defendant had no right, by denying that he had committed the acts complained of, to put the plaintiffs to the expense of proving them. *Att.-Gen. v. Garner*, 76 L. J. K.B. 965; [1907] 2 K.B. 480; 97 L. T. 486; 5 L. G. R. 944; 71 J. P. 357; 23 T. L. R. 563—Channell, J.

Transfer of Powers to Urban Council—Expenses Incurred under Burial Acts—Poor Rate—General District Rate.]—Where an urban council have under section 62 of the Local Government Act, 1894, taken over the powers, duties, and liabilities of a burial board, the expenses incurred by the council in carrying into execution the Burials Acts, 1882 to 1885, are payable out of the poor rate, and are not chargeable to the general district rate. *Reg. v. Connah's Quay Overseers*, 70 L. J. K.B. 651; [1901] 2 K.B. 174; 84 L. T. 601; 49 W. R. 463; 65 J. P. 500—D.

"Expenses incurred."]—The expression "expenses incurred" in section 232 of the Public Health (Ireland) Act, 1878 (corresponding to section 229 of the English Public Health Act, 1875), means actual or estimated expenses. *Reg. v. Local Government Board*, [1905] 2 Ir. R. 324—K.B. D.

7. TOPICS OF LOCAL GOVERNMENT.

(a) Administration of Justice.

Borough with no Separate Commission of Peace—Clerk to Justices—Appointment—

Salary—Unappropriated Fees and Fines.]—In the case of a borough having no separate commission of the peace the mayor and immediate ex-mayor cannot together, as Justices of the borough, appoint a Justices clerk to perform solely the duties of clerk of special and petty sessions held in and for the borough; nor can they make such an appointment in conjunction with Justices of the county usually acting for the petty sessional division in which such borough is situate. If, however, the provisions of section 5, sub-section 1 of the Justices Clerks Act, 1877, are complied with, the Justices of the petty sessional division in which the borough is situate, including the mayor of the borough, may appoint a second clerk to act for them when holding petty or special sessions within the borough, and in that case the salary will be payable by the county council, and the unappropriated fees and fines from such sessions will be payable to the county treasurer. *Huntingdon Corporation v. Huntingdonshire County Council*, 70 L. J. K.B. 755; [1901] 2 K.B. 257; 85 L. T. 26; 65 J. P. 675—D.

County Council—Quarter Sessions Borough with Population under Ten Thousand—Salaries of Recorder, Clerk of Peace, and Clerk to Justices—Expenses of Quarter and Petty Sessions—Liability for Payment of.]—The liability of a quarter sessions borough, with a population under ten thousand, to pay the salaries of its recorder, clerk of the peace, and clerk to the borough Justices in petty sessions, is not transferred by the Local Government Act, 1888, to the council of the county in which the borough is included. Decision in *Kent County Council and Sandwich Borough Council, In re* (80 L. J. Q.B. 314; [1891] 1 Q.B. 389), on this point, and *Herefordshire County Council, In re* (64 L. J. M.C. 26; [1895] 1 Q.B. 43), overruled. *Thetford Corporation v. Norfolk County Council*, 67 L. J. Q.B. 907; [1898] 2 Q.B. 468; 79 L. T. 315; 47 W. R. 1; 62 J. P. 724—C.A.

(b) *Animals, Diseases of.*

Inspector Appointed by Local Authority—Order of Board of Agriculture—Negligence of Inspector.]—A local authority who have appointed an inspector under the provisions of the Diseases of Animals Act, 1894, are not liable in respect of a negligent act committed by him in carrying out a duty which has been directly imposed upon him by an Order of the Board of Agriculture. *Stanbury v. Exeter Corporation*, 75 L. J. K.B. 28; [1905] 2 K.B. 888; 93 L. T. 795; 54 W. R. 247; 70 J. P. 11; 4 L. G. R. 57; 22 T. L. R. 3—D.

(c) *Arbitration.*

Award—Omission of Umpire to Make and Annex Statutory Declaration.]—Where an umpire acting under the Public Health Act, 1875, omitted to make and annex to his award the statutory declaration prescribed by section 180 of the Act, the Court set aside the award at the instance of a party who took steps immediately on becoming aware of the omission. *Ludlow Corporation v. Prosser*, 70 J. P. 400; 4 L. G. R. 940; 22 T. L. R. 597—D.

Power to Award Costs to Unsuccessful Party.]—A corporation took proceedings under section 95 of the Public Health Act, 1875, against a person for an alleged nuisance, and in that litigation the corporation failed. Thereafter the defendant to those proceedings claimed full compensation under section 308 of the Public Health Act, 1875. In the arbitration which followed no compensation was awarded, and the corporation was ordered to pay the costs of the arbitration:—*Held*, that the arbitration was a fresh proceeding distinct from the previous litigation, and that the arbitrator had no power to award costs to the claimant, he being wholly unsuccessful. *Barnett and Eccles Corporation, In re*, 65 J. P. 757—D.

(d) *Areas, Transfer and Adjustment of.*

Arbitration as to Difference—Costs of Arbitration.]—By a Local Government Board's order part of the S. M. R. District was transferred to the district of the B. U. D. Council, and the parties being unable to agree to an arbitrator to adjust a difference between them, one was appointed by the Local Government Board, under section 62, sub-section 2 of the Local Government Act, 1888. By his award he directed the defendants to pay the plaintiffs a certain sum, and directed that the costs of the award—namely 10l. 10s.—should be paid by both parties in equal shares. No mention was made of the costs of the reference. Subsequently he determined the costs of the reference to be 34l. 2s. 10d., and the costs of the taxation 4l. 4s. In an action to recover these sums from the defendants,—*Held*, that they could not be recovered. *South Mimms Rural Council v. Barnet Urban Council*, 82 L. T. 421—Grantham, J.

Severance of new Urban District from former Rural District—Compensation—"Adjustment."]—Where a portion of a district is taken away from the jurisdiction of a rural district council and constituted into an urban district with a council of its own, the rural district is not, under section 62 of the Local Government Act, 1888, entitled to compensation from the newly formed urban district for the loss of a ratepaying area occasioned by the severance, the word "adjustment" in that section not being equivalent to "compensation," and an apprehended diminution in rates not being comprehended within the words "property, income, debts, liabilities, and expenses." *Roehampton Union and Haslingden Union, In re* (68 L. J. Q.B. 531; [1899] 1 Q.B. 540), and *Buckinghamshire County Council and Hertfordshire County Council, In re* (68 L. J. Q.B. 417; [1899] 1 Q.B. 515), overruled. *Caterham Urban Council and Godstone Rural Council, In re*, 73 L. J. K.B. 589; [1904] A.C. 171; 90 L. T. 653; 52 W. R. 625; 68 J. P. 429; 2 L. G. R. 596; 20 T. L. R. 481—H.L. (E).

Severance of Part of District—Constitution of New District—Adjustment of Liabilities—Adjustment and Agreement as to Existing Accounts—Right to Claim Subsequent Adjustment for Loss by Severance.]—By an order made by a county council under section 57 of the Local Government Act, 1888, a part of a rural district was severed from the district and constituted a

new urban district, and all necessary adjustments were to be made in accordance with the provisions of section 68 of the Local Government Act, 1894. An adjustment of accounts was then made and an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, and these sums were paid. Subsequently the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree, and an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement:—*Held*, that the adjustment claimed by the rural council was an adjustment within the meaning of section 68 of the Local Government Act, 1894, although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district; and further, that the claim to have such adjustment was not barred by the prior agreement between the councils. *St. Thomas Rural Council and Heavitree Urban Council, In re*, 86 L. T. 153; 66 J. P. 597—Wright, J.

Transfer of Powers—Abolition of Office—Compensation—Emoluments—Amount—Resolution of Council—Power to Rescind.—By section 30 of the London Government Act, 1899, and the enactments incorporated therewith, including section 120 of the Local Government Act, 1888, any existing officer of a borough council who suffers pecuniary loss from the abolition of his office is entitled to compensation, regard being had to any additional emoluments acquired by him by virtue of those enactments. The officer is required to deliver a claim shewing the amount received and expended by him in every year during the period of five years before the passing of the Act, and the council are required to take the same into consideration and assess the just amount of compensation. The amount assessed becomes a specialty debt due from the council to the officer:—*Held*, that the amount of the emoluments is a question of fact for the council, and that their finding cannot be reviewed by the Court. *Livingstone v. Westminster City Council*, 73 L. J. K.B. 434; [1904] 2 K.B. 109; 52 W. R. 895; 68 J. P. 276; 2 L. G. R. 581; 20 T. L. R. 361—Buckley, J.

An officer on the abolition of his office delivered a claim stating the amount of his emoluments for five years before the abolition of his office. The council by resolution granted him an annual sum equal to thirty-seven-sixtieths of the amount stated. The council subsequently rescinded that resolution, and by a second resolution granted a sum equal to thirty-seven-sixtieths of a smaller amount:—*Held*, that the first resolution was binding and could not be rescinded. *Id.*

Boundaries—Intercepting Sewer Constructed under Local Act to Serve Certain Districts—Extension of Constituent District—Drainage of Added Area into Intercepting Sewer.—An intercepting sewer was made under the Brighton Intercepting and Outfall Sewers Act, 1870, which provided for the making of intercepting

and outfall sewers for Brighton, and two adjoining Improvement Act districts in the parish of Hove, and for the vesting of the sewers in the defendant sewers board. Section 91 of the Act provided that if, after the passing of the Act, any local board or body of commissioners should be constituted for any district in which any part of the sewers authorised would be situate, having powers with respect to sewerage, and to levy rates within such district, such local board or commissioners should be at liberty, by notice to the sewers board, to participate in the benefits and liabilities of the Act, and should thenceforth be a local authority within the Act. By the Hove Commissioners Act, 1873, a body of improvement commissioners was constituted for the whole parish of Hove, and these commissioners were given the benefits and liabilities of the former commissioners for the two parts of Hove under the Act of 1870. By an order made by the county councils of East and West Sussex in 1893, under the Local Government Act, 1888, it was provided that the area of the parish of Aldrington should be transferred to and form part of the urban sanitary district of Hove, and that the "district" in the Act of 1873 should mean the parishes of Hove and Aldrington, instead of the parish of Hove. The district of Hove thus extended was subsequently formed into a borough, and the plaintiffs became the successors of the Hove Commissioners. The plaintiffs claimed to be entitled under these circumstances to send the drainage of Aldrington into the intercepting sewer:—*Held* (reversing the decision of *Kerewich, J.*), that the order of the county councils, having been laid upon the table of both Houses of Parliament, and duly confirmed by the Local Government Board, was unimpeachable; that the case came within section 91 of the Act of 1870; and that the plaintiffs were entitled to a declaration that they were a local authority within the Act of 1870, and as such entitled to discharge into the intercepting sewers the whole of the sewage of Hove, including that coming from the parish of Aldrington; and that the fact that the sewer might not be at present large enough to accommodate the additional sewage was no answer to the claim for a declaration of the plaintiff's rights, though it might be a ground for giving the defendants reasonable time to comply with the order if an injunction were asked for. *Hove Corporation v. Brighton Sewers Board*, 1 L. G. R. 355; 67 J. P. 335—C.A.

Parish Partly Within and Partly Without Urban Sanitary District—Order Uniting Part of Old Parish Outside Urban District with next Parish—Re-naming of Remainder of Old Parish—Provision for Continuation of Pauper Settlements in New Parishes—Continuation of Status of Irremovability—Validity.—Before the passing of the Local Government Act, 1894, a parish was situated partly within and partly without an urban sanitary district. Pursuant to the powers given by the Local Government Acts, 1888 and 1894, an order was made by a county authority and confirmed by the Local Government Board, uniting the portion of the parish which was partly without the urban sanitary district, with the neighbouring parish, and directing that the remaining portion of the parish situated within the urban sanitary dis-

trict should be known as "the parish of W. W." The order contained a clause providing that every person who had acquired a settlement in the original parish should be deemed to have acquired a settlement in that one of the newly formed parishes which comprised the place where the circumstances conferring the settlement in the original parish had occurred; and also a clause providing that any person who had acquired a *status* of irremovability in the original parish should be deemed to have acquired a *status* of irremovability from the parish in which he should reside on the date of the operation of the order or (if he should then be in receipt of relief) from the parish in which he was residing at the time of becoming chargeable:—*Held*, that, whether or not the clauses were *ultra vires* of the provisions of the Act of 1888 or those of 1894, no objection to their legality could, by reason of section 42 of the Act of 1894, be entertained in legal proceedings commenced more than six months after the confirmation of the order by the Local Government Board. *Ree v. Middlesex Justices; Walsall Union, Ex parte*, 76 L. J. K.B. 839; [1907] 2 K.B. 581; 96 L. T. 798; 71 J. P. 393; 5 L. G. R. 1232; 23 T. L. R. 524—C.A.

Creation of County Borough—Adjustment of Financial Relations between Borough and County—Compensation.—On the creation under sections 54 and 59 of the Local Government Act, 1888, of a county borough out of the pre-existing county, no compensation is payable for loss of contributions occasioned by the severance from either of the newly constituted administrative areas to the other. The same principles are to be applied to the establishment of a county borough out of part of a county as were applied in *Caterham Urban Council and Godstone Rural Council, In re* (73 L. J. K.B. 539; [1904] A.C. 171), where an urban district council was carved out of a rural district council. *West Hartlepool Borough Council v. Durham County Council*, 76 L. J. K.B. 859; [1907] A.C. 246; 97 L. T. 114; 71 J. P. 385; 5 L. G. R. 854; 23 T. L. R. 576—H.L. (H.)

Poor Law Unions—Order of County Council—Transfer of Portion of Parish from one Union to Another—No Alteration of Boundaries of Unions.—Where by an order of a county council made pursuant to the Local Government Act, 1888, s. 57, and confirmed by the Local Government Board, a portion of a common-law parish wholly within one poor-law union in the county is transferred to a common-law parish within another union in the same county, and the whole area of that parish as extended is included in the rural district to which the transferred portion belonged, but no order has been made altering the boundaries of the two unions, the parish to which the portion was transferred still retains its identity and as a whole is within the union in which it was formerly included, notwithstanding that its area has been extended. The added portion consequently is within the same union. *West Ham Union v. London County Council* (71 L. J. K.B. 299; [1902] 1 K.B. 562) discussed and applied. *Bootle Guardians v. Whitehaven Guardians*, 72 L. J. Ch. 582; [1903] 2 Ch. 142; 89 L. T. 237; 51 W. R. 550; 67 J. P. 325; 1 L. G. R. 585—Byrne, J.

Adjustment between Unions.—Where by an order of a county council a portion of a township is transferred from one union to another an adjustment under section 68 of the Local Government Act, 1894, is in all cases required as between the two newly constituted unions. *Rochdale Union and Haslingden Union, In re*, 67 L. J. Q.B. 846; [1898] 2 Q.B. 206; 78 L. T. 563; 62 J. P. 678—D.

In making such adjustment the arbitrator must take into consideration any loans which may be outstanding and charged upon the rates of the union from which the area has been detached. Where a workhouse provided for the old union is to become for the future the sole property of the union from which the area has been detached, the arbitrator must also consider the terms upon which that is to be done. *Id.*

Transfer of Liabilities—Action Pending—Costs.—A certain area was transferred from the jurisdiction of the defendant rural council to that of the corporation of a borough by a provisional order which declared that all liabilities, &c., attaching exclusively to the area so transferred should also be transferred, and that any actions or proceedings relating exclusively to such area pending at the time of the transfer might be continued and enforced against the corporation. An action was pending at the time of the transfer to restrain the defendant rural council from allowing sewage matter, conveyed through their sewers from certain houses into a cesspool, to escape into a natural stream flowing through the plaintiff's property. The houses, sewers, and cesspool were all within the area transferred, the plaintiff's property being just outside same. After the transfer the corporation were added as co-defendants to the action, and they then gave an undertaking, which satisfied the plaintiff, to abate the nuisance:—*Held*, that all the liability of the original defendants, the rural council, was transferred to the corporation, and that the costs of the plaintiff, as well as those of the original defendants, fell to be borne by the corporation. *Jackson v. Plympton Rural Council*, 64 J. P. 168—Cozens-Hardy, J.

Adjustment of Property and Liabilities.—A parish was taken from a rural district and duly constituted an urban district under the provisions of the Local Government Acts, 1888 and 1894. Prior to the order constituting such urban district, the rural district received from rates levied in the parish for highway purposes an amount greater than that expended for such purposes in the parish:—*Held*, that the loss to the rural council of this surplus was a matter for adjustment under section 62 of the Local Government Act, 1888. *Godstone Rural Council and Caterham Urban Council, In re*, 66 J. P. 678—Wright, J.

Rural District Council—Clerks of Former Sanitary Authority and Highway Authority—Duties and Position of, under Council.—The plaintiff was clerk to a rural sanitary authority, and J. was clerk to the highway board for the same district, which two boards were succeeded by the defendant council, which subsequently directed that certain of the duties formerly executed by the plaintiff should be executed by

J., but no alteration was made in the *status* or remuneration of the plaintiff:—*Held*, that the plaintiff was not entitled to an injunction restraining the defendants from carrying out this arrangement. *Genn v. East Kerrier Rural Council*, 62 J. P. 215—Jeune, P.

Creation of Urban out of Rural District—Loss of Rateable Area—Adjustment—Compromise—*Ultra Vires*.]—*See* COMPROMISE, col. 485.

Effect of, on Pauper's Settlement.]—*See* POOR LAW.

Separation of Parish from Union—Adjustment of Rights.]—*See* POOR LAW.

(e) *Bathing*.

Machines—Licence for One Year—Regulations Made Subsequent to Grant of Licence—Power of Licensing Authority to Revoke Licence.]—The defendants, under their by-laws, granted a licence to the plaintiff authorising him to let bathing machines for one year on the beach. Subsequent to the grant of such licence the defendants made new regulations with regard to licences, and on an infringement by the plaintiff of such new regulations the defendants revoked his licence:—*Held*, that the plaintiff was entitled to an injunction restraining the defendants from doing so. *Pelham v. Littlehampton Urban Council*, 63 J. P. 88—Grantham, J.

Sea Bathing—Charge for Bathing Machine—Charge for Costumes and Towels.]—A by-law as to bathing made by an urban authority under section 69 of the Town Police Clauses Act, 1847, substantially in the model form, fixed the maximum charges for the use of bathing machines stationed on any stand, and provided that the prescribed charges should include charges for the use of towels and a bathing costume. The appellants, who were the proprietors of bathing machines used within the district, charged a bather, in addition to the maximum charge for the use of the machine fixed by the by-law, the sum of threepence for the use of a costume and towels, and were convicted of a breach of the by-law in respect of the charge of threepence thus made. The bather had not demanded the use of a costume and towels without extra charge:—*Held*, that the conviction must be quashed—by LORD ALVERSTONE, C.J., and WILLS, J., on the ground that the by-law in so far as it purported to restrict the charges that could be made for the use of a costume and towels was *ultra vires* and bad; by CHANNELL, J., on the ground that if the by-law prohibited an extra charge for a costume and towels absolutely it was *ultra vires* and bad; and that if it merely required the bathing-machine proprietor to provide such requisites as were necessary for decency without extra charge, leaving him free to make an extra charge for articles of superior quality, in which case it might be a good by-law, no breach of the by-law had been shewn. *Parker v. Clegg*, 2 L. G. R. 608—D.

(f) *Betting*.

Street Betting—Distributing Newspaper Publishing Probable Results of Sporting Compe-

titions.]—Section 16 of the Local Government Act, 1888, empowers a county council to make by-laws for the good rule and government of their county. A county council made a by-law prohibiting persons under a penalty from frequenting and using any street or other public place for the purpose of selling or distributing any paper devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions:—*Held*, that the by-law was unreasonable and invalid. *Scott v. Pilliner*, 73 L. J. K.B. 998; [1904] 2 K.B. 855; 91 L. T. 658; 53 W. R. 284; 63 J. P. 518; 2 L. G. R. 1018; 20 Cox C.C. 731; 20 T. L. R. 662—D.

—“Place of public resort.”]—A borough improvement Act empowered the corporation to make by-laws for the prevention of betting and of public offences and nuisances in the “public streets, passages, . . . recreation grounds, and other places of public resort” within the borough. The corporation made a by-law for the prevention of betting in any “street, passage, recreation ground, or other place of public resort” within the borough:—*Held*, first, that the by-law was not *ultra vires*; secondly, that private ground, bounded by streets, unfenced, and daily frequented by the public for the purpose of betting, though without the permission of the owner, was a “place of public resort” within the meaning of the by-law. *Kitson v. Ashe*, 63 L. J. Q.B. 286; [1899] 1 Q.B. 425; 87 L. T. 323; 63 J. P. 325; 19 Cox C.C. 257—D.

—Frequenting Public Place.]—Under a statute which empowered county councils from time to time to “make such by-laws as to them seem meet for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner,” a county council made a by-law which provided that “no person shall frequent and use any road or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets”:—*Held*, that this by-law was not *ultra vires* of the county council. *Davies v. Jeans*, 6 F. (Just. Cas.) 37—Ct. of Justy.

—Using Streets for Betting—No Obstruction.]—The S. County Council, under the Local Government Act, 1888, s. 16, made a by-law as follows: “No person shall frequent any street or public place, and use the same for the purpose of betting or wagering, or agreeing to bet or wager, either on behalf of himself or any other person”:—*Held*, that the by-law was one properly made for the good rule and government of the administrative county, and was therefore not *ultra vires* or invalid. *Jones v. Walters*, 78 L. T. 167; 62 J. P. 374; 19 Cox C.C. 1—D.

(g) *Bridges*.

County Bridges—Cost of Erecting and Maintaining—Quarter Sessions Boroughs—Liability to Contribute.]—The quarter sessions boroughs included in section 35 of the Local Government

Act, 1888, are not liable to contribute to the cost of maintaining or erecting county bridges which have been purchased, taken over, or erected by the county council under section 6 of the Act. *Bury St. Edmunds Corporation v. West Suffolk County Council*, 67 L. J. Q.B. 750; [1898] 2 Q.B. 246; 78 L. T. 624; 47 W. R. 16; 62 J. P. 486—D.

Such expenses are "special" and not "general" county purposes within the meaning of section 68 of the Act. *Id.*

Bridge Repairable Ratione Tenuræ—Repairs Effected by District Council—Recovery of Sums Expended.]—The remedy for the recovery of the expenses of placing in repair a highway repairable *ratione tenuræ* from "the person liable to repair," afforded to district councils by section 25, sub-section 2 of the Local Government Act, 1894, is confined to the occupier of the land chargeable with the obligation, and creates no liability in the owner of such land to repay sums so expended. *Cuckfield District Council v. Goring*, 67 L. J. Q.B. 539; [1898] 1 Q.B. 865; 78 L. T. 530; 46 W. R. 541; 62 J. P. 358—D.

(h) Buildings.

Trifling Offence.]—By-laws as to the construction of buildings ought to contain provisions under which the hard-and-fast rules they lay down may be dispensed with in the case of buildings of exceptional character to which those rules are unsuited. But the absence of such provisions does not render the by-laws invalid as being unreasonable. Where, however, proceedings are taken for a breach of a by-law in the case of such a building it is competent to the Justices to treat non-compliance with the by-laws as a trifling offence within the meaning of section 16 of the Summary Jurisdiction Act, 1879, and to dismiss the information accordingly. *Salt v. Scott-Hall* (72 L. J. K.B. 627; [1903] 2 K.B. 245) approved and followed. *Pomeroy v. Malvern Urban Council*, 89 L. T. 555; 1 L. G. R. 825; 67 J. P. 375—D.

The object of by-laws as to new buildings made for the prevention of fire is to protect the inmates of the new buildings themselves as well as to prevent the spread of fire to adjoining buildings. The breach of a by-law requiring new buildings to be inclosed with walls of incombustible materials is therefore not necessarily a trifling offence merely because the building is far removed from other buildings.—*Id.*

Continuing Offence—Retaining Control.]—A person who erects a new building in contravention of a by-law made under section 157 of the Public Health Act, 1875, cannot be convicted of the continuing offence, under section 158 of that Act, consisting in the continued existence of the building in such a form or state as to be in contravention of the by-law, unless he retains such control over the building as renders him in fact responsible for the continued existence of the building in that state. *Pomeroy v. Malvern Urban Council*, 89 L. T. 555; 1 L. G. R. 825; 67 J. P. 375; 20 Cox C.C. 572—D.

Buildings of a Temporary Character.]—Sections 40 and 41 of the Public Health (Ireland) Act, 1878, and the Dublin City by-laws made thereunder (which provide as to the erection of buildings, their position in reference to the street upon which they abut, and the necessity for the walls to be of incombustible materials) contemplate buildings of a permanent character, and not mere temporary structures. *Dublin Corporation v. Irish Church Missions*, [1901] 2 Ir. R. 387—Q.B. D.

Whirligigs and Swings.]—A local authority purporting to act under the Public Health Act made a by-law, subsequently confirmed by the Local Government Board, that no person should cause or suffer any whirligig or swing to be set in motion or driven on any land immediately adjoining or abutting upon any street or road within the district unless such whirligig or swing was placed at a distance of not less than twenty yards from any road or street, and separated from any street or road by a wall not less than fourteen inches in thickness, and carried up to a height of not less than four feet above the level of the street or road:—*Held*, that the by-law was unreasonable and void, inasmuch as it required a structure of a permanent character, involving large expense, to provide against a temporary danger, which could as effectively be provided against by a temporary structure. *Ennisconthy Urban Council v. Field*, [1904] 2 Ir. R. 518—K.B. D.

New Building—Materials—By-law—No Dispensing Power.]—A by-law made under section 157, sub-section 2 of the Public Health Act, 1875, by a rural district council having urban powers, provided that "every person who shall erect a new building shall cause such building to be inclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together." The district council had no power to dispense with the by-law in exceptional cases:—*Held*, that the by-law was not unreasonable or *ultra vires*. *Salt v. Scott-Hall*, 72 L. J. K.B. 627; [1903] 2 K.B. 245; 88 L. T. 868; 52 W. R. 95; 67 J. P. 306; 1 L. G. R. 753; 20 Cox C.C. 492—D.

Discretion of Justices.]—Though by-laws are of general application and contain no dispensing power, yet in exceptional cases the Justices have a discretion by virtue of section 16 of the Summary Jurisdiction Act, 1879, to dismiss an information for an offence against the by-laws. *Id.*

No Retrospective Operation.]—Certain by-laws passed by a district council and duly confirmed applied to "new buildings," and in the case of these required certain conditions to be fulfilled by the person erecting them. Before these by-laws were passed a builder had dug trenches for the foundations of cottages, laid concrete in these trenches, and laid some brickwork thereon. No further work was done by him until after the by-laws came into operation:—*Held*, that such buildings were not "new buildings," and therefore that the by-laws, which were not made retrospective, had no application to them. *Hubbard v. Bromley District Council*, 69 J. P. 437; 3 L. G. R. 1377—D.

— **Alteration of Old Building—By-laws.**—The provision in section 159 of the Public Health Act, 1875, whereby, for the purposes of that Act, the alteration of an existing building in certain specified ways is to be considered the erection of a new building, does not imply that no other alteration of an existing building can amount to the erection of a new building for the purposes of the Act or of by-laws made under it. And the question whether an alteration of an existing building otherwise than in one of the specified ways does amount to the erection of a new building for such purposes is a question of fact. *Redruth Brewery v. Redruth District Council*, 3 L. G. R. 130; 69 J. P. 78—D.

— **Shelter for Weighing-Machine—Movable Shop for Sale of Refreshments.**—A movable wooden structure about ten feet long, seven feet broad, ten feet high in front and eight feet high behind, having shutters in front and a door at one side, not fixed to the soil, without sanitary arrangements or provision for artificial lighting or heating, erected at a seaside resort as a shelter for a weighing-machine, and containing besides the weighing-machine a table and two chairs, open in the summer months during the day and visited by persons using the weighing-machine, of which an attendant has charge, is not a "new building" within the by-law of a borough providing that "Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together." *Southend-on-Sea Corporation v. Archer*; *Same v. Romanis*, 70 L. J. K.B. 328; 84 L. T. 264; 65 J. P. 292—D.

A movable wooden structure upwards of nine feet long, six feet broad, and seven feet high, having a movable front, not fixed to the soil, without sanitary arrangements or provision for artificial lighting or heating, erected at a seaside resort only in the summer months for the sale of refreshments, containing a counter and shelves on which goods are placed, and open during the day in charge of an attendant as a shop for the sale of refreshments to customers, is not a "new building" within the above by-law. *Ib.*

New House not Certified for Habitation—"Letting" House—Caretaker in Occupation.—Allowing a caretaker to be in occupation of a newly built house is not a "letting" of same within the meaning of a by-law which imposes a penalty for "letting" any new dwelling-house before it has been certified as in every respect fit for human habitation. *Gowen v. Sedgwick*, 68 J. P. 484—D.

Erecting Shed—By-law—Neglecting to Comply with Notice—Insufficiency of Notice.—By certain by-laws Nos. 53 and 96 it was provided that if any person should erect new domestic buildings certain open space was to be provided, and any one who was intending to erect a building was to give notice to the council and deliver plans thereof, a description of the materials to be used, and other details. By by-law No. 98, where a person who has erected a building or done any other work to which the by-laws apply receives a notice in writing

specifying any matters in respect of which the erection or the work is in contravention of any by-law, such person must cause anything done in contravention to be amended. A notice was served stating: "I am directed . . . to call your attention to the fact that a wooden erection has been made . . . contrary to Nos. 53 and 96 of the by-laws. . . ."—*Held*, that such notice was sufficient. *Dickinson v. Forsyth*, 90 L. T. 30; 68 J. P. 170; 2 L. G. R. 1199—D.

Floors of Warehouse Buildings—General Clause to Secure Adequate Strength.—Where the by-laws of an urban authority lay down rules as to the strength of timbers for floors of certain kinds, and do not provide in detail for all possible modes of construction, but contain a general clause requiring suitable materials and adequate strength, a floor constructed partly of timber and partly of steel is subject to such general clause, and not to the rules applicable to floors constructed wholly of timber. *Towers v. Brown*, 2 L. G. R. 942—D.

Hoarding—"Abutting" on Street.—A hoarding for advertisements sixty feet long and twelve feet above a hedge, no part of such hoarding being nearer to the street than two feet and having the hedge between it and the street, does not "abut" on the street. *Barnett v. Covell*, 90 L. T. 29; 2 L. G. R. 215; 68 J. P. 93; 20 T. L. R. 134—D.

Water Tower Erected under Special Act—District Council's By-laws under Public Health Act, 1875—Notices by Water Company to District Council.—A water company, empowered by their special Act merely to erect a high-service water tower in a particular situation, are not exempt from the by-laws of a district council made under section 157 of the Public Health Act, 1875, requiring the delivery of certain notices before building has been commenced. *Uckfield Rural Council v. Crowborough Water Co.*, 68 L. J. Q.B. 1009; [1899] 2 Q.B. 664—D.

Dangerous Structure—Costs Incurred by Authority.—Section 257 of the Public Health Act, 1875, does not apply to section 75 of the Towns Improvement Clauses Act, 1847, incorporated in the Act of 1875 by section 160. Expenses of putting up a hoarding under section 75 of the Act of 1847 can be therefore recovered, although three months have not elapsed since the demand. *Usk Urban Council v. Mortimer*, 90 L. T. 25; 68 J. P. 38; 2 L. G. R. 135; 20 T. L. R. 96—D.

Wooden Structure—Stable.—Under the powers given by section 34 of the Local Government Act, 1858, a local board made a by-law that every person intending to erect any "new building" should give fourteen days' notice to the local board of such intention, and should at the same time deliver detail plans and sections of the proposed new building.—*Held*, that a wooden structure, being under twenty feet each way and with a slanting roof of twelve feet high, intended for a stable and erected in the centre of inclosed private ground of nearly an acre in extent, was a "new building" within the meaning of this by-law. *South Shields Cor-*

poration v. Wilson, 84 L. T. 267; 65 J. P. 294; 19 Cox C.C. 667—D.

Public Conveniences—"Proper and convenient situation."—**Nuisance—Detriment to Adjoining Property.**—The urban authority of a seaside resort decided to erect a public sanitary convenience, and selected a site, freely given by the owner, on the slope of the cliffs some thirty feet from the plaintiffs' good-class private houses, and close to public seats used by residents and visitors for the salubrity of the air and the amenity of the view. The plaintiffs, in a *quia timet* action, complained of a private nuisance likely to arise from noise and smell, and of a public nuisance in respect of the erection of the convenience on the selected site.—*Held*, on the facts, that no public or private nuisance was to be apprehended, and that the defendant council had reasonably exercised their powers under section 39 of the Public Health Act, 1875, in resolving to erect a convenience of this kind, and in selecting the site in question. *Mayo v. Seaton Urban Council*, 2 L. G. R. 127; 68 J. P. 7—Kekewich, J.

Post "in over or under any street"—**Pillar Supporting Tramway Cable—Penetration of Subsoil.**—A municipal corporation by their special Act, which incorporated the Lands Clauses Consolidation Act, 1845, were empowered to work tramways, and for that purpose to erect "in over or under any street" poles and posts. The plaintiff was the lessee of a piece of land, the surface of which had been dedicated to the public and formed part of a street, subject to the right of the plaintiff to place furniture thereon for sale. For the purpose of supporting the overhead electric wire of their tramway, the corporation, without giving the plaintiff notice under the Lands Clauses Act of their intention to take land, erected a pillar on the piece of land, which was sunk in the ground to the depth of six feet.—*Held*, that the erection of the pillar was within the powers conferred upon the company by their special Act; that it did not amount to a taking of land within the meaning of the Lands Clauses Consolidation Act, 1845; and consequently that it did not constitute a trespass to the property of the plaintiff. *Escott v. Newport Corporation*, 73 L. J. K.B. 693; [1904] 2 K.B. 869; 90 L. T. 348; 52 W. R. 543; 68 J. P. 135; 2 L. G. R. 779; 20 T. L. R. 158—D.

Building not "adapted to be used . . . as a place of habitual employment for any person in any manufacture, trade, or business"—**Stable for Horses used in Business.**—A stable in which horses belonging to a builder are kept and in which they are fed and groomed is not a building "adapted to be used . . . as a place of habitual employment for any person in any manufacture, trade, or business" within the meaning of a clause in the model form exempting from building by-laws any building which shall not exceed certain dimensions, and shall not, *inter alia*, be "constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment for any person in any manufacture, trade, or business," and shall be at a certain distance from other buildings and property. Such a stable, fulfilling the necessary conditions as to

dimensions, &c., is therefore exempt from by-laws containing the exemption in question. *Linzell v. Felkstone Urban Council*, 90 L. T. 388; 2 L. G. R. 372; 68 J. P. 208—D.

Building Unfit for Human Habitation—Closing Order—"Dwelling-house"—Houses Uninhabited for Five and a Half Years.—A closing order under section 32 of the Housing of the Working Classes Act, 1890, is properly made in respect of houses already closed to human habitation for the past five and a half years, for the circumstance of their being uninhabited renders them none the less "dwelling-houses" within the definition in section 29 of that Act. *Robertson v. King*, 70 L. J. K.B. 630; [1901] 2 K.B. 265; 84 L. T. 842; 49 W. R. 542; 65 J. P. 453—D.

Projections from Buildings—"Sign"—Iron Pole Fixed by Bolt and Nut and Carrying Flag.—Section 36, sub-section 5 of the Liverpool Improvement Act, 1892, provides that it shall not be lawful, without the consent of the corporation, to place, fix, or hang any door, shutter, trap, platform, shoot, sign, cathead, crane, hoist, or other apparatus or thing in connection with any building or structure so as to project over the surface of any street. An information alleging a breach of this enactment in respect of an iron pole, placed through a slightly open window, bolted by a screw bolt and nut to the building, and bearing a flag or advertisement on canvas which hung over the street, was dismissed, subject to a Case stated, in which the reason for dismissing the information was stated to be "that the pole and flag were not a sign within the meaning of the sub-section and that the projections therein referred to were intended to be of a more permanent and fixed character".—*Held*, that the Case must be remitted for reconsideration. *Goldstraw v. Jones*, 96 L. T. 30; 71 J. P. 22; 21 Cox C.C. 350; 4 L. G. R. 1176—D.

Arch Built under Carriage-way—Cross-action—Injunction to Restrain Interference with Electric Cables.—W. R. & Co. were occupiers of land on both sides of F. Street within the urban district of which the W. U. D. C. was the urban authority. In April, 1901, W. R. & Co. constructed a tunnel or culvert twelve feet beneath the carriage-way of F. Street for the purpose of carrying electric cables in connection with their business. The tunnel consisted of a concrete flooring and a brick archway. They subsequently changed their plans, and, cutting through the concrete, laid the cables in pipes upon or nearly upon the clay subsoil, and filled in the flooring with fresh concrete. The W. U. D. C. gave them notice to remove the tunnel in accordance with section 26 of the Public Health Act, 1875. W. R. & Co. then removed the keystone of the arch, the tunnel fell in, and the subsidence was made good with ballast. The W. U. D. C., not being satisfied, brought an action claiming a declaration that they, as the urban authority, might properly cause the arch, vault, or cellar constructed by the defendants under the carriage-way of F. Street to be altered, pulled down, or otherwise dealt with as the W. U. D. C. should think fit. W. R. & Co. instituted a cross-action for an injunction to prevent the W. U. D. C. from cutting, disturbing, or injuring their pipes or

electrical wires. The two actions came on together. It was argued on behalf of the W. U. D. C. that they had a right to remove the whole of the structure, including the pipes and wires:—*Held*, that, on the evidence, the pipes were not in any part of the structure, and therefore it was unnecessary to decide whether the concrete flooring was part of the tunnel; the W. U. D. C. were entitled to remove the structure, which they could and must do without injuring the pipes or wires. The injunction in the cross-action was granted. *Walker Urban Council v. Wigham*, 85 L. T. 579; 66 J. P. 152—Farwell, J.

Domestic Building—“Open space” in the Rear of Building.—By a by-law of a local authority, “every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than 150 square feet and free from any erection thereon above the level of the ground . . . and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises, immediately opposite or adjoining the site of such building, to be not less than 10 feet.” The defendants owned a piece of land which sloped upwards from a road, there being a dwarf wall at the top of the slope. They cut into the slope and built a retaining wall at the back, and upon the space so excavated they erected a domestic building, the top of which came a few inches above the level of the dwarf wall, without having a distance of ten feet between the building and the bank. There were no buildings within ten feet of the rear of the building:—*Held*, that the defendants had not provided an “open space” in the rear of such building, and that therefore they had contravened the by-law. *Att.-Gen. v. Friary Holroyd and Healy’s Breweries*, 71 J. P. 343; 5 L. G. R. 697; 23 T. L. R. 437—Warrington, J.

Shelter for Weighing-Machine—Movable Shop for Sale of Refreshments.—A movable wooden structure about ten feet long, seven feet broad, ten feet high in front and eight feet high behind, having shutters in front and a door at one side, not fixed to the soil, without sanitary arrangements or provision for artificial lighting or heating, erected at a seaside resort as a shelter for a weighing-machine, and containing besides the weighing-machine a table and two chairs, open in the summer months during the day and visited by persons using the weighing-machine, of which an attendant has charge, is not a “new building” within the by-law of a borough providing that “Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together.” *Southend-on-Sea Corporation v. Archer*; *Same v. Romanis*, 70 L. J. K.B. 328; 84 L. T. 264; 65 J. P. 292; 19 Cox C.C. 660—D.

A movable wooden structure upwards of nine feet long, six feet broad, and seven feet high, having a movable front, not fixed to the soil, without sanitary arrangements or provision for artificial lighting or heating, erected at a seaside resort only in the summer months for the sale of refreshments, containing a counter and shelves on which goods are placed, and open

during the day in charge of an attendant as a shop for the sale of refreshments to customers, is not a “new building” within the above by-law. *Id.*

“Building used exclusively for the working of such mine.”—“Any building (not being a dwelling-house) erected or intended to be erected in connection with any mine, or intended to be used exclusively for the working of such mine,” was not to be subject to certain by-laws:—*Held*, that the words “used exclusively for the working of such mine” were not to be confined to the getting of the materials, but included putting such materials into a deliverable state as a commercial product. They would not, however, cover buildings used for carrying on another business which the owner of the mine might carry on in addition to the mining in order to make the mine profitable. *Tylecote v. Morton*, 85 L. T. 692; 66 J. P. 136—D.

Building Erected in Contravention of By-law—Continuing Offence—Builder no longer Entitled to Enter upon Building.—A by-law of a local authority which provided for the ventilation of buildings imposed a penalty on any person erecting a building in contravention of its provisions, and a further penalty for every day during which the offence continued after notice by the local authority. A builder having been convicted of erecting a building in contravention of the by-law, notice under the by-law was given to him by the local authority. The builder had never been owner of the building, and since the conviction he had not been in possession of it, or entitled to enter upon it. The building having been suffered to remain unaltered,—*Held*, that the builder was not liable for the continuing offence under section 158 of the Public Health Act, 1875, or otherwise. *Welsh v. West Ham Corporation*, 69 L. J. Q.B. 114; [1900] 1 Q.B. 324; 82 L. T. 262; 19 Cox C.C. 480—D.

—Sale of Building—Liability of Purchaser.—By section 3 of the Public Health (Buildings in Streets) Act, 1888, “It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same.” “Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority”:—*Held*, that a purchaser of a building erected in contravention of the section, who allowed it to remain in the same state after written notice from the urban authority, was not a “person offending” against the enactment, and could not be convicted of allowing the offence to continue. *Blackpool Corporation v. Johnson*, 71 L. J. K.B. 485; [1902] 1 K.B. 646; 87 L. T. 28—D.

(i) Burial.

Burial Board—Urban District—County Borough—Transfer of Powers.—The area of a

county borough is an "urban district" within the meaning of section 62, Part IV. of the Local Government Act, 1894, and the borough council is entitled to exercise the powers conferred by that section. *Kirkdale Burial Board v. Liverpool Corporation*, 73 L. J. Ch. 529; [1904] 1 Ch. 829; 91 L. T. 28; 52 W. R. 427; 68 J. P. 289; 2 L. G. R. 763; 20 T. L. R. 406—Swinfen Eady, J.

By defining "urban district" to mean the district of an urban sanitary authority, section 21, sub-section 1, Part II. of the Act impliedly includes a county borough in such term, and the true meaning of section 35, which excludes county boroughs from the operation of Part II. of the Act, save where specially provided, is that an "urban district" where mentioned in Part II. of the Act does not, in the absence of special provision to the contrary, include a county borough. Section 35 does not exclude a county borough from the definition of "urban district" contained in section 21, sub-section 1, so as to place county boroughs outside the Act altogether, except where otherwise specially provided. *Ib.*

(j) *Common Lodging-house.*

Registration of, when Required—Penalty for Keeping.]—The Common Lodging-houses Acts, 1851 and 1853, are sanitary Acts. A common lodging-house is that class of lodging-house in which persons of the poorer class are received for short periods and, although strangers to one another, are allowed to inhabit one common room. The fact that such a house is not carried on as a business for the sake of profit, but as a humane or charitable enterprise, does not take it out of the measure of sanitary protection provided by the Acts, or prevent it being a common lodging-house within their meaning. The question is not with what object, or prompted by what motive the house is carried on, but whether the house is such and is so carried on as a lodging-house as to be within the provisions of the Acts. *Logsdon v. Booth*, 69 L. J. Q.B. 131; [1900] 1 Q.B. 401; 81 L. T. 602; 48 W. R. 266; 64 J. P. 165—D.

Although a common lodging-house is "open to all comers" in the sense that practically all comers are received without discrimination, there is no obligation upon the keeper to receive them. He may refuse to admit any person he may choose to exclude. *Ib.*

Booth v. Ferrett (59 L. J. M.C. 136; 25 Q.B. D. 87) was wrongly decided. *Ib.*

Institution for Assisting the Poor of Better Class—Separate Sleeping Cubicles—Charges Above Average Rate.]—The fact that separate sleeping accommodation by means of cubicles, the other rooms being used in common, is afforded to lodgers, at charges above the ordinary rate paid in common lodging-houses, at an institution promoted by benevolent persons for the benefit of a class of poor persons superior to the "dosser" class, does not render such institution any the less a "common lodging-house," nor exempt it from registration and inspections under the Common Lodging-houses Acts, 1851 and 1853. *Logsdon v. Booth* (69

L. J. Q.B. 131) discussed and followed. *Logsdon v. Trotter*, 69 L. J. Q.B. 312; [1900] 1 Q.B. 617; 82 L. T. 151; 48 W. R. 365; 64 J. P. 421; 19 Cox C.C. 460—D.

Charitable Institution—No Payment made by Persons Admitted.]—Having regard to the definition of a "common lodging-house" in section 3 of the Common Lodging-houses (Ireland) Act, 1860, as a "house in which persons are harboured or lodged for hire," &c., a house used for lodging persons of the poorest class, which is carried on as a charitable institution without taking any payment from those admitted, is not a "common lodging-house" within the meaning of the Common Lodging-houses Acts, 1851 and 1853, and the London County Council (General Powers) Act, 1902, and is therefore not subject to the provisions of those Acts. *Gilbert v. Jones* (74 L. J. K.B. 929; [1905] 2 K.B. 691) overruled. *Parlier v. Talbot*, 75 L. J. Ch. 8; [1905] 2 Ch. 643; 93 L. T. 522; 54 W. R. 132; 4 L. G. R. 27; 70 J. P. 43; 22 T. L. R. 10—C.A.

The definition of a "common lodging-house" in the Common Lodging-houses (Ireland) Act, 1860, is not affected by the repeal of that Act by the Public Health (Ireland) Act, 1878. *Ib.*

Per COZENS-HARDY, L.J.—A lodging-house may be a "common lodging-house" within the meaning of the Acts although it is carried on for charity and not for purposes of gain, but the persons receiving the benefit of the charity must be of the very poor and humble class. The sleeping of persons not of the same family in a common room and having meals in a common room does not constitute a "common lodging-house" if such accommodation is not the main purpose of the charity, but a charitable institution will not cease to be a "common lodging-house" because it has other benevolent or religious purposes outside the operation of the Acts. *Ib.*

The fact that a house, used as a common lodging-house, is not carried on as a business for the sake of profit, but as a humane and charitable enterprise, no payment whatever being taken from those admitted, does not prevent it from being a "common lodging-house" within the meaning of the Common Lodging-houses Act, 1851, and the London County Council (General Powers) Act, 1902, and from being, as such common lodging-house, subject to the sanitary provisions of those Acts. *Logsdon v. Booth* (69 L. J. Q.B. 131; [1900] 1 Q.B. 401) and *Logsdon v. Trotter* (69 L. J. Q.B. 312; [1900] 1 Q.B. 617) followed. *Gilbert v. Jones*, 74 L. J. K.B. 929; [1905] 2 K.B. 691; 93 L. T. 520; 54 W. R. 94; 69 J. P. 392; 3 L. G. R. 987; 21 T. L. R. 709—D. But see preceding case.

Compensation for Damage by Exercise of Statutory Powers.]—See STATUTORY POWERS and cols. 1418-9.

(k) *Cyclists.*

Lights—One Hour After Sunset—One Hour Before Sunrise.]—The appellant was riding a

bicycle on August 19, 1898, at Bristol without a light at 8.16 p.m. The hour of sunset at Greenwich on that day was 7.13 p.m., but at Bristol it was ten minutes later—namely, 7.23 p.m. The Justices were of opinion that “one hour after sunset” meant one hour after sunset at Greenwich, and convicted the appellant. *Held*, that the magistrates were wrong. *Gordon v. Cann*, 68 L. J. Q.B. 434; 80 L. T. 20; 47 W. R. 269; 63 J. P. 324—D.

(1) *Factories.*

Sanitary Conveniences for Workers—Suitability or Sufficiency—Requirements of Government Inspector—Justices' Jurisdiction to Hear Evidence.]—Justices have no jurisdiction to hear evidence upon or decide the question of suitability or sufficiency of sanitary accommodation existing in a factory, or required by the notice served by a factory inspector upon the owner of a factory. *Tracey v. Pretty*, 70 L. J. K.B. 234; [1901] 1 K.B. 444; 83 L. T. 767; 49 W. R. 282; 65 J. P. 196; 19 Cox C.C. 593—D.

—Appeal from Inspector's Requirements.]—But the requirement of the factory inspector is the subject of an appeal to quarter sessions under section 7 of the Public Health Acts Amendment Act, 1890. *Ib.*

Ventilation—Dust Injurious to Workers—Evidence of Actual Injury Unnecessary.]—In proceedings under section 36 of the Factory and Workshop Act, 1878, in which the owners of the factory are called upon to provide, maintain, and use a fan or other mechanical means for preventing the inhalation of dust generated in the factory by the workers to an injurious extent, it is unnecessary to prove by evidence that any worker has sustained actual injury, but it is enough to shew that dust was generated to such an extent that its tendency was necessarily to injure the workers' health in course of time. *Hoare v. Ritchie*, 70 L. J. K.B. 279; [1901] 1 K.B. 434; 84 L. T. 54; 49 W. R. 351; 65 J. P. 261—D.

(m) *Fire Brigade.*

Urban District—Superintendent—Implied Authority to Call in other Fire Brigade—Remuneration.]—The superintendent of the fire brigade of an urban district has, in the absence of express regulations to the contrary, an implied authority from the district council to call in, where necessary for the proper discharge of his duties, the services of another fire brigade, and the fire brigade so called in, in the absence of evidence shewing that the services were rendered gratuitously, are entitled to receive from the district council reasonable remuneration for the work of the members and for the use of the fire engine and other necessary implements. *Janes v. Staines Urban Council*, 83 L. T. 426—D.

“Purchase or provide” fire engines, &c., in section 32 of the Town Police Clauses Act, 1847, enables an urban district council not

merely to buy, but, where necessity arises; to hire temporarily fire engines, &c. *Ib.*

(n) *Food and Drugs.*

Butter and Margarine.]—7 Edw. 7 c. 21 is the *Butter and Margarine Act*, 1907.

Fertilizers and Feeding Stuffs.]—6 Edw. 7 c. 27 is the *Fertilizers and Feeding Stuffs Act*, 1906.

Food.]—7 Edw. 7 c. 32 is the *Public Health (Regulations as to Food) Act*, 1907.

Food and Drugs.]—62 & 63 Vict. c. 51 is the *Sale of Food and Drugs Act*, 1899.

Oil in Tobacco.]—63 & 64 Vict. c. 35 is the *Oil in Tobacco Act*, 1900.

(1) *Generally.*

Sale of Article not of Nature, Substance, and Quality Demanded—Drug not in Accordance with Standard of “British Pharmacopœia”—Compounded Drug.]—A chemist selling to a purchaser, who asks for “mercury ointment” but does not state that he requires it to be made in accordance with the standard of the *British Pharmacopœia*, an ointment containing only about one-fourth of the percentage of mercury contained in the mercury ointment of the *British Pharmacopœia*, without informing him of the difference, is liable to be convicted under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser a drug which is not of the nature, substance, and quality of the article demanded by the purchaser. *Dickins v. Randerson*, 70 L. J. K.B. 344; [1901] 1 K.B. 437; 84 L. T. 204; 65 J. P. 262; 19 Cox C.C. 643—D.

—Milk as Taken from Cow Deficient in Fat.]—In proceedings under section 6 of the Sale of Food and Drugs Act, 1875, in respect of a sale of milk, it was proved that the milk sold contained only 2.81 per cent. of milk fat as against the 3 per cent. laid down by the Sale of Milk Regulations, 1901, as the *prima facie* standard for genuine milk, but that the milk sold had in fact not been tampered with, and that the deficiency was accounted for by the length of the interval that had been allowed to elapse between the successive milkings of the cows from which the milk was obtained:—*Held*, that under these circumstances the Justices were not bound to convict, and that it was a question of fact whether the article sold was, or was not, of the nature, substance, and quality demanded. *Smithies v. Bridge* (71 L. J. K.B. 555; [1902] 2 K.B. 13) explained. *Wolfenden v. McCulloch*, 92 L. T. 857; 3 L. G. R. 561; 69 J. P. 223; 20 Cox C.C. 864; 21 T. L. R. 411—D. *And see MILK, infra.*

—“Chewing gum”—Paraffin Wax.]—On the hearing of two informations under sections 3 and 6 of the Sale of Food and Drugs Act, 1875, it was proved or admitted before the Justices that the appellant was a shop-keeper, carrying on business at 5 P. Road, T., where he retailed sweets and groceries. On May 13,

1899, the respondent visited the appellant's shop, and purchased some "chewing gum." Each of the packets of "chewing gum" was labelled "R. & Co.'s chewing. This must not be eaten. For chewing only." The respondent, after looking at the packets and reading the labels, asked the price, and bought three-pennyworth. It was proved, or admitted, that the "chewing gum" was sold as an article to be chewed and not as an article to be eaten. It could not be dissolved by the saliva of the mouth, nor could it be masticated by the teeth. It was, however, capable of being swallowed whole, although it was not intended to be swallowed. Paraffin wax was one of the ingredients, and each packet contained 8·3 per cent. thereof. The wax was an essential ingredient. Paraffin wax if received into the stomach was injurious to health, and the quantity of wax in the packets was sufficient to make the article as a sweet injurious to health if passed into the stomach. If swallowed, therefore, it was injurious to health, but if it was used in the manner in which it was intended to be used—namely, for chewing—it was not in any way injurious to health. The Justices convicted the appellant:—*Held*, that on the facts the Justices were wrong. *Bennett v. Tyler*, 81 L. T. 787; 64 J. P. 119; 19 Cox C.C. 434—D.

— **Tapioca Sold as Sago.**—Where it appeared that it was the custom of the trade to sell as sago a particular kind of tapioca which was of the same value as sago, it was held that the Justices might find that a sale of such tapioca to a person who asked for sago was not a sale to his prejudice, and might therefore dismiss the information taken out against the seller for selling to the prejudice of the purchaser an article not of the nature, substance, and quality of the article demanded. *Sandys v. Rhodes*, 67 J. P. 352—D.

— **No Evidence of Inferiority of Article Sold—Addition of Glucose to Marmalade.**—To a person who asked for a pot of marmalade a grocer sold a pot of marmalade which was found to contain 13 per cent. of starch glucose. The glucose consisted of sugar, a gummy substance which had no sweetening property, and water. There was no legal standard for the making of marmalade, and manufacturers used various recipes, and for many years glucose had been used by many, though not by all, manufacturers in the making of it. The glucose to the extent used was not injurious to health, and it prevented the marmalade from crystallising and had a tendency to prevent mildewing and fermenting:—*Held*, that there was no evidence that the article supplied was inferior to the article demanded or was adulterated, and no evidence therefore that the sale was a sale to the prejudice of the purchaser within the meaning of section 6 of the Sale of Food and Drugs Act, 1875. *Smith v. Wisden*, 85 L. T. 760; 66 J. P. 150; 20 Cox C.C. 135—D.

— **Article not Stated to be Injurious to Health.**—To justify a conviction under section 6 of the Sale of Food and Drugs Act, 1875, in respect of the sale of an article of food with which a foreign ingredient has been mixed, it must be found that the article of food has been rendered injurious to health by the admixture of the ingredient; a finding that the added in-

redient is in itself injurious to health is insufficient. It is not, however, necessary that the analyst's certificate on which the proceedings under the section are founded should state that the article is injurious to health. *Hull v. Horsnell*, 92 L. T. 81; 2 L. G. R. 1280; 68 J. P. 591; 20 Cox C.C. 759; 21 T. L. R. 32—D.

Proof of Quality where no Standard Fixed by Regulation.—In the case of an article such as brandy, where no standard of purity has been fixed by regulation, the question whether the article supplied is of the nature, quality, and substance demanded is one of fact to be decided on the evidence given at the hearing. *Wilson and McPhee v. Wilson*, 6 F. (Just. Cas.) 10—Ct. of Justy.

Sale by "Person"—Limited Company.—A limited company is a "person" within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, which provides that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty. *Pearks v. Ward*, 71 L. J. K.B. 656; [1902] 2 K.B. 1; 87 L. T. 51; 66 J. P. 774; 20 Cox C.C. 279—D.

Sale "to the prejudice of purchaser"—Purchase for Analysis—Knowledge of True Nature of Article Sold.—The respondent employed an agent to purchase on his behalf from the appellants, a grocery company, half a pound of "butter" for the purpose of analysis. The agent asked for and both he and the respondent expected to get "butter," but the company supplied a substance known as "Pearks's butter," consisting of butter blended with milk, and containing in consequence an excess of moisture. The agent and the respondent both knew that the butter supplied was moist, though they did not know that it contained such an excess of moisture as it did contain:—*Held*, a sale "to the prejudice of the purchaser," within the meaning of section 6 of the Sale of Food and Drugs Act, 1875. *Id.*

Sale "to the prejudice of purchaser"—Preserved Peas—Sulphate of Copper Used as Colouring-matter.—An information under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser, as preserved peas, an article not of the nature, substance, and quality demanded, was dismissed by the Justices, on the ground that there had been no sale to the prejudice of the purchaser; subject to a Case finding as facts that the purchaser asked for preserved peas, that he was supplied with preserved peas containing, as added colouring-matter, sulphate of copper in a quantity insufficient to be injurious to health, and that preserved peas are habitually sold with added colouring-matter:—*Held*, that the Justices were justified in point of law in dismissing the information. *Friend v. Mapp*, 2 L. G. R. 1317; 63 J. P. 539—D.

(2) Beer.

Admixture of Arsenic in Beer—Liability of Innocent Vendor.—A person who sells beer which in fact contains such an admixture of

arsenic as to be prejudicial to health is liable to conviction under section 6 of the Sale of Food and Drugs Act, 1875, although he does not know, and cannot reasonably be expected to know, of the presence of the arsenic in the beer. *Goulden v. Rook*, 70 L. J. K.B. 747; [1901] 2 K.B. 290; 84 L. T. 719; 49 W. R. 634, 701; 65 J. P. 646; 19 Cox C.C. 725—D.

(3) Brandy and Rum.

Sale of Brandy—Sufficiency of Certificate.]—Brandy having been analysed, the certificate stated: "I am of opinion that the said sample contained parts as under, or the percentages of foreign ingredients as under: It has been reduced from 25 degrees under proof to 27.6 degrees under proof."—*Held*, that the certificate was sufficient. *Findley v. Haas*, 88 L. T. 465; 67 J. P. 198; 1 L. G. R. 377; 20 Cox C.C. 399—D.

Rum more than Twenty-five Degrees under Proof—Notice Posted up—Sufficiency of Notice—"Spirits . . . not . . . of any guaranteed strength"—Sale to the "prejudice of the purchaser."—A notice posted up in an inn that "all spirits sold . . . are of the same quality and strength as heretofore, but, in order to comply with the Food and Drugs Act, will not be of any guaranteed strength," is not a sufficient notice to prevent a sale of rum which is more than twenty-five degrees below proof from being a sale to the prejudice of the purchaser; the vendor in such circumstances is therefore liable to the penalty imposed by section 6 of the Sale of Food and Drugs Act, 1875 (*DARLING, J.*, dissenting). *Dawes v. Wilkinson*, 76 L. J. K.B. 182; [1907] 1 K.B. 278; 96 L. T. 26; 71 J. P. 23; 5 L. G. R. 1; 23 T. L. R. 34—D.

(4) Butter.

Addition of Fat—Importation—Warranty of Quality—Liability of Importer.]—Upon a prosecution under section 1 of the Sale of Food and Drugs Act, 1899, for importing butter adulterated with foreign fat in packages not marked with a description indicating that the butter has been so treated, it is not open to the defendant to set up as a defence that he received the butter with a written warranty of purity, in the truth of which he believed. Such a defence is only available where there has been a sale of the adulterated article. *Kelly v. Lonsdale*, 75 L. J. K.B. 822; [1906] 2 K.B. 486; 95 L. T. 427; 70 J. P. 441; 4 L. G. R. 949; 21 Cox C.C. 281; 22 T. L. R. 655—D.

Standard of Percentage of Fat—Sale to Prejudice of Purchaser.]—Upon a prosecution under section 6 of the Sale of Food and Drugs Act, 1875, for selling as margarine an article not of the nature, substance, and quality demanded, the fact that the article sold is margarine within the definition of that term in the Margarine Act, 1887, does not preclude the Justices from convicting on the ground that the article is not genuine margarine. And in deciding whether the article is genuine it is for the Justices to determine, on the evidence before them, the standard, as regards the ingredients and their percentages, with which margarine, to be genuine, must comply. *Roberts v. Leeming*, 8 L. G. R. 1081; 69 J. P. 417—D.

Upon a prosecution of the kind the Justices found that, to be genuine, margarine should contain at least 85 per cent. of fat, and, as the article sold contained only 75 per cent. of fat, convicted:—*Held* (*LORD ALVERSTONE, C.J.*, dissenting), on the particular facts, that there was evidence on which the Justices could come to the conclusion that margarine ought to contain at least 85 per cent. of fat. *Ib.*

Milk-blended Butter—Margarine—Substance with more than 10 per Cent. of Butter Fat.]—Butter blended with milk so that it contains an excess of water does not become margarine. Therefore a vendor of such milk-blended butter cannot be convicted under section 8 of the Sale of Food and Drugs Act, 1899, for selling margarine containing more than 10 per cent. of butter fat. The sale of butter blended with milk is lawful if sold as such. *Bayley v. Pearks*, 87 L. T. 67; 66 J. P. 790; 20 Cox C.C. 289—D.

—Notice Affixed in Shop—Excessive Percentage of Water.]—To a purchaser who went into a shop and asked for half a pound of best fresh butter the seller sold butter which was found to be adulterated by the addition of water, and which was in fact milk-blended butter containing an excess of water. There was hung in a conspicuous place in the shop a notice that all butter sold in the shop was milk-blended butter, and the butter when handed to the purchaser was wrapped up in a paper wrapper on which was printed a notice that the butter was choicest butter blended with milk, whereby the percentage of water in it was increased. Upon an information against the seller under section 6 of the Sale of Food and Drugs Act, 1875, for selling butter which was not of the nature, substance, and quality of the butter demanded, the Justices found that the sale was to the prejudice of the purchaser, but that the seller was protected by section 8 of the Act by reason of the notice in the shop, and by reason that the butter was wrapped in a printed notice disclosing the fact that the article was a mixture; but there was no finding by them as to whether the notice on the wrapper could or could not be seen by an ordinary purchaser:—*Held*, that the notice on the wrapper was a sufficient notice by label within section 8, and was a good defence under that section, and that the Justices were right in dismissing the information. *Hayes v. Rule*, 87 L. T. 133; 66 J. P. 661; 20 Cox C.C. 328—D.

—Excessive Percentage of Water—Notice Affixed in Shop.]—Where provision merchants affixed in their shop, in a position visible to an ordinary purchaser, a notice to the effect that the butter sold at their establishment was butter blended with milk and containing 20 to 24 per cent. of moisture,—*Held*, that a sale of such blended butter was not a sale "to the prejudice of the purchaser" within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, although the percentage of water was excessive, and the purchaser had not in fact seen the notice. *Pearks v. Houghton*, 71 L. J. K.B. 385; [1902] 1 K.B. 889; 86 L. T. 325; 50 W. R. 605; 66 J. P. 422—D.

—Excess of Water.]—A provision merchant selling to a purchaser, who asks for "butter," butter to which, by a process subsequent to its

manufacture, milk has been added without being converted into butter, and which in consequence contains an excess of water, is liable to be convicted, under section 6 of the Sale of Food and Drugs Act, 1875, of selling, to the prejudice of the purchaser, an article not of the nature, substance, and quality of the article demanded by the purchaser. *Pearks v. Knight*; *Pearks v. Van Tromp*, 70 L. J. K.B. 1002; [1901] 2 K.B. 825; 85 L. T. 379; 50 W. R. 104; 65 J. P. 822; 20 Cox C.C. 46—D.

Butter Containing Excess of Moisture Wrapped up in Greaseproof Paper.—A person purchasing butter for the purpose of analysis caused each of the three parts into which the butter was divided to be wrapped up in a greaseproof envelope. The analysts certified that the butter contained an excess of water, adding that no change had taken place in the butter which would interfere with the analysis, and that in consequence of the butter having been so fastened up it was probable that there had been considerable loss of water since the date of the purchase. On a Case stated by Justices who had convicted the seller under section 6 of the Sale of Food and Drugs Act, 1875,—*Held*, that the wrapping up of the butter in the manner above mentioned was a sufficient compliance with section 14 of the Act. *Pearks v. Ward*, 71 L.J. K.B. 656; [1902] 2 K.B. 1—D.

Margarine—Exposing for Sale—Label.—On the defendant's counter there was a butt of margarine from which the lid had been removed, but which was branded on the lid, bottom, and side with the word "Margarine." There was no label attached as required by the second regulation in section 6 of the Margarine Act, 1887. The defendant's assistant, on being asked for one pound of margarine by the prosecutor, sliced away that quantity from the margarine in the butt, and sold it to him:—*Held*, that the facts brought the defendant within the second regulation, and that the magistrates ought to have convicted the defendant thereunder. *Maquire v. Porter*, [1905] 2 Ir. R. 147—K.B. D.

Excess of Water.—Margarine having been purchased and analysed, evidence was given that it contained 21 per cent. of water, which was at least 5 per cent. in excess of water that margarine should contain:—*Held*, that the vendor was rightly convicted of selling to the prejudice of the purchaser margarine not of the nature, substance, and quality demanded, contrary to section 6 of the Sale of Food and Drugs Act, 1875. *Burton v. Mattinson*, 86 L. T. 770; 66 J. P. 628; 20 Cox C.C. 262—D.

Butter Substitute—Sale of "Keeloma"—Sale "under the name of margarine."—The respondent asked at the appellant's shop for half a pound of "Keeloma" and received a substance wrapped in a brown paper with no label upon it. On the package being opened it was found that there was a second wrapper of paper with the word "Margarine" printed on it as required by the Margarine Act, 1887. Keeloma was in fact margarine, and the purchaser knew this when he purchased it. Notices were displayed in the shop stating that only Keeloma and Overweight, the new

butter substitutes, were sold there, and to comply with the Acts they were sold under the name of margarine. The appellants having been convicted of selling margarine under another name,—*Held*, that the selling of the article under a special name was not necessarily an offence against the Act, and the conviction was wrong. *Keeloma Dairy Co. v. Jones*, 70 J. P. 533; 5 L. G. R. 246; 22 T. L. R. 535—D.

"Package" containing—Open Tub.—A dealer in margarine had in his shop at the back of his counter, and in full view of customers, several tubs, open at the top, containing margarine:—*Held*, that these tubs were "packages" within the meaning of section 6 of the Margarine Act, 1887, and that they should have been branded or durably marked as required by that section. *McNair v. Horan*, 91 L. T. 555; 2 L. G. R. 1239; 63 J. P. 518; 20 Cox C.C. 729—D.

Importation of, otherwise than in Packages Marked "Margarine"—Conviction—Question of Fact—Right of Appeal.—No appeal on a question of fact lies to quarter sessions from a conviction by Justices under section 1 of the Sale of Food and Drugs Act, 1899. So *held* by RIDLEY, J., and DARLING, J. (BRAY, J., *dissentiente*). *Ree v. Otto Monsted, Lim.*, 75 L. J. K.B. 629; [1906] 2 K.B. 456; 95 L. T. 526; 4 L. G. R. 942; 70 J. P. 435; 21 Cox C.C. 289—D.

Purchase by Retail Dealer from Wholesale Dealer—Purchase by Inspector from Retail Dealer for Analysis—Admissibility of Analyst's Certificate in Proceedings by Inspector against Wholesale Dealer.—Where a wholesale dealer has sold an article as butter to a retail dealer in the ordinary course of business, and the retail dealer has subsequently sold, on his own account, a portion of the article as butter to an inspector of weights and measures purchasing for analysis, the analyst's certificate of the analysis of such portion is not admissible in proceedings by the inspector against the wholesale dealer under section 6 of the Margarine Act, 1887, as evidence that the article sold by him was margarine. *Tyler v. Kingham*, 69 L. J. Q.B. 630; [1900] 2 Q.B. 413; 83 L. T. 169; 64 J. P. 598; 19 Cox C.C. 547—D.

"Parcel" of—Label—Six Pounds of Margarine Forming Triangular Group or Pyramid.—Six separate pounds of margarine, each partially covered with paper, placed together in a shop window in the form of a triangular group or pyramid, and touching each other, form one "parcel" within the meaning of section 6 of the Margarine Act, 1887, and are sufficiently labelled to satisfy that section by a single label placed at the base of the triangular group or pyramid so as to extend across the whole of the bottom portion of the three lowest pieces. *Parkinson v. McNair*, 93 L. T. 553; 3 L. G. R. 982; 69 J. P. 399; 21 Cox C.C. 42—D.

Register—Obligation to Produce Register for Examination by Inspector—Right of Inspector to take Notes.—The power given by section 7 of the Sale of Food and Drugs Act, 1899, to officers of the Board of Agriculture to inspect the registers kept by

manufacturers of, and wholesale dealers in, margarine carries with it the right to take notes of the entries in such registers. *Hart v. Cohen & Van der Laan*, 4 F. 445—Ct. of Sess.

A firm of margarine dealers were convicted under section 7, sub-section 3 of the Sale of Food and Drugs Act, 1899, of failure to produce the register kept by them. They had produced their register, but declined to allow the inspector to make notes of its contents:—*Held*, that the conviction was right. *Id.*

— “*Marvo*”—Sale of Butter Substitute otherwise than as Margarine.]—The respondent went into the appellant's shop and asked for half a pound of “*Marvo*,” and was served with a substance from a box labelled “*Margarine*,” which substance, before being handed to the respondent, was wrapped in paper on which was printed in half-inch letters “*Margarine*.” Inside the package was found a slip on which was printed: “*Marvo* (registered by Act of Parliament). Without this slip none is genuine”; and behind the counter was a notice: “*Notice*—‘*Marvo*,’ the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food and Drugs Act is sold as ‘*Margarine*’”:—*Held*, that the appellant had not sold a substance prepared in imitation of butter under a name other than margarine, within section 3 of the Margarine Act, 1887. *Tanner v. Dyball*, 94 L. T. 539; 4 L. G. R. 506; 70 J. P. 279; 21 Cox C.C. 123—D.

— Statement of Weight not Filled up—Butter—Article Liable to Decomposition—Statement as to Change in Constitution.]—In a prosecution under the Sale of Food and Drugs Act, it is not a valid objection to the analyst's certificate that the space in the schedule form of certificate for the weight of the sample has been left blank without any statement that the article could not be conveniently weighed. But a certificate of the analysis of an article which is sent as butter is invalid if the analyst does not report whether any change had taken place in the constitution of the article, the direction in the schedule form of certificate so to report being imperative in the case of butter; and it is no excuse for non-compliance with this direction that the article proved on analysis to be margarine. *Hunter v. Winthrop*, 7 F. (Just. Cas.) 22—Ct. of Justy.

(5) Drugs.

Not of Nature, Substance, and Quality of Article Demanded—Drug not in Accordance with Standard of “*British Pharmacopœia*”—“*Mercury ointment*.”]—A chemist selling to a purchaser, who asks for “*mercury ointment*” but does not state that he requires it to be made in accordance with the standard of the *British Pharmacopœia*, an ointment containing only about one-fourth of the percentage of mercury contained in the mercury ointment of the *British Pharmacopœia*, without informing him of the difference, is liable to be convicted under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser a drug which is not of the nature, sub-

stance, and quality of the article demanded by the purchaser. *Dickins v. Randerson*, 70 L. J. K.B. 344; [1901] 1 K.B. 437; 84 L. T. 204; 65 J. P. 262—D.

— *Vinegar of Squills*.]—The *British Pharmacopœia* gives a formula for the preparation of vinegar of squills but fixes no standard as to the amounts of its ingredients which that drug in its finished state is to contain. On an information under the Sale of Food and Drugs Acts for selling vinegar of squills otherwise than in accordance with the demand of the purchaser, it was proved that the drug sold contained less acetic acid than vinegar of squills freshly made in accordance with the formula of the *British Pharmacopœia* would contain, but that vinegar of squills, even though properly kept, gradually undergoes a loss of acetic acid. The Justices, without considering whether deficiency in acetic acid impairs the efficiency of the drug, convicted on this evidence:—*Held*, that there was no evidence to justify the conviction. *Hudson v. Bridge*, 88 L. T. 550; 67 J. P. 136; 1 L. G. R. 400; 20 Cox C.C. 425—D.

— *Compounded Drug*—Sale to Prejudice of Purchaser.]—Proceedings may properly be taken under section 6 of the Sale of Food and Drugs Act, 1875, against a person who sells to the prejudice of the purchaser a compounded drug which is not of the nature, substance, and quality of the article demanded by the purchaser. *Beardsley v. Walton*, 69 L. J. Q.B. 344; [1900] 2 Q.B. 1; 82 L. T. 119; 64 J. P. 436; 19 Cox C.C. 447—D.

Evidence of Commercial Standard Differing from Pharmacopœia—Admissibility.]—In a prosecution under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser an article which is not of the nature, substance, and quality of the article demanded, upon the ground that the article, being one mentioned in the *British Pharmacopœia*, is not in accordance with the prescription in the *Pharmacopœia*, evidence tendered for the defendant is admissible to shew that there is a commercial standard of the article differing from that prescribed by the *British Pharmacopœia*. *Dickins v. Randerson* (70 L. J. K.B. 344; [1901] 1 K.B. 437) explained. *Boots Cash Chemists v. Cowling*, 88 L. T. 539; 67 J. P. 195; 1 L. G. R. 884; 20 Cox C.C. 420—D.

• *Injurious to Health*—“*Chewing gum*”—*Paraffin Wax*.]—On the hearing of two informations under sections 3 and 6 of the Sale of Food and Drugs Act, 1875, it was proved or admitted before the Justices that the appellant was a shop-keeper, carrying on business at 5 P. Road, T., where he retailed sweets and groceries. On May 13, 1899, the respondent visited the appellant's shop, and purchased some “*chewing gum*.” Each of the packets of “*chewing gum*” was labelled “*B. & Co.'s chewing*. This must not be eaten. For chewing only.” The respondent, after looking at the packets and reading the labels, asked the price, and bought three-pennyworth. It was proved, or admitted, that the “*chewing gum*” was sold as an article to be chewed and not as an article to be eaten. It could not be dissolved by the saliva of the mouth, nor could it be masticated by the teeth. It was, however, capable of being swallowed

whole, although it was not intended to be swallowed. Paraffin wax was one of the ingredients, and each packet contained 8·3 per cent. thereof. The wax was an essential ingredient. Paraffin wax if received into the stomach was injurious to health, and the quantity of wax in the packets was sufficient to make the article as a sweet injurious to health if passed into the stomach. If swallowed, therefore, it was injurious to health, but if it was used in the manner in which it was intended to be used—namely, for chewing—it was not in any way injurious to health. The Justices convicted the appellant:—*Held*, that on the facts the Justices were wrong. *Bennett v. Tyler*, 81 L. T. 787; 64 J. P. 119—D.

(6) Fertilisers and Food-stuffs.

False Invoice—Prosecution—Condition Precedent—Compliance with Provisions as to Samples and Analysis—“Permitting” Invoice to be False—Guilty Knowledge.]—Compliance with the provisions of the Fertilisers and Feeding-stuffs Act, 1893, as to the taking of samples and the analysis of the article sold, is not a condition precedent to a prosecution under section 3, sub-section 1 (b) of the Act. *Korten v. West Sussex County Council*, 72 L. J. K.B. 514; 88 L. T. 466; 67 J. P. 167; 1 L. G. R. 445; 20 Cox C.C. 402—D.

A chemical company sold a quantity of a particular kind of fertiliser, and an invoice was sent to the purchaser stating that the goods contained 38 to 45 per cent. of total phosphates. The goods in fact contained less than 38 per cent. of phosphates. The evidence shewed that the managing director of the company knew that in the kind of fertiliser in question the proportion of phosphates varied, that in the ordinary course of business sales of that fertiliser would come under his notice, that he was cognisant of the general form of invoice used, and that invoices with a guarantee would not be sent out in the ordinary course without his knowledge; but there was no evidence that he saw the particular invoice in question or knew it to be false, though there was evidence that that invoice would not be sent out in the ordinary course without his knowledge. The managing director having been convicted under section 3, sub-section 1 (b) of the Fertilisers and Feeding-stuffs Act, 1893, of permitting an invoice or description of the article sold to be false in a material particular to the prejudice of the purchaser,—*Held*, that the conviction was right. *Ib.*

—Permitting Invoice to be False—Guilty Knowledge.]—In order to constitute the offence under section 3, sub-section 1 (b) of the Fertilisers and Feeding-stuffs Act, 1893, of permitting an invoice or description of the article sold to be false in a material particular to the prejudice of the purchaser, it is not necessary to prove guilty knowledge. *Laird v. Dobell*, 75 L. J. K.B. 163; [1906] 1 K.B. 131; 93 L. T. 842; 54 W. R. 506; 4 L. G. R. 232; 70 J. P. 62; 21 Cox C.C. 66—D.

(7) Meat.

Diseased—Liability of Person in whose Possession Meat Found—Exposure for Sale.]—A

person in whose possession unsound meat is found is not liable to be convicted under sections 116 and 117 of the Public Health Act, 1875, of the offence of having in his possession unsound meat intended for the food of man, if he shows that at the time the meat was unsound it was not intended for the food of man. *Mallinson v. Carr* (60 L. J. M.C. 34; [1891] 1 Q.B. 48) distinguished. *Wieland v. Butler-Hogan*, 73 L. J. K.B. 513; 90 L. T. 588; 53 W. R. 68; 68 J. P. 310; 2 L. G. R. 1074; 20 Cox C.C. 630; 20 T. L. R. 419—D.

Meat “deposited for the purpose of sale”—Third Person—No Exposure for Sale.]—A person who deposits for the purpose of sale upon the premises of a third person unsound meat intended for the food of man is not liable to the penalty imposed by section 117 of the Public Health Act, 1875, as amended by section 23 of the Public Health Acts Amendment Act, 1890, if there has been no exposure for sale of such unsound meat. *Barlow v. Terrett* (60 L. J. M.C. 104; [1891] 2 Q.B. 107) followed. *Firth v. McPhail*, 74 L. J. K.B. 458; [1905] 2 K.B. 300; 92 L. T. 567; 69 J. P. 203; 3 L. G. R. 478; 20 Cox C.C. 821; 21 T. L. R. 403—D.

Condemnation of Unfit for Food of Man—Compensation—Arbitration—Jurisdiction of Arbitrator—Costs of Magisterial Proceedings.]—Where meat has been condemned and ordered to be destroyed by a magistrate as unfit for the food of man, and the owner of the meat claims compensation under section 308 of the Public Health Act, 1875, the arbitrator appointed to award compensation under that section has jurisdiction to decide the question of the soundness of the meat, and may award as part of the compensation the expenses incurred by the claimant in proceedings before the magistrate. *Walshaw v. Brighouse Corporation*, 68 L. J. Q.B. 828; [1899] 2 Q.B. 286; 81 L. T. 2; 47 W. R. 600—C.A.

Costs of Successful Defence.]—Upon an arbitration under section 308 of the Public Health Act, 1875, all that is to be considered by the arbitrator is whether the person claiming compensation has suffered damage, and the amount of such damage. The costs of successfully defending a prosecution for exposing for sale unsound meat, which meat is the subject of the claim for compensation, cannot be recovered as damages. *Davies and Rhondda Urban Council, In re*, 80 L. T. 696—D.

Unsound—Destruction of—No Justice’s Order.]—The seizure and subsequent destruction of unsound meat by an inspector of nuisances without an order having been obtained in that behalf from a Justice of the peace is illegal. *Ormerod v. Rochdale Corporation*, 62 J. P. 153—Bruce, J.

(8) Milk.

Article not of Nature and Substance Demanded—Sale of Milk Deficient in Fat—Absence of Addition to or Abstraction from Milk.]—Where a purchaser demands new milk and the seller supplies him with an article which comes direct from the cow, and which has not been tampered with or adulterated in any way, but is deficient

in fat in consequence of the cow having been treated in an abnormal manner, there is evidence upon which Justices may find that the seller has committed the offence under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser milk not of the nature, quality, and substance of the article demanded. *Smithies v. Bridge*, 71 L. J. K.B. 555; [1902] 2 K.B. 13; 87 L. T. 167; 50 W. R. 686; 66 J. P. 740; 20 Cox C.C. 342—D.

Per LORD ALVERSTONE, C.J.—*Lane v. Collins* (54 L. J. M.C. 76; 14 Q.B. D. 193), was decided upon a special state of facts. *Id.*

Milk as Taken from Cow Deficient in Fat.—In proceedings under section 6 of the Sale of Food and Drugs Act, 1875, in respect of a sale of milk, it was proved that the milk sold contained only 2·81 per cent. of milk fat as against the 3 per cent. laid down by the Sale of Milk Regulations, 1901, as the *prima facie* standard for genuine milk, but that the milk sold had in fact not been tampered with, and that the deficiency was accounted for by the length of the interval that had been allowed to elapse between successive milkings of the cows from which the milk was obtained:—*Held*, that under these circumstances the Justices were not bound to convict, and that it was a question of fact whether the article sold was, or was not, of the nature, substance, and quality demanded. *Smithies v. Bridge* (71 L. J. K.B. 555 [1902] 2 K.B. 13) explained. *Wolfenden v. McCulloch*, 92 L. T. 857; 3 L. G. R. 561; 69 J. P. 228; 21 T. L. R. 411—D.

Sale of Milk Deficient in Fat—Absence of, Addition to, or Abstraction from Milk.—Where a purchaser demands new milk and the seller supplies him with an article which comes direct from the cow, and which has not been tampered with or adulterated in any way, but is deficient in fat in consequence of the cow having been treated in an abnormal manner, there is evidence upon which Justices may find that the seller has committed the offence under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser milk not of the nature, quality, and substance of the article demanded. *Smithies v. Bridge*, 71 L. J. K.B. 555; [1902] 2 K.B. 13; 87 L. T. 167; 50 W. R. 686; 66 J. P. 740—D.

Per LORD ALVERSTONE, C.J.—*Lane v. Collins* (54 L. J. M.C. 76; 14 Q.B. D. 193) was decided upon a special state of facts. *Id.*

"Skimmed" Milk—"Separated" Milk—Disclosure of Injurious Alteration.—The question whether or not an alteration in the quality, substance, or nature of a food or drug has been sufficiently disclosed is a question of fact. Milk from which 97 per cent. of the fat had been abstracted was sold as skimmed milk. The magistrate held, on the evidence, that this was not a sufficient disclosure under the Act:—*Held*, that there was no appeal from his decision. *Petchey v. Taylor*, 78 L. T. 501; 62 J. P. 360; 19 Cox C.C. 33—D.

Milk Watered in Transit by Rail from Country to Town—Seller's Liability for Acts of Strangers.—A dairy-farmer, under contract for the sale and delivery of pure unskimmed milk by rail,

carriage paid, to the purchaser, at a London railway terminus, is liable to be convicted of an offence under section 6 of the Sale of Food and Drugs Act, 1875, as amended by section 8 of the Amendment Act, 1879, if, on its arrival at the London platform, a sample of the milk be found, after analysis at the instance of an inspector under the Acts, to contain a percentage of added water, although such adulteration was wholly without the knowledge or connivance of the farmer, his servants or employees, and could only have been effected by some one, a stranger to him, after the milk had been placed in the train and during its transit from the country station to the London terminus. *Parker v. Alder*, 68 L. J. Q.B. 7; [1899] 1 Q.B. 20; 79 L. T. 381; 47 W. R. 142; 62 J. P. 772; 19 Cox C.C. 191—D.

Ten per Cent. added Water—Milk exceptionally Good—Trifling Offence.—The respondent was charged with selling milk contrary to section 6 of the Food and Drugs Act, 1875. At the hearing of the information the certificate of the analyst was produced and proved on behalf of the appellant, and showed as follows: "I, the undersigned public analyst for the county of Essex, do hereby certify that I received on June 5, 1899, a sample of milk. . . . I am of opinion that the same contained the parts as under: Fat, 3·55 parts; non-fatty solids, 7·46 parts; water, 88·99 parts; total, 100·00. I am therefore of opinion that this milk contains 10 per cent. of added water." The Justices received the certificate of the analyst as sufficient evidence of the facts as herein stated, but it appeared to them that the milk was exceptionally good, the butter fat being above normal, and, having regard to all the circumstances, they thought that, though the charge was proved, the offence was of so trifling a nature that it was inexpedient to inflict any punishment, and they therefore dismissed the information:—*Held*, remitting the case to the Justices, that if the milk was exceptionally good after the adulteration they need not convict, but if it was only exceptionally good before, the offence was one for which they should convict. *Banks v. Wooler*, 81 L. T. 785; 64 J. P. 245; 19 Cox C.C. 432—D.

Adulteration—Knowledge of Purchaser.—W. was charged before Justices with selling for new milk an article not of the nature, substance, and quality demanded, contrary to section 6 of the Food and Drugs Act, 1875. A sergeant of police, acting under H.'s orders, who was an inspector under the Act, purchased the milk from W., who, when he was asked for new milk, sold skimmed, and charged a penny a pint, the usual price for skimmed. The Justices differed—one being of the opinion that only a penny a pint being asked the purchaser must have been aware it was skimmed milk he was buying:—*Held*, that the knowledge of the purchaser was immaterial, and case remitted to the Bench to convict. *Heywood v. Whitehead*, 76 L. T. 781; 18 Cox C.C. 615—D.

Milk Labelled as "not guaranteed three per cent."—Notice to Purchaser.—A dairyman sold milk to a purchaser, who asked for sweet milk, from a can on which the following words were embossed: "Not guaranteed three per cent." These words were seen by the purchaser and

"understood by him to mean that the milk in the can was not guaranteed to contain three per cent. of milk fat." The analysis shewed that the milk sold "was not of the nature, substance and quality of sweet milk, but was sweet milk with some admixture of skimmed milk":—*Held* (LORD MONCREIFF dissenting), that the dairyman had been guilty of an offence under the Sale of Food and Drugs Act, 1875, in respect that the label on the milk-can gave no notice that the milk was not pure sweet milk, but merely that that milk was not guaranteed to be of a certain quality. *Souter v. Lean*, 6 F. (Just. Cas.) 20—Ct. of Justy.

Sale in Highway from Vehicle or Can—Name and Address of Seller.—The respondent's servant, who was going from house to house in a village supplying milk, went into a shop carrying in his hand a three-gallon milk-can from which he supplied the shopkeeper with a pint of milk, and on coming out of the shop went to a cart standing about twenty yards off, in which the can and other similar cans were carried. The respondent's name and address were on the cart, but not on the can. An information against the respondent under section 9 of the Sale of Food and Drugs Act, 1899, having been dismissed by the Justices on the ground that the name and address on the cart were a sufficient compliance with the section, on an appeal from their decision by Case stated, —*Held*, that the section required the person selling the milk to have his name and address upon the cart where the milk was sold from the cart, or upon the can where the milk was sold from the can; that the name and address upon the cart were not sufficient unless the milk was sold from the cart; and that the Case must go back to the Justices to find whether the milk was in fact sold from the cart or from the can, and to decide in accordance with the opinion of the Court. *Crabtree v. Skelton*, 70 L. J. K.B. 560—D.

Warranty—Addition of Preservative by Retailer.—A retailer of milk, who, after he has received milk from the wholesale dealer under a contract containing a warranty, adds boric acid to it, cannot, upon proceedings taken against him under section 6 of the Sale of Food and Drugs Act, 1875, for selling milk deficient in fat and containing added water, set up his vendor's warranty as a defence under section 25. Having added boric acid, he cannot be heard to say that the milk when he sold it was in the same condition as when he purchased it. *Hennen v. Long*, 90 L. T. 387; 68 J. P. 237; 2 L. G. R. 437; 20 Cox C.C. 608—D.

The Sale of Food and Drugs Act, 1875, does not require a specific warranty with each consignment of milk delivered under a contract; and a general warranty in writing that future deliveries of milk shall be "new unadulterated and with all its cream on" affords the retail dealer the protection of section 25 as a defence. The connection between the milk delivered under such warranty and that which may subsequently be the subject-matter of an alleged offence under the Act may be shewn by evidence. *Harris v. May* (63 L. J. M.C. 39; 12 Q.B. D. 97) disapproved. *Laidlaw v. Willson* (63 L. J. M.C. 35; [1894] 1 Q.B. 74) followed. *Elliot v. Pilcher*, 70 L. J. K.B. 795; [1901]

2 K.B. 817; 85 L. T. 50; 65 J. P. 743; 20 Cox C.C. 18—D.

Semble, section 25 of the Act of 1875 has no application to offences created by sections 3, 4, and the first part of section 9 of the Act. *Id.*

Warranty in Writing when a Defence.—To support a defence of warranty under section 25 of the Sale of Food and Drugs Act, 1875, a retailer of milk must shew that the producer's contract with him—"the milk to be pure new milk"—covers each consignment of milk delivered under it. *Robertson v. Harris*, 69 L. J. Q.B. 526; [1900] 2 Q.B. 117; 82 L. T. 536; 48 W. R. 571; 64 J. P. 565—D.

Contract by Letters—Label—Notice.—The respondents by a contract in writing agreed to buy pure new milk with all its cream, each churn to bear a written warranty. To each churn was attached a label, "Warranted pure new milk with all its cream delivered under contract." The company also verbally agreed to buy milk, and that a written warranty should be given with each consignment in the form of a label. To a churn delivered under that agreement was attached a label, "Warranted pure new milk with all its cream." Prosecutions having been instituted against the company under section 6 of the Sale of Food and Drugs Act, 1875, notice was given on their behalf under section 20, sub-section 1 of the Sale of Food and Drugs Act, 1899, and copies of the labels were inclosed. It was found by the magistrate that all the requirements of section 25 of the Sale of Food and Drugs Act, 1875, had been complied with, and he discharged the company from the prosecutions for selling milk not of the nature, substance, and quality demanded by the purchaser, such milk being delivered in pursuance of these contracts:—*Held*, that the magistrate was right. *Semble*, that a contract to give a written warranty need not be in writing. *Irving v. Callow Park Dairy Co.*, 87 L. T. 70; 66 J. P. 804; 20 Cox C.C. 295—D. *And see infra*, WARRANTY.

Place of Delivery to Purchaser—Milk to be "delivered carriage paid to" a Certain Railway Station.—The respondent, who kept a dairy at East Ham, having been summoned under section 6 of the Sale of Food and Drugs Act, 1875, for selling milk which was deficient in fat, set up the defence under section 25 that she had purchased the milk as the same as that demanded of her by the purchaser, and with a written warranty to that effect, and that she had sold it in the same state as when she purchased it. She had entered into a written contract for the purchase of "sixteen gallons of pure new milk with all its cream delivered daily, carriage paid, to Wanstead Park Station," and while this contract was in force a number of churns of milk arrived at Wanstead Park Station consigned to the respondent from a station in Derbyshire, and were labelled "Warranted pure new milk with all its cream, pursuant to contract." The churns remained on the platform at Wanstead Park Station for nearly an hour, when they were taken away by the respondent to her dairy. On the same morning part of the milk was sold which was found to be deficient in fat. It was proved that the milk when sold by the respondent was in the

same state as when she received it at Wanstead Park Station, but there was no evidence as to whether it was in the same state as when it was delivered by the seller at the station from which it was sent, or when taken from the train on its arrival at Wanstead Park:—*Held*, that the place of delivery of the milk to the respondent was at Wanstead Park Station, and not at the station from which it was sent; that the purchase took place when she received the milk in her van at Wanstead Park Station; and that, as she had proved that she sold the milk in the same state as she had received it at that station, she was thereby discharged from the prosecution under section 25. *Sanders v. Sadler*, 95 L. T. 872; 71 J. P. 3; 5 L. G. R. 240; 21 Cox C.C. 316; 23 T. L. R. 11—D.

— **Contract for the Purchase of the Whole of the Milk Required by Dairy—Evidence to Connect Warranty with Purchase.**—Under a contract the appellant agreed to buy the whole of the milk required for his dairy during twelve months from certain vendors. The contract contained a warranty that the milk was pure, with all its cream, as received from the cow. The appellant was prosecuted under section 9 of the Sale of Food and Drugs Act, 1875, for selling milk from which milk fat had been abstracted so as to affect injuriously its quality, nature, and substance, without making disclosure of the alteration. It was proved that the particular consignment of milk, the subject of the prosecution, was received by the appellant from his vendors, accompanied by a delivery note which made no reference either to the contract or warranty. It was further proved that the milk was delivered under, and within the period covered by, the contract:—*Held*, that there was a sufficient connection shewn on the face of the contract between the warranty contained therein and the particular consignment of milk, without relying on the delivery note, so as to make the warranty a good defence to the appellant. *Watts v. Stevens* (75 L. J. K.B. 823; [1906] 2 K.B. 323) distinguished. *Evans v. Weatheritt*, 76 L. J. K.B. 628; [1907] 2 K.B. 80; 96 L. T. 641; 71 J. P. 228; 5 L. G. R. 608; 23 T. L. R. 424—D.

Reasonable Belief in Truth of Warranty—Milk Consigned by Rail in State of Purity found Adulterated on Delivery.—On proceedings before a magistrate under section 20 (6) of the Sale of Food and Drugs Act, 1899, against a dairy farmer in the country, for giving a false warranty with certain milk consigned by him by rail to a purchaser in London, which was found to be adulterated when it arrived at the London terminus where the property in the milk passed, the defendant proved facts shewing that he had reason to believe that the milk was pure when it was handed over to the railway company at the country station:—*Held*, that the magistrate was right in holding, on this evidence, that the defendant had brought himself within the provisions of the sub-section protecting the person giving the warranty if he proves that when he gave it he had reason to believe that the statements or descriptions contained therein were true. *Oatley v. Lemon*, 92 L. T. 200; 69 J. P. 163; 3 L. G. R. 315; 20 Cox C.C. 791—D.

Contract for Future Deliveries—Continuing

Warranty—Evidence to Connect Warranty with Purchase.—Although it is not necessary that a defendant in a prosecution under the Sale of Food and Drugs Act, 1875, should, in order to satisfy the provision contained in section 25 of the Act, prove that he received a written warranty with each article purchased by him, there must be some written evidence to connect a warranty intended to be continuing with the article. Therefore, if, before delivery of milk, a written warranty is given to the defendant that all milk supplied to him is "perfectly pure and with all its cream as the cow gives it," and the warranty is intended to be continuing, but there is no written evidence connecting it with the milk subsequently delivered, the defendant will not by virtue of section 25 of the Act be entitled to protection in a prosecution under section 6 of the Act for selling to the prejudice of the purchaser milk which is not of the nature, substance, and quality demanded by him. So *held* by LORD ALVERSTONE, C.J., and DARLING, J. (RIDLEY, J., dissenting). *Watts v. Stevens*, 75 L. J. K.B. 828; [1906] 2 K.B. 323; 95 L. T. 200; 70 J. P. 418; 4 L. G. R. 821; 21 Cox C.C. 230; 22 T. L. R. 622—D.

Harris v. May (53 L. J. M.C. 39; 12 Q.B. D. 97) and *Robertson v. Harris* (69 L. J. Q.B. 526; [1900] 2 Q.B. 117) approved. *Elliot v. Pilcher* (70 L. J. K.B. 795; [1901] 2 K.B. 817) disapproved. *Ib.* And see *infra*.

(9) Warranty.

Defence of Written Warranty—Sufficiency.—In order that a warranty may be relied upon as a defence under section 25 of the Sale of Food and Drugs Act, 1875, such warranty must have been given to the person raising that defence from his immediate vendor, and must be given in writing. *Quære*, whether the benefit of a written warranty given by the farmer to the middleman can be transferred by a contract in writing between the middleman and his purchaser, so as to be a defence under section 25. *Hargreaves v. Spackman*, 98 L. T. 41; 72 J. P. 52; 6 L. G. R. 145—D.

Jurisdiction of Justices.—The jurisdiction of Justices is not extended by the Sale of Food and Drugs Act, 1899, s. 20, sub-s. 5, so as to include proceedings under section 20, sub-section 6, for giving a false warranty against a warrantor, who has given a warranty outside the area included in their jurisdiction, where the person who has received the warranty has also been prosecuted under section 20, sub-section 6, for giving a false warranty, and has been discharged under the provisions of that sub-section. *Manners v. Tyler*, 71 L. J. K.B. 585; [1902] 1 K.B. 901; 86 L. T. 716; 50 W. R. 604; 66 J. P. 806—D.

False Warranty in Writing—Mens Rea—Nature, Substance, and Quality of Article Demanded.—Under clause 3 of section 27 of the Sale of Food and Drugs Act, 1875, in order to constitute the offence of giving a false warranty in writing to a purchaser in respect of an article of food or drug, a *mens rea* on the part of the seller at the time when the warranty was given must be proved. *Derbyshire v. Houlston*, 66 L. J. Q.B. 569; [1897] 1 Q.B.

772; 76 L. T. 624; 45 W. R. 527; 61 J. P. 374; 18 Cox C.C. 609—D.

"Without accepting any responsibility after delivery"—**Validity of Warranty.**—The addition of the words "but without accepting any responsibility after delivery" do not affect a warranty so as to make it unavailable as a defence under section 25 of the Sale of Food and Drugs Act, 1875. *Wilson v. Playle*, 88 L. T. 554; 67 J. P. 263; 1 L. G. R. 870; 20 Cox C.C. 433—D.

False Warranty to Purchaser in Writing—Time within which Proceedings must be Commenced.—Proceedings under section 20, subsection 6 of the Sale of Food and Drugs Act, 1899, against a person for having, in respect of an article of food or drug sold by him as principal or agent, given to the purchaser a false warranty in writing, must be commenced within six months from the date when such warranty was given. *Whitaker v. Pomfret*, 71 L. J. K.B. 353; [1902] 1 K.B. 661; 86 L. T. 420; 50 W. R. 393; 66 J. P. 408; 20 Cox C.C. 180—D. And see *supra*, MILK, col. 1345.

(10) Inspectors.

Inspector of Nuisances—Public Analyst—Power to Act outside District—Milk in Course of Delivery.—Neither an inspector of nuisances nor a public analyst can act under section 3 of the Sale of Food and Drugs Act Amendment Act, 1879, where the place of delivery of the milk in course of delivery under the contract of sale is not within the district for which he is appointed. *McNair v. Cave*, 72 L. J. K.B. 26; [1903] 1 K.B. 24; 87 L. T. 680; 51 W. R. 112; 67 J. P. 50; 1 L. G. R. 28; 20 Cox C.C. 364—D.

Right of Local Inspector to Prosecute for Penalties in his own Name.—Where, under section 2 of the Food and Drugs Act, 1899, the Local Government Board or Board of Agriculture, through their officer, procure samples of an article of food for analysis, and communicate the certified result of the analysis, when made, to the secretary of the local authority, such secretary may, without any special resolution, transmit such certificate to the inspector appointed under the Food and Drugs Act, 1875, and he, without antecedent authorisation, may proceed in his own name to prosecute for any penalties to which the vendor may be liable. *Connor v. Butler*, [1902] 2 Ir. R. 569—K.B. D.

(11) Taking Samples and Analyses.

Refusal to Supply Sample of Milk to Inspector—Obstructing Inspector in the Course of his Duties.—Under section 17 of the Sale of Food and Drugs Act, 1875, an inspector is entitled to demand to be supplied in the same manner as the public are being supplied, and consequently if a dairyman, supplying milk to the public by retail from cans, refuses to supply an inspector on demand with milk except from the top of one of the cans instead of from its cran from which the public are being supplied, he is guilty of a contravention of the enactment. A dairyman so refusing to supply an inspector

has not wilfully obstructed and impeded the inspector in the course of his duty within section 16 of the Sale of Food and Drugs Act, 1899. *Scutar v. Kerr*, [1907] S.C. (J.) 49—Ct. of Justy.

Sample of Milk Procured by Agent of Inspector—Proceedings in Name of Inspector.—Under section 8 of the Sale of Food and Drugs Act, 1879, an inspector may obtain by an agent a sample for analysis of milk in course of delivery; and in such a case a prosecution in respect of the milk from which the sample was taken may competently be instituted in the name of the inspector. *Tyler v. Dairy Supply Co.*, 72 J. P. 132—D.

Request of Defendant for Government Analysis of Third Sample—Sample Incapable of Analysis.—The "article of food or drug" which, in accordance with the provisions of section 21 of the Sale of Food and Drugs Act, 1899, has, on the request of either party to a prosecution, to be sent to the Commissioners of Inland Revenue for analysis, need not necessarily be the third part or sample retained by the purchaser in accordance with section 14 of the Sale of Food and Drugs Act, 1875. It is therefore not a condition precedent to the conviction of a person for a contravention of section 6 of the Act of 1875 that there should be produced at the hearing an analysis by the Commissioners of Inland Revenue of such third part or sample, although the defendant may have requested such analysis under section 21 of the Act of 1899. *Hutchinson v. Stevenson* (4 Ct. of Sess. Cas. (5th Ser.) Just. Cas. 69) not followed. *Suckling v. Parker*, 75 L. J. K.B. 302; [1906] 1 K.B. 527; 94 L. T. 552; 54 W. R. 438; 70 J. P. 209; 21 Cox C.C. 145; 4 L. G. R. 531; 22 T. L. R. 357—D.

Purchase of Sample for Purpose of Analysis—Division of Article Purchased.—An inspector purchased four penny packets of cream of tartar, all of which bore similar labels, and, having mixed the contents together, divided them into three parts. One of these he delivered to the seller, another he retained, and the third he sent to the county analyst for analysis:—*Held*, that there had been a sufficient compliance with the requirements of section 14 of the Sale of Food and Drugs Act, 1875, and that it was not necessary that any single packet should have been divided into three parts. *Mason v. Cowdary* (69 L. J. Q.B. 667; [1900] 2 Q.B. 419) distinguished. *Smith v. Savage*, 74 L. J. K.B. 576; [1905] 2 K.B. 88; 92 L. T. 775; 53 W. R. 477; 3 L. G. R. 582; 69 J. P. 245; 20 Cox C.C. 847; 21 T. L. R. 424—D.

Sample Taken of Milk "in course of delivery."—The servant of S., a wholesale milk-dealer, in pursuance of a contract between S. and B., a retail milk-seller, took milk from S.'s cart in cans belonging to S. into B.'s shop, and there poured it into empty cans belonging to B. An inspector and his assistant were present while this was being done, and immediately after the milk had been poured into B.'s cans the inspector took a sample of the milk from these cans:—*Held*, that the milk was still "in course of delivery" when the sample was taken. *Semple v. Dunbar*, 6 F. (Just. Cas.) 65—Ct. of Justy.

Milk in Course of Delivery—Fair Sample.]—

A dairy farmer, who was under contract to supply a dairyman with forty gallons of milk daily in part fulfilment of his contract for a particular day supplied twenty-two gallons of sweet milk contained in three cans, two of which contained eight gallons each and the third six gallons. The dairyman provided two vessels for the reception of the milk. Into one of these vessels the whole contents of the two eight-gallon cans and four gallons from the six-gallon can—twenty gallons in all—were poured. Into the second vessel the remaining two gallons from the six-gallon can were poured. On the vessels being thus filled from the cans, an inspector under the Sale of Food and Drugs Acts took a sample from each vessel for analysis. When analysed, the sample from the twenty-gallon vessel was found to contain 3.05 per cent. of milk fat, and the sample from the two-gallon vessel 2.8 per cent. of milk fat. By the Board of Trade Regulations, when sweet milk does not contain 3 per cent. of milk fat the presumption is that the milk is not genuine until the contrary is proved. The dairy farmer having been convicted of a contravention of section 3 of the Sale of Food and Drugs Act, 1879, in respect of the sample taken from the two-gallon vessel, appealed:—*Held*, quashing the conviction, that the sample from the two-gallon vessel was not a fair sample of the original contents of the six-gallon can. *Crawford v. Harding*, [1907] S. C. (J.) 11—Ct. of Justy.

Demand by Inspector for Milk from Particular Can—Warning by Seller that Milk in such Can might not be Sweet Milk—Bona Fides.]—The defendant, a dairyman, started on his round with a quantity of milk, the produce of his own dairy. Finding that his supply was running short, he called at a dairy and asked for two gallons of sweet milk. He was supplied with that quantity, which he put into an empty can. He did not ask for or obtain a warranty with this milk, being content to rely upon his knowledge of the dairyman, from whom he had frequently obtained milk in similar circumstances. He thereafter met the prosecutor, of whose official position he was aware. The prosecutor, having demanded two-pence worth of sweet milk, the defendant was proceeding to supply him with milk from a can containing the produce of his own dairy, as to the genuineness of which he had personal knowledge, but the prosecutor insisted on getting milk from the can containing the purchased milk. The defendant then sold the amount asked for from this can, but informed the prosecutor that the milk was not the produce of his own cows, and warned him that it might or might not prove to be sweet milk. The milk sold to the prosecutor contained 13 per cent. of added water:—*Held*, on these facts, that the defendant had not committed an offence under the Sale of Food and Drugs Acts. *Frew v. Gunning*, 3 F. (Just. Cas.) 51—Ct. of Justy.

Sale "to the prejudice of purchaser"—Demand by Inspector of Sample from Churn—Absence of Request to be Supplied with "Milk."]—It was proved on an information under section 6 of the Sale of Food and Drugs Act, 1875, that the respondent, a milk seller, had supplied the appellant, an inspector under the Act, with a

sample of milk from a milk churn, and that the sample was deficient in natural fat. It was found as a fact that there had been no request in terms on the part of the inspector to be supplied with "milk," and that the inspector had been supplied with what he demanded—namely, a sample from the milk churn:—*Held*, that on these facts it was not proved that there had been any sale to the prejudice of the purchaser, and that the information had been rightly dismissed. *Sandys v. Jackson*, 92 L. T. 646; 3 L. G. R. 285; 69 J. P. 171—D.

Article Purchased in Small Bottles—Division into Three Parts for Analysis.]—The purchase by an inspector under the Sale of Food and Drugs Act, 1875, of six small bottles of camphorated oil in one lot for analysis, and their division by him into three lots of two bottles each, one of which he sends to the public analyst, is not a compliance with section 14 of the Act, because each bottle, however small, is itself an article within the meaning of the section, and ought to be divided into three parts. *Mason v. Cowdary*, 69 L. J. Q.B. 667; [1900] 2 Q.B. 419; 82 L. T. 802; 49 W. R. 28; 64 J. P. 662; 19 Cox C.C. 536—D.

Division of Article Purchased into Three Parts—Sufficiency of Each Part for Analysis.]—Where an article is purchased for analysis under section 14 of the Sale of Food and Drugs Act, 1875, each of the three parts into which, in accordance with the requirements of the section, it is to be divided, must be sufficient in quantity to afford reasonable facilities for the purpose of analysis. *Lowery v. Hallard*, 75 L. J. K.B. 249; [1906] 1 K.B. 398; 93 L. T. 844; 54 W. R. 520; 4 L. G. R. 189; 70 J. P. 57; 21 Cox C.C. 75; 22 T. L. R. 186—D.

Fastening up Parts of Article—Butter containing Excess of Moisture Wrapped up in Greaseproof Paper.]—A person purchasing butter for the purpose of analysis caused each of the three parts into which the butter was divided to be wrapped up in a greaseproof envelope. The analysts certified that the butter contained an excess of water, adding that no change had taken place in the butter which would interfere with the analysis, and that in consequence of the butter having been so fastened up it was probable that there had been considerable loss of water since the date of the purchase. On a Case stated by Justices who had convicted the seller under section 6 of the Sale of Food and Drugs Act, 1875,—*Held*, that the wrapping up of the butter in the manner above mentioned was a sufficient compliance with section 14 of the Act. *Pearks v. Ward*, 71 L.J. K.B. 656; [1902] 2 K.B. 1—D.

Accidental Loss of Sample.]—It is a condition precedent to a conviction under section 6 of the Sale of Food and Drugs Act, 1875, that the prosecutor shall produce, on the motion of the accused, the sample of the article in question directed to be retained and sent, on the motion of either party, to Somerset House for analysis, and the accidental loss of the sample will not relieve the prosecutor from compliance with this condition. *Hutchison v. Stevenson*, 4 F (Just. Cas.) 69—Ct. of Justy.

Analyst's Certificate—Sufficiency of Particulars.]—A certificate of a public analyst

which merely states that a sample of beer submitted to him for analysis "contains a serious quantity of arsenic" is insufficient. The certificate should contain particulars sufficient to enable the magistrates to come to a conclusion. *Goulder v. Rook*, 70 L. J. K.B. 747; [1901] 2 K.B. 290—D.

— **Sufficiency—Standard of Genuine Milk.**]

It is desirable that an analyst's certificate, under the Sale of Food and Drugs Acts, stating that a sample of milk is adulterated by reason of a deficiency in milk fat, should state in terms the standard with reference to the amount of milk fat in genuine milk on which the analyst bases his conclusions. But failure so to state the standard does not vitiate the certificate if a simple calculation from the figures given in the certificate makes it apparent that the analyst has proceeded upon the standard laid down by the Sale of Milk Regulations, 1901. *Bayley v. Cook*, 92 L. T. 170; 53 W. R. 410; 69 J. P. 139; 3 L. G. R. 304; 20 Cox C.C. 779; 21 T. L. R. 235—D.

— **Article Liable to Decomposition—Statement as to Change in Constitution of Article which would interfere with Analysis.**]

Semble, that if the analyst's certificate does not, in the case of a drug liable to decomposition, contain a report as to whether any change has taken place in the constitution of the article which would interfere with the analysis, as is required by the note in the schedule to the Act of 1875, the defect would be a bar to a conviction based on the evidence afforded by the certificate alone; and *query* whether the defect can be cured by evidence given by the analyst. *Hudson v. Bridge*, 88 L. T. 550; 67 J. P. 186; 1 L. G. R. 409; 20 Cox C.C. 425—D.

Per CHANNELL, J.—The words "interfere with the analysis" in the note in question mean prevent the analysis from being effective for the purpose of shewing what the constitution of the article was at the time of sale. And where an article varies in its composition so that at one time it will contain more of a particular ingredient than at another, then the analyst ought in his certificate to state whether any change has taken place at the time of his analysis which would prevent his analysis from shewing what the constitution of the article was at the time it was sold. *Id.*

— **Omission of Weight of Sample Sent for Analysis.**]

The provisions of section 18 of the Sale of Food and Drugs Act, 1875, as to the form of certificate, coupled with the words in the form itself, given in the schedule, may in some cases be treated as merely directory; and therefore the omission by a public analyst to state in his certificate the weight of a sample of butter submitted to him for analysis does not render such certificate invalid in a case where the Justices have found that the omission is immaterial. *Sneath v. Taylor*, 70 L. J. K.B. 872; [1901] 2 K.B. 376; 49 W. R. 719; 65 J.P. 548—D.

— **Justices' Own Knowledge of Article Alleged to be Adulterated.**]

Justices are not bound, upon the hearing of a complaint under section 6 of the Sale of Food and Drugs Act, 1875, to discard their own knowledge of the properties of the article alleged to be adul-

terated, although such knowledge be derived from a report upon the particular article by authorities at Somerset House, which report has been produced by the defendant for the mere cross-examination of the analyst, and is not in evidence in the proceedings. *Reg. v. Field* (64 L. J. M.C. 158) followed. *Shortt v. Robinson*, 68 L. J. Q.B. 352; 80 L. T. 261; 63 J. P. 295; 19 Cox C.C. 243—D.

(12) *Proceedings.*

Prosecution Instituted by Officer of Local Authority not Empowered to Appoint Analyst.]

—The jurisdiction of Justices to hear and determine an information under the Sale of Food and Drugs Acts, where the prosecution is instituted by an officer of a local authority, acting by the directions of the local authority, is not affected by the question whether it was or was not *intra vires* of the local authority to give their officer such directions. It is enough to give the Justices jurisdiction that the officer was in fact the person who procured the sample and obtained the analysis. *Worthington v. Kyme*, 93 L. T. 546; 54 W. R. 185; 3 L. G. R. 1098; 69 J. P. 390; 21 Cox C.C. 37—D.

Jurisdiction of Justices Outside Area.]

The jurisdiction of Justices is not extended by the Sale of Food and Drugs Act, 1899, s. 20, sub-s. 5, so as to include proceedings under section 20, sub-section 6, for giving a false warranty against a warrantor, who has given a warranty outside the area included in their jurisdiction, where the person who has received the warranty has also been prosecuted under section 20, sub-section 6, for giving a false warranty, and has been discharged under the provisions of that sub-section. *Manners v. Tyler*, 71 L. J. K.B. 585; [1902] 1 K.B. 901; 86 L. T. 716; 50 W. R. 604; 66 J. P. 806; 20 Cox C.C. 222—J.

Laying of Information—Issue and Service of Summons.]

A prosecution is instituted within the period required by section 19, sub-section 1 of the Sale of Food and Drugs Act, 1899, if the information is laid and the summons issued within twenty-eight days from the purchase of the article in respect of the sale of which the prosecution is instituted; and service of the summons is not necessary within the twenty-eight days in order to comply with the requirement of the section. *Beardsley v. Giddings*, 73 L. J. K.B. 378; [1904] 1 K.B. 847; 90 L. T. 651; 53 W. R. 78; 68 J. P. 222; 2 L. G. R. 719; 20 Cox C.C. 645; 20 T. L. R. 315—D.

— By section 19, sub-section 1 of the Sale of Food and Drugs Act, 1899, a prosecution under the Sale of Food and Drugs Act "shall not be instituted after the expiration of twenty-eight days from the time of the purchase" of the article:—*Held*, that the prosecution was "instituted" if the information was laid within the twenty-eight days, and that it was not necessary that the summons should be issued within that period. *Brooks v. Bagshaw*, 73 L. J. K.B. 839; [1904] 2 K.B. 798; 91 L. T. 535; 53 W. R. 19; 68 J. P. 514; 2 L. G. R. 1007; 20 Cox C.C. 727; 20 T. L. R. 655—D.

Return of Summons—Computation of Time.]

Section 19, sub-section 2 of the Sale of Food

and Drugs Act, 1899, provides that in any prosecution under the Sale of Food and Drugs Acts "the summons . . . shall not be made returnable in less time than fourteen days from the day on which it is served":—*Held*, that the period prescribed by the sub-section is a period of fourteen clear days, exclusive not only of the day on which the summons is served, but also of that on which it is returnable. *McQueen v. Jackson*, 72 L. J. K.B. 606; [1903] 2 K.B. 163; 88 L. T. 871; 1 L. G. R. 601; 67 J. P. 353; 20 Cox C.C. 499—D.

Notice of Defence.—An information having been laid by the respondent against the appellant under section 6 of the Sale of Food and Drugs Act, 1875, the appellant's solicitors sent on November 2 to the respondent the following notice:—"We beg to give you formal notice that our client purchased the same butter with a written warranty from G. L. Limited, of 84 C.-St., M. The following is a copy of the warranty in question: 'We guarantee all butters sold by us to be absolutely pure; guaranteed pure butter within the 3rd and 7th sects. of the Margarine Act, 1877' . . . The defendant intends to rely on the foregoing as a defence to this summons." On August 4 the appellant had purchased the butter of the wholesale house, and on the invoice was stated: "We guarantee all butters sold by us to be absolutely pure." The appellant was dissatisfied with this, and, when going to the wholesale house the following week, and after the butter was delivered, took the invoice to the wholesale house, who put on it: "Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887. In case of samples being taken for analysis, shew this warranty to the inspector":—*Held*, that the notice of November 2 was a good notice of a defence under section 20 of the Sale of Food and Drugs Act, 1899. *Farthing v. Parkinson*, 90 L. T. 738; 68 J. P. 353; 2 L. G. R. 989; 20 Cox C.C. 661—D.

Amendment of Information.—*See* JUSTICE OF THE PEACE, col. 1168.

Repeal of Procedure Section.—*See* STATUTE.

(o) *Housing of the Working Classes.*

Housing of Working Classes.—3 Edw. 7 c. 39 is the *Housing of the Working Classes Act*, 1903.

— 63 & 64 Vict. c. 59 is the *Housing of the Working Classes Act*, 1900.

Closing Order—Housing Acts—"Dwelling-house" already Closed for Habitation under By-law—Rescission of By-law.—A closing order may be made under the Housing of the Working Classes Acts, in respect of a house unfit for human habitation, notwithstanding that, at the date of such closing order, an order prohibiting its use for human habitation, made pursuant to a by-law, is in force, and that the building is, in fact, uninhabited. *Quere*, whether an order prohibiting the use of a house for habitation, made by a local authority pursuant to a by-law in that behalf, remains in operation after the rescission of the by-law. *Slight v. Portsmouth*

Corporation, 95 L. T. 356; 4 L. G. R. 635; 70 J. P. 359—D.

(p) *Infectious Diseases.*

Notification.—62 & 63 Vict. c. 8 is the *Infectious Disease (Notification) Extension Act*, 1899.

Conveyance by Vessels.—4 Edw. 7 c. 16 enables regulations to be made to prevent danger arising from conveyance of infection in vessels.

Jurisdiction—"Proper lodging or accommodation"—**Order for Patient's Removal.**—The circumstance that a person suffering from scarlet fever is lodged in the parlour of a four-roomed house, the other three rooms of which are occupied by the rest of the family, is in itself sufficient evidence that he is "without proper lodging or accommodation" within the meaning of section 124 of the Public Health Act, 1875, to warrant Justices ordering his removal to a hospital, for that section, though primarily for the protection of the patient, is equally directed to the protection of other persons from infection. *Warwick v. Graham*, 68 L. J. Q.B. 1001; [1899] 2 Q.B. 191; 80 L. T. 773; 63 J. P. 599; 19 Cox C.C. 363—D.

Premature Discharge of Patient from Hospital Provided by Corporation—Infection of other Persons—Liability of Corporation—Negligence of Officer.—Where a corporation provides a hospital under the provisions of the Public Health Act, 1875, for the reception of patients suffering from infectious disease, there is no absolute obligation upon the corporation not to discharge a patient who may cause contagion. There is an implied undertaking by the corporation that their hospital shall be managed with all reasonable skill and care, but the corporation do not act as medical men. They do not undertake to give medical advice, but they do undertake that the patients received in the hospital shall have competent medical advice and assistance. Therefore, if, by the negligence of a competent and duly qualified medical man appointed by the corporation as visiting physician to the hospital, a patient is prematurely discharged and contagion is thereby caused to other persons, the corporation are not liable for such negligence of the medical man. *Evans v. Liverpool Corporation*, 74 L. J. K.B. 742; [1906] 1 K.B. 160; 69 J. P. 263; 3 L. G. R. 868; 21 T. L. R. 558—Walton, J.

Destruction of Articles Exposed to Infection by Order of Medical Officer of Health—Scope of Authority—Liability of Local Authority.—The defendant council's medical officer of health ordered the destruction of certain clothes of the plaintiff (which had been exposed to infection) by the hands of the defendants' inspector of nuisances. The plaintiff was a private patient of the medical officer of health. The inspector of nuisances gave in to the defendants a list of the things he had destroyed in obedience to the instructions he had received from the medical officer. It was not proved that the medical officer reported the destruction of the things to the defendants. A claim was made by the plaintiff against the defendants for the value of the things destroyed:—*Held*, that the medical

officer was not acting within the general scope of his authority in ordering the destruction of the things, and there being no ratification by the defendants of what had been done by their inspector of nuisances, they were not liable. *Garlick v. Knottingley Urban Council*, 68 J. P. 494; 2 L. G. R. 1345—D.

Maintenance of Children in Infectious Hospital—Children sent from Children's Hospital—Liability.—Charitable guardians of children, such as the authorities of the Victoria Hospital for Children, are not "patients" within the meaning of section 182 of the Public Health Act, 1875, so as to be liable as such for the maintenance in an infectious hospital of children sent there by them. *Farquhar v. Isle of Thanet Hospital Board*, 68 J. P. 319; 2 L. G. R. 1310—D.

Obstruction of Execution of Order for Removal—Finality of Order.—At the hearing of a summons under section 124 of the Public Health Act, 1875, for obstructing the execution of an order made under the section for removal to a hospital of a person suffering from an infectious disorder, the Justices have no jurisdiction to go behind the order by enquiring into the truth of the facts upon which it was made. If a person, knowing that such order has in fact been made, delays the execution of it, he commits an offence under the section. *Reg. v. Davey*; *Bishop, Ex parte*, 68 L. J. Q.B. 675; [1899] 2 Q.B. 301; 80 L. T. 798; 63 J. P. 515; 19 Cox C.C. 365—D.

Semble, that the validity of such an order may be questioned by means of a writ of *habeas corpus* or *certiorari*. *Ib.*

(q) *Insanitary Areas.*

Improvement Scheme—Provisional Order—Confirmatory Act—Valuation for Compensation.—Where property in an unhealthy district is compulsorily acquired by a local authority under the Housing of the Working Classes Act, 1890, persons interested therein retain all their legal rights in respect of the same until the Provisional Order made in respect thereof under section 8 of the Act has been confirmed by Act of Parliament under section 8, sub-section 6. Where property is taken under this Act the estimate of the value payable by way of compensation under section 21 is not limited to the value of the property as given in the estimate made under the improvement scheme provided for by sections 4 and 6. *Dye v. Patman*, 46 W. R. 200; 62 J. P. 135—Byrne, J.

(r) *Land.*

Land Acquired for One Purpose—Proposed Use for Another—Powers of Local Government Board.—Land compulsorily acquired by a local authority under section 176 of the Public Health Act, 1875, for a particular purpose, cannot be permanently used for another purpose inconsistent with that for which it was acquired. *Att.-Gen. v. Hanwell Urban Council*, 69 L. J. Ch. 626; [1900] 2 Ch. 377; 82 L. T. 778; 48 W. R. 690—C.A.

The Local Government Board have no power under section 175 of the Public Health Act,

1875—which gives them power to direct that land not required for the purpose for which it was acquired shall not be sold—to order land to be used for a purpose inconsistent with that for which it was acquired. *Ib.*

Land Acquired by Local Authority for Definite Purpose—Interim User.—Land acquired by a local authority under the Public Health Act, 1875, for a definite purpose may, in the interval before it is required for such purpose, be used in any lawful manner which does not substantially interfere with its immediate use when so needed for the purpose for which it was acquired; it is not necessary that during such interval the land should be kept in the same state in which it was when acquired. *Att.-Gen. v. Teddington Urban Council*, 67 L. J. Ch. 23; [1898] 1 Ch. 66; 77 L. T. 426; 46 W. R. 88; 61 J. P. 825—Romer, J.

Lands Compulsorily Taken—Award—Leave to Appeal—"Failure of justice."—Under Schedule II. (26) of the Housing of the Working Classes Act, 1890, leave to appeal against the arbitrator's award fixing the amount of compensation for lands compulsorily taken under the Act can be granted by the Court only "upon being satisfied that a failure of justice will take place if such leave is not granted." In an application for leave to appeal by the owner of lands in terms of the schedule, *held* that it was not a sufficient ground for granting leave—first, that the arbitrator had limited the skilled evidence of the value of the lands to two witnesses on each side; or secondly, that he had, in addition to hearing such evidence, personally inspected the lands in the presence of the parties, and in his award had proceeded in part on his own judgment as a man of skill. Observations on the meaning of the words "failure of justice." *Mucknight's Trustee v. Edinburgh Corporation*, 3 F. 90—Ct. of Sess.

Superfluous Lands—Sale by Local Authority—Restrictive Conditions.—A local authority, offering superfluous land for sale by auction, in lots, subject to special conditions (subsequently incorporated into the conveyances of the lots sold) restricting the right of each purchaser as to building on his lot, and having sold one lot, is under an obligation to the purchaser of such lot to observe the restrictive conditions, as to the lots remaining unsold in its hands, to the same extent as purchasers of the lots if sold would be. *Davis v. Leicester Corporation* (68 L. J. Ch. 440; [1894] 2 Ch. 208) followed. *Holford v. Acton Urban Council*, 67 L. J. Ch. 636; [1898] 2 Ch. 240; 78 L. T. 829—Stirling, J.

The Court, in determining the respective liabilities and rights of the vendor and the purchaser of the lot sold, will be guided by the principle that the law will imply, in the contract between them, any term obviously intended which is necessary to make the contract effectual, where otherwise, as expressed in writing, it would be futile and would not carry out the intention of the parties. *Dictum* of BOWEN, L.J., in *Oriental Steamship Co. v. Taylor* (63 L. J. Q.B. 128, 132; [1893] 2 Q.B. 518, 527), followed. *Ib.* And see LANDS CLAUSES ACTS, col. 1253.

(s) *Lighting.*

Purchase of Undertaking—Consideration—“Annuity of 5 per cent. per annum” upon Sum Properly Expended—Irredeemable Stock—Implied Power to Issue—Powers of Corporation—Statute—Provisional Order.]—An Electric Lighting Provisional Order gave a corporation power to purchase compulsorily the undertaking of a company upon the terms of issuing to the company such an amount of corporation stock as would produce, by the dividends thereon, “an annuity of 5 per cent.” upon the capital properly expended by the undertakers. By a Local Government Board Provisional Order, the power (which the corporation then had) to issue irredeemable stock was repealed. Each of the Acts of Parliament which confirmed these orders received the Royal assent on the same day:—*Held*, that the stock to be issued to the company was irredeemable stock; that the corporation had not, by implication, power to issue such stock; and that so long as they were unable to issue such stock their power of compulsory purchase could not be enforced. *Sheffield Corporation v. Sheffield Electric Light and Power Co.*, 67 L. J. Ch. 113; [1898] 1 Ch. 203; 77 L. T. 616; 46 W. R. 435; 62 J. P. 87—North, J.

(t) *Lodging-house.*

“House occupied by members of more than one family.”—An ordinary six-roomed house, not specially constructed to be let in separate tenements, having one common internal staircase and one front door, each floor of which is let to and occupied by a separate family, the landlord living elsewhere, and only attending once a week to collect rents, is a house occupied by more than one family within section 94 of the Public Health (London) Act, 1891, which authorises the making of by-laws as to certain matters in the case of “a house or part of a house which is let in lodgings or occupied by members of more than one family.” *Kyffin v. Simmons*, 67 J. P. 227; 1 L. G. R. 381—D.

(u) *Music and Dancing Licences.*

See *The Baths and Washhouses Act*, 1899 (62 & 63 Vict. c. 29).

Condition—Charge to be made for Admission.]—Justices, in granting a licence for music and dancing at a hall which was in connection with a licensed house, imposed the condition that the sum of at least threepence should be charged to each person for admission, and that this sum should not be returned in the form of refreshment:—*Held*, that the Justices had power, under section 51 of the Public Health Acts Amendment Act, 1890, to impose this condition. *Richards, ex parte*, 68 J. P. 536; 20 T. L. R. 669—D.

(v) *Negligence of Local Authority.*

Roads, as to.]—See *ROADS*, *infra*, col. 1366.

Sewers, as to.]—See *SEWERS*, *infra*, col. 1372.

(w) *Noises.*

Music in Streets—No Annoyance.]—The K. County Council, under the Local Government Act, 1888, s. 16, made a by-law as follows:—“No person shall sound or play upon any musical or noisy instrument, or sing in any public place or highway, within fifty yards of any dwelling-house, after being required by any constable or by an inmate of such house personally or by his or her servant to desist”:—*Held*, that the by-law was not invalid *outra vires*. *Brownscombe v. Johnson*, 78 L. T. 265; 62 J. P. 326; 19 Cox C.C. 25—D.

Singing near Dwelling-house—Prohibition of—Request by Constable to Desist.]—A by-law prohibiting persons from playing or singing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of the house to desist, is reasonable and valid (*MATHEW, J.*, dissenting). *Kruse v. Johnson*, 67 L. J. Q.B. 782; [1898] 2 Q.B. 91; 78 L. T. 647; 46 W. R. 630; 62 J. P. 469; 19 Cox C.C. 103—D.

(x) *Nuisances.*

Alkali Works.]—6 Edw. 7 c. 14 is the *Alkali Works Regulation Act*, 1906.

Pollution of Rivers.]—61 & 62 Vict. c. 34 is the *Rivers Pollution (Border Councils) Act*, 1898.

Inspection of Premises by Local Authority—Entry without Asking Permission—Execution of Statutory Powers.]—Where a local authority and their officers, of their own motion and without asking any person's permission, enter premises for the purpose of examining as to the existence of any nuisance thereon, they are not employed in the execution of the Public Health Act, 1875, inasmuch as section 102 of the Act does not authorise entry by the local authority without permission first being requested. Therefore the owner of the premises cannot be convicted under such circumstances upon an information preferred against him under section 306 of the Act for wilfully obstructing the local authority in the execution of the Act. *Consett Urban Council v. Crawford*, 72 L. J. K.B. 571; [1903] 2 K.B. 183; 88 L. T. 836; 51 W. R. 669; 67 J. P. 309; 1 L. G. R. 558; 20 Cox C.C. 481—D.

Pollution of River—Injunction—Discharge of Sewage—Prescriptive Right of Inhabitants to Discharge into Sewers of Local Authority—Measure of Damages—Continuance of Injury.]—Where householders have acquired a prescriptive right to drain into the sewers of a local authority through which sewage is discharged into a river, and an order has already been made against the local authority under the Rivers Pollution Prevention Act, 1876, and the local authority are taking steps to abate the nuisance caused by the pollution, the Court will refuse to interfere by injunction against the local authority. *Harrington (Earl) v. Derby Corporation*, 74 L. J. Ch. 219; [1905] 1 Ch. 205; 92 L. T. 153; 69 J. P. 62; 3 L. G. R. 321; 21 T. L. R. 98—Buckley, J.

Where a local authority have neglected their duty under the Public Health Acts, the remedy of a person aggrieved is not by action but by complaint to the Local Government Board under section 299 of the Public Health Act, 1875. *Ib.*

Owing to the pollution of a river by a local authority the plaintiff's lake, which was fed from it, became silted up, and the water supply from the lake to the plaintiff's house destroyed:—*Held*, that the plaintiff was entitled to damages for the expense to which he had been put in obtaining another water supply to his house, but not in respect of the silting up of the lake, as his remedy was to exclude the water when he found it was polluted, and claim damages for the loss sustained by not enjoying the supply. *Ib.*

Discharge of Sewage upon Private Property—Private Nuisance—Prescriptive Rights—Liability of Sanitary Authority for Present and Future Connections of Sewage Drains.]—Where sewage is discharged by a sanitary authority upon private property so as to become a nuisance, no injunction will be granted against the authority which will interfere with the rights of householders under section 21 of the Public Health Act, 1875, to connect their houses with the sewers of such authority, if such rights have been gained by prescription, or the connections made with the consent or acquiescence of the sanitary authority; nor will an injunction be granted which will prohibit such authority from permitting or allowing fresh connections to be made, but an injunction will be granted restraining the authority from directing or authorising any sewage or foul matter to flow or to be discharged from sewers or drains vested in them as such sanitary authority on to private property. *Charles v. Finchley Local Board* (52 L. J. Ch. 554; 23 Ch. D. 767) dissented from; and *Att.-Gen. v. Acton Local Board* (52 L. J. Ch. 108; 22 Ch. D. 221) and *Ainley v. Kirkheaton Local Board* (60 L. J. Ch. 734) followed. *Brown v. Dunstable Corporation*, 68 L. J. Ch. 498; [1899] 2 Ch. 378; 80 L. T. 650; 47 W. R. 538; 63 J. P. 519—Cozens-Hardy, J.

The proper remedy in such a case is to apply to the Local Government Board, under section 299 of the Public Health Act, 1875, for an order which would be enforceable by writ of *mandamus*. *Ib.*

A claim of right to discharge surface water, sewage, and drainage along a natural channel upon private property set up by the defendants held to have failed, as it would be highly dangerous to allow the trivial and occasional passage along a natural channel of water more or less contaminated to ripen into a legal claim to pour sewage of all kinds and of indefinite amount along such natural channel. *Ib.*

Depositing Offensive Matter—Manure—Railway Truck.]—By-law No. 2 of the respondents was as follows: "No person shall deposit, throw, or allow to run, lodge, or accumulate upon the surface of any street, square, court, highway, or place, or on any waste or unoccupied ground, or on any uncovered drain, ditch, watercourse, sink, pond, or other collection of water, or

expose or cause to be exposed in any other manner whatever within the district, any animal or vegetable matter, fish, offal, ordure, blood, bones, manure, shells, broken glass, china, or earthenware, dust, ashes, house refuse, waste, or runnings from any manufactory, or other offensive or noxious matter whatever." The appellants received in their goods yard at H. H. a truck of manure which had been carried by them in the ordinary course of their business. It arrived on the Sunday, and notice was at once given to the consignee, who proceeded to remove it on the Monday, and on being emptied it gave forth a very offensive smell. The magistrates convicted the appellants of a breach of the by-law:—*Held*, that the magistrates were wrong. *London, Brighton, and South Coast Railway v. Hayward's Heath Urban Council*, 80 L. T. 266; 19 Cox C.C. 255—D.

Overcrowding—Order to Inspect—Evidence as to Reasonable Grounds—Form of Order.]—Where by virtue of section 102 of the Public Health Act, 1875, an application is made to a Justice for an order to enter premises where a nuisance is alleged to exist, such Justice, although he has not to decide whether a nuisance in fact exists, may consider whether there are reasonable grounds for suspecting there is a nuisance, and for that purpose may receive evidence as to the true state of the facts. If a Justice makes an order for the officer to enter to inspect, such order ought to be made in reference to a particular subject-matter. *Wimbledon Urban Council v. Hastings*, 87 L. T. 118—D.

"House"—School without Boarders.]—"House" in section 91, sub-section 5 of the Public Health Act, 1875, includes a day school where there are no boarders and where none of the members of the staff reside. *Ib.*

Accumulation of House Refuse—Injunction.]—An accumulation of London house refuse, kept on the premises of a firm who obtain a supply of such refuse for the purposes of their business, which causes serious annoyance to persons in the neighbourhood by giving off an offensive odour, and from time to time occasioning a plague of flies, is a public nuisance, the continuance of which will be restrained by injunction at the suit of the Attorney-General on the relation of the local authority, even though there is no evidence that the accumulation is a source of actual injury or danger to health. *Att.-Gen. v. Keymer Brick and Tile Co.*, 1 L. Ch. R. 654; 67 J. P. 434—Joyce, J.

Domestic Sanitary Arrangements—Local Authority's Notice of Insufficiency—Application to Enter Premises—Justices' Jurisdiction to Entertain Evidence of Sufficiency of Existing Arrangements.]—Upon an application by a local authority to a Court of summary jurisdiction, under section 305 of the Public Health Act, 1875, for an order entitling them to enter a house and substitute a new water-closet in lieu of the existing sanitary arrangements—their notice under section 36 not having been complied with, and permission to enter having been refused by the owner—Justices are not entitled, at the hearing, to review such notice, nor to receive evidence on the part of the owner as to

the sufficiency of the existing sanitary arrangements. *Robinson v. Sunderland Corporation* (No. 2), 68 L. J. Q.B. 330; [1899] 1 Q.B. 751; 80 L. T. 262; 68 J. P. 341; 19 Cox C.C. 245—D.

The only appeal from an order of a local authority under section 36 is to the Local Government Board under section 268. *Ib.*

Defective Water-closet—No Report from Inspector of Nuisances—Claim by Local Authority to Enter Premises—Injunction.]—The plaintiff, the owner of certain premises, claimed an injunction against a local authority. In his statement of claim he alleged that the local authority, without any report from their inspector of nuisances under section 36 of the Public Health Act, 1875, had made an order under that section requiring him to remedy an alleged defective water-closet on his premises, and that they threatened, failing his compliance with such order, to commit a trespass by entering on his premises:—*Held*, that this disclosed a reasonable cause of action. *Robinson v. Sunderland Corporation* (No. 1), 63 J. P. 19—C.A.

Privies—Cleansing Undertaken by Local Authority—Failure to Eradicate Fever Germs—Substitution of Water-closets—Duty of Local Authority.]—Where a local authority has taken upon itself, under section 42 of the Public Health Act, 1875, the cleansing of privies belonging to cottage property, but has, after notification of an outbreak of typhoid fever, failed to eradicate fever germs which have penetrated crevices in the brickwork and cause a nuisance, such authority cannot under section 94 call upon an owner of the property to abate the nuisance by abolishing privies and substituting water-closets. *Barnett v. Laskey*, 63 L. J. Q.B. 55; 79 L. T. 408; 63 J. P. 5—D.

The word "cleansing" in section 42 has a wide meaning, and includes removal of matter which causes the nuisance. *Ib.*

—Insufficient Privy—Jurisdiction of Local Authority to Require Water-closet.]—Under section 36 of the Public Health Act, 1875, the local authority has power to order the conversion of an insufficient privy into a water-closet. *St Luke's, Middlesex, Vestry v. Lewis* (81 L. J. M.C. 73; 1 B. & S. 865) applied. *Nicholl v. Epping Urban Council*, 68 L. J. Ch. 393; [1899] 1 Ch. 844; 80 L. T. 515; 47 W. R. 457; 68 J. P. 600—Stirling, J.

Liability of Local Authority for Nuisance.]—A local order confirmed by statute enacted that it should be the duty of a corporation within a fixed time to proceed to carry out works for the disposal of sewage approved by the Local Government Board, and, in the event of the corporation not so proceeding, that they might be compelled to proceed in manner provided by section 299 of the Public Health Act, 1875, which section empowers the Local Government Board to enforce performance of duty by defaulting local authorities by writ of *mandamus*. Section 27 of the Public Health Act, 1875, empowers local authorities to construct works for the disposal of sewage, "provided that no nuisance be created." The corporation proceeded to construct sewage works approved by the Local Government Board:—*Held*, that the local order did not alter in any way the obliga-

tion of the corporation not to create a nuisance; and that the fact that the Local Government Board gave their approval to the works did not authorise the corporation to create a nuisance, such approval being merely a condition precedent to the execution of the works, and the order merely providing machinery for enforcing the obligation of the corporation. *Held*, also, that a breach of section 17 of the Public Health Act, 1875, had been committed for which an action was maintainable by the Attorney-General. *Att.-Gen. v. Dorchester Corporation*, 94 L. T. 682; 70 J. P. 281; 4 L. G. R. 675; 22 T. L. R. 480—C.A.

"Owner"—Collector of Rents.]—A person who collects the rents of property as agent for another is "owner" within section 94 of the Public Health Act, 1875, and may be served with a notice under that section and required to abate a nuisance on the premises arising from structural defects of the premises. *Broadbent v. Shepherd* (No. 1), 83 L. T. 504; 49 W. R. 205; 65 J. P. 70—D.

Abatement of Nuisance—Structural Defects—Liability of "Owner"—Agent for Premises Ceasing to be Agent.]—Where there has been failure to comply with a notice to abate a nuisance served under section 94 of the Public Health Act, 1875, the object of proceedings, under section 95 of the Act, to obtain an order to abate the nuisance is to found the right of a local authority to enter the premises, do the work, and if necessary recover the expenses from the responsible person; and as the word "owner" in section 95 of the Act includes the person who is the agent of the owner at the time when the offence is committed, an order to abate the nuisance can be made against such agent at an adjourned hearing of a summons taken out against him in respect of such failure, although during the interval between the original and adjourned hearing of the summons he ceases to be such agent. *Broadbent v. Shepherd* (No. 2), 70 L. J. K.B. 628; [1901] 2 K.B. 274; 84 L. T. 844; 49 W. R. 521; 65 J. P. 499—D.

The plaintiff R. was the owner of a house, and on November 24, 1897, the defendants served on him a notice that, as the house was without a sufficient water-closet, he was "to provide a sufficient water-closet to the said house according to the specification given by this notice," and then followed the usual notice that if the work was not done the authority would enter and do the work, and a specification of the kind of water-closet to be put in. In an action for an injunction to restrain the authority from entering,—*Held*, that the notice was bad on the ground that it did not allow the owner to comply with it by providing any other "sufficient" water-closet than that specified, although it was not given in pursuance of a general resolution without regard to the particular requirements. *Semble*, that it might be bad also for leaving out the words "earth closet or privy," which according to section 36 of the Public Health Act, 1875, the premises should be without before the notice can be given. In such a case the remedy of the plaintiff is not by appeal to the Local Government Board under section 268 of the Public Health Act, 1875; appeals to that body lie only in cases where the question arises as to the

sufficiency. *Robinson v. Sunderland Corporation*, 78 L. T. 194; 62 J. P. 216—Ridley, J.

Complaint of Private Individual—Order of Justices—Specification—Prohibition of Recurrence.—An order of Justices, upon the complaint of a private individual, on his own behalf, under section 105 of the Public Health Act, 1875, directing the abatement of a nuisance, must specify the works or things necessary to be done to abate it; but so much of the order as goes on to prohibit the recurrence of the nuisance need not specify them where the recurrence can be prevented by the mere refraining on the part of the aggressor from doing an act of a particular nature. *Reg. v. Horrocks; Boustead, ex parte*, 69 L. J. Q.B. 688; 82 L. T. 767; 64 J. P. 661; 19 Cox C.C. 529—D.

Abatement Notice—Compliance with Notice by Person not Legally Liable—Liability of Sanitary Authority to Recoup Expenses of Abatement—Action not Brought Within Six Months of Service of Abatement Notice.—Where a sanitary authority serves a notice under the Public Health (London) Act, 1891, requiring the abatement of a nuisance in connection with a supposed drain, and in the course of the works carried out in compliance with the notice it is discovered that the supposed drain is a sewer, and that the sanitary authority is liable to do the repairs required by the notice, an action brought to recover back from the sanitary authority the cost of the repairs as money paid to the use of and at its request, is an action for an "act done in pursuance, or execution, or intended execution of" an Act of Parliament, or of a "public duty or authority" within the meaning of section 1 of the Public Authorities Protection Act, 1893, and the sanitary authority is therefore entitled to the protection conferred by that section. *Cree v. St. Pancras Vestry*, 68 L. J. Q.B. 389; [1899] 1 Q.B. 693; 80 L. T. 388—Bruce, J.

— Compliance with Notice by Person not Liable—Liability of Sanitary Authority—Recovery of Expenses by Person not Liable—Compulsion.—Where a person is called upon by the sanitary authority to abate, and does abate, a nuisance by doing work which the sanitary authority themselves are liable to do, and where that person afterwards seeks to recover from them the cost of the work, upon the principle that, where one person is compelled to do work which another is legally compellable to do, the cost of the work may be recovered by the one as money paid at the other's request, regard must be had to the fact that in the case of a nuisance prompt action by some one is imperative; and because of that fact it is not necessary to shew that there was actual, direct, or irresistible compulsion in order to bring the case within the principle above enunciated. It is sufficient to shew that the sanitary authority took steps which practically amounted to compulsion. *Andrew v. St. Olave's Board of Works* (67 L. J. Q.B. 592; [1898] 1 Q.B. 775) explained and followed. *Self v. Hove Commissioners* (64 L. J. Q.B. 217; [1895] 1 Q.B. 685) commented upon. *North v. Walthamstow Urban Council*, 67 L. J. Q.B. 972; 62 J. P. 836—Channell, J.

Order for Abatement of Nuisance—What Constitutes.—Where Justices make an order

for the abatement of a nuisance under section 112 of the Public Health (Ireland) Act, 1878 [corresponding to section 96 of the English Public Health Act, 1875], the order of the Justices is not the entry in the order-book, but the document drawn up in accordance with Form C, Schedule C of the Act [corresponding to Form C, Schedule IV. of the English Act]. If the order so drawn up is good in form, its validity is not affected by the fact that the entry in the order-book would be bad on its face as an order. *Re v. Down Justices*, [1905] 2 Ir. R. 648—K.B. D.

Signature of Order.—Whether, where such an order is made by more than two Justices, the signature of two of them is sufficient, *quære. Ib.*

(y) *Open Spaces.*

6 Edw. 7 c. 25 is the *Open Spaces Act*, 1906.

(z) *Riots.*

Suppression—Troops Summoned to Aid—Expenses of Troops—Liability of County Fund.—Where troops are summoned by Justices of a county to aid in the suppression of apprehended riots the county council cannot be called upon to pay out of the county fund the expenses of housing and feeding them. *Reg. v. Glamorganshire County Council*, 68 L. J. Q.B. 1047; [1899] 2 Q.B. 536; 81 L. T. 372; 48 W. R. 112; 64 J. P. 115—C.A.

Per VAUGHAN WILLIAMS, L.J.—At all events, these expenses cannot be paid out of the county fund otherwise than in a case where the troops are summoned with the concurrence of the chief constable and the expenses are incurred by him, of which there is no evidence in the present case. *Ib.*

(aa) *Roads.*

Maintenance—County—County Borough—Financial Relations—Equitable Adjustment—Main Roads—County Bridges—Contribution Towards Expenses—Local Government Order.—An equitable adjustment respecting financial relations made as between an administrative county and a newly constituted county borough by virtue of a Local Government Order in terms similar to those of section 32 of the Local Government Act, 1888, may properly include a sum payable by the council of the borough to the council of the county, in respect of contributions, made before the constitution of the county borough, by the area included after its constitution in the county borough towards the expenses—first, of main roads and county bridges; and secondly, other miscellaneous expenses connected with elections, registration of voters, the weights and measures and health departments, and salaries of officers, and legal, stationery, and office expenses. *Durham County Council v. West Hartlepool Borough Council*, 74 L. J. K.B. 815; [1905] 2 K.B. 340; 92 L. T. 685; 54 W. R. 110; 69 J. P. 283; 3 L. G. R. 738—Channell, J.

Subsidence of Highway—Liability of Sanitary Authority—Defective Condition of Sewer and Road under Highway—Absence of Negligence.

—An action will not lie against a sanitary authority, whose duty it is, under the Public Health Act, 1875, to maintain sewers, for damage occasioned by the subsidence of a highway due to the defective condition of a sewer and the road under the highway, unless there is negligence upon the part of the sanitary authority. *Lambert v. Lowestoft Corporation*, 70 L. J. K.B. 333; [1901] 1 K.B. 590; 84 L. T. 237; 49 W. R. 316; 65 J. P. 326—Lord Alverstone, C.J.

Negligence—Road Making by District Council
—Employment of Contractor—Liability of District Council for Negligence of Contractor.]—A district council employing a contractor to do work in a place where the public are in the habit of passing, which will, unless precautions are taken, cause danger to the public, must take precautions, and if these are omitted cannot, on damage ensuing, escape liability by seeking to throw the blame on the contractor. No sound distinction in this respect can be drawn between a public highway and a road which may be, and to their knowledge probably will in fact be, used by persons lawfully entitled so to do. *Penny v. Wimbledon Urban Council*, 67 L. J. Q.B. 754; [1898] 2 Q.B. 212; 78 L. T. 748; 62 J. P. 582—Bruce, J.

—Making up Road—Dangerous Work—Employment of Contractor—Liability.]—Where a public body takes upon itself the making-up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road. That duty cannot be evaded by employing a contractor to carry out the work. *Hill v. Tottenham Urban Council*, 79 L. T. 495—Bruce, J. And see *STREETS*, *infra*, col. 1389.

(bb) *Sale of Articles on Beach.*

Sale on Beach and Foreshore, Regulating—Validity.]—Under statutory powers enabling a corporation to make by-laws for regulating the selling or hawking of any article on their beach and foreshore, the corporation made a by-law that: "A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose".—*Held*, that the by-law was unreasonable and bad on the ground that it gave the corporation power to make any agreement they chose without reference to the question of the reasonableness or unreasonableness of such agreement, and that it reserved to them a right to refuse to give a licence to any particular person. *Parker v. Bournemouth Corporation*, 86 L. T. 449; 66 J. P. 440—D.

(cc) *Smoke.*

Factory Chimney—Abatement—Sufficiency of Notice to Abate.]—A notice to abate a nuisance caused by quantities of black smoke issuing from a factory chimney need not necessarily

specify the works required to be done in order to abate the nuisance. *Millard v. Wastall*, 57 L. J. Q.B. 277; [1898] 1 Q.B. 342; 77 L. T. 692; 46 W. R. 258; 62 J. P. 135; 18 Cox C.C. 695—D.

(dd) *Sewers and Drains.*

(1) *"Sewer" Generally.*

Drain or Sewer—Pipe Receiving Drainage from Sewer—Liability to Repair.]—A pipe which is *prima facie* a sewer does not cease to be a sewer merely because it receives the drainage of another sewer. *Wood Green Urban Council v. Joseph*, 74 L. J. K.B. 954; 93 L. T. 434; 3 L. G. R. 1147; 69 J. P. 464—D.

"Sewer"—"Drain"—Long User.]—In 1859 or 1860 an estate was laid out for building purposes and a road constructed through it. A twelve-inch drain was at the same time laid from end to end of the road, which discharged its contents into a culvert and then into a river. Houses were built from time to time in the road, and some of the owners of these houses, as early as 1876, connected their drains with the twelve-inch drain, but some of the other houses in the road drained into cesspools. In 1882 the local authority's surveyor was aware of at least one connection from a house with the twelve-inch drain:—*Held*, that the twelve-inch drain was a sewer and had vested in the local authority, and that it must be inferred that the local authority had accepted it as laid to their satisfaction. *Wilmslow Urban Council v. Sidebottom*, 70 J. P. 537—Neville, J.

"Drain" or "Sewer"—Conduit Leading to no Outlet—Conduit Laid by Trespasser.]—A conduit in order to be a "sewer" within the Public Health Act, 1875, must be, in some form or other, a line of flow by which sewage or other liquid matter of some kind, such as would be conveyed through a sewer, is taken from one point to another point and there discharged. It must have a *terminus a quo* and a *terminus ad quem*. *Pakenham v. Ticehurst Rural Council*, 2 L. G. R. 19; 67 J. P. 448—Buckley, J.

A conduit is none the less a sewer because at a particular point in its course there is a cesspool which existed before the conduit was laid, and which has been converted into a catchpit, nor because at a particular point in its flow the sewage has been so treated as to have become innocuous. *Id.*

If by way of trespass a conduit such as to fall within the definition of "sewer" has been laid upon land without the knowledge or sanction of the landowner, the landowner upon ascertaining the fact may cause it to be removed; but if he permits it to remain adopting the act of the trespasser, it will vest as a "sewer" in the local authority. *Id.*

—Liability of Local Authority.]—A pipe laid down before 1894, which is not a sewer within the definition contained in section 4 of the Public Health Act, 1875, does not become a sewer under section 25 of the Local Government Act, 1894, by reason of its becoming vested under that section in the authority

having the management of roads, and being a local authority under the Act of 1875, inasmuch as the effect of section 25 of the Act of 1894 is not to alter the status of the pipe, although it transfers the powers, duties, and liabilities of the highway authority in respect of it to the local authority. *Williamson v. Durham Rural Council*, 75 L. J. K.B. 498; [1906] 2 K.B. 65; 95 L. T. 471; 54 W. R. 491; 70 J. P. 352; 4 L. G. R. 1163—D.

— **Trespass on Neighbour's Land.**—In considering whether a culvert for conveying the drainage from more than one house is a "sewer" or a "drain" within the definition clause (section 4) of the Public Health Act, 1875, the test is whether the houses do in point of fact constitute one building only, or more than one. *Webb v. Knight*; *Hedley v. Webb*, 70 L. J. Ch. 663; [1901] 2 Ch. 126; 84 L. T. 526; 65 J. P. 425—Cozens-Hardy, J.

Query, whether a sewer carried across a neighbour's land by trespass does or does not vest in the local authority under section 13 of the Public Health Act, 1875. *Semble*, not. *Ib.*

— **Pipe Draining Several Houses of Same Owner—Drainage Passing through Single Private Drain to Public Sewer—Liability to Repair.**—A pipe conveying the drainage from several houses belonging to one owner, which is a sewer within the meaning of section 4 of the Public Health Act, 1875, does not cease to be so and become a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, and so repairable by the owner of the houses, because the sewage from it passes on its way to the public sewer through a single private drain conveying the drainage from houses belonging to different owners to which section 19 of the Act of 1890 applies. *Jackson v. Wimbledon Urban Council*, 74 L. J. K.B. 641; [1905] 2 K.B. 27; 92 L. T. 553; 53 W. R. 485; 69 J. P. 225; 3 L. G. R. 586; 21 T. L. R. 479—C.A.

— **Pipe used for Draining Semi-detached Houses—"One building only."**—The question whether a pair of semi-detached houses are "one building only" within section 4 of the Public Health Act, 1875, so as to make a pipe used for draining them a "drain" to which the provisions of section 41 can be applied, is a question of fact depending upon the circumstances of each case. *Humphery v. Young*, 72 L. J. K.B. 6; [1903] 1 K. B. 44; 87 L. T. 551; 51 W. R. 298; 67 J. P. 34; 1 L. G. R. 142—D.

— **"Single private drain"—Liability to Repair.**—If in any particular case it is shewn that a pipe is a private drain and not a sewer (which *prima facie* it will be if it drains more than one house) an order may be made under section 41 of the Public Health Act, 1875; but the mere fact that it drains houses which belong to different owners is not sufficient evidence that the pipe is a single private drain. *Thompson v. Eccles Corporation*, 73 L. J. K.B. 497; [1904] 2 K.B. 1; 90 L. T. 507; 68 J. P. 315; 2 L. G. R. 556—D. Reversed, 74 L. J. K.B. 130; 3 L. G. R. 20; 21 T. L. R. 49—C.A.

— **House Connected by Sewer with Single Private Drain—"Connected with public sewer by**

single private drain."—**Liability to Repair.**—A house connected with a public sewer by means of a pipe, being a sewer within the meaning of section 4 of the Public Health Act, 1875, discharging into another pipe being a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, is not "connected with a public sewer by a single private drain" within the meaning of the later enactment. Judgment of the Divisional Court (74 L. J. K.B. 954) affirmed on other grounds. *Wood Green Urban Council v. Joseph*, 76 L. J. K.B. 173; [1907] 1 K.B. 182; 96 L. T. 176; 71 J. P. 89; 5 L. G. R. 322; 23 T. L. R. 126—C.A.

Sewage Pipe with no Outlet.—The fact that a pipe which has no lawful outlet for sewage receives sewage from a house as well as surface-water from a highway is not of itself proof that the pipe is a sewer. If a nuisance arises solely in consequence of a person's own act in sending sewage down such a pipe, he is responsible under sections 94 and 95 of the Public Health Act, 1875, as a person causing or continuing the nuisance by his "act default or sufferance." *Wincanton Rural Council v. Parsons*, 74 L. J. K.B. 533; [1905] 2 K.B. 34; 93 L. T. 13; 69 J. P. 242; 3 L. G. R. 771—D. And see *Bromley Borough Council v. Cheshire*, 77 L. J. K.B. 332; [1908] 1 K.B. 690; 72 J. P. 34; 6 L. G. R. 156—D; and *NUISANCE*, *supra*.

Group of Houses with Common Access and Common Accommodation.—A group of a considerable number of houses are not "premises within the same curtilage" within the meaning of that expression as used in the definition of "drain" in section 4 of the Public Health Act, 1875, though they have a common access by means of a court, and certain accommodation such as ashpits and water-closets in common. A conduit for the drainage of such a group of houses is therefore a "sewer" and not a "drain" within the meaning of that Act. *St. Martin-in-the-Fields Vestry v. Bird* (64 L. J. Q.B. 230; [1895] 1 Q.B. 428) followed. *Harris v. Scurfield*, 91 L. T. 536; 2 L. G. R. 974; 68 J. P. 516; 20 T. L. R. 659—D. And see *PRIVATE DRAIN*, *infra*.

"Stream" or "Sewer"—Conversion of Natural Watercourse into Sewer—Discharge of Manufacturing Effluent.—A conduit, which was originally a natural stream, may be a "sewer" within the meaning of the Public Health Acts, if for a considerable period it has ceased to be to any substantial extent a channel for the conveyance of water, and has become a channel substantially for the conveyance of sewage only. But the mere illegal act on the part of a local authority of discharging sewage into a natural stream in contravention of section 17 of the Public Health Act, 1875, or of the Rivers Pollution Prevention Act, 1876 (or, while that Act was in force, in contravention of section 4 of the Local Government Act, 1858, Amendment Act, 1861), does not convert the stream into a sewer. *West Riding Rivers Board v. Gaunt*, 67 J. P. 183; 1 L. G. R. 133—D.

Sewage Flowing into Ditch—No Outflow.—Underground pipes or drains which carry sewage-matter from different points on an estate into a ditch on the same estate, from

which ditch there is no outflow, do not constitute a sewer within the meaning of section 4 of the Public Health Act, 1875. *Pakenham v. Ticehurst Rural Council*, 67 J. B. 448—Buckley, J.

Cesspool—Catchpit.—By the consent of two landowners pipes were laid above and below an old cesspool for the conveyance of sewage-matter to prevent an overflow. By this arrangement the cesspool was converted into a catchpit:—*Held*, that the new connection constituted a sewer. *Id.*

Where a system of pipes has been laid by one man in the land of another for the conveyance of sewage-matter, such system will constitute a sewer, and be vested in the local authority, if the second landowner consents to such system being laid either at the time the work is done or subsequently. *Id.*

Cesspools—Omission to Construct—Want of Structural Convenience—Liability of Owner.—The appellants' predecessors in title deposited with the respondents a plan providing for the draining of certain houses into cesspools. The cesspools were not, however, constructed, and the appellants' predecessors without permission turned the slop and scullery water from the houses into a surface-water drain made by the respondents upon a highway upon which the houses abutted. The slop and scullery water passed through the drain into an open ditch and caused a nuisance. The respondents had not constructed any sewer by means of which the appellants could drain their houses. Upon a summons under section 95 of the Public Health Act, 1875, the Justices made an order upon the appellants to abate the nuisance:—*Held*, that the nuisance arose from the want of a "structural convenience" within the meaning of section 94, and that the order was therefore properly made; and *held*, further, that although the surface-water drain was a "sewer" within the definition in section 4, the appellants, even if they had given the notice prescribed by section 21, would not have been entitled to use it to carry off their slop and scullery water. *Kinson Pottery Co. v. Poole Corporation*, 68 L. J. Q.B. 819; [1899] 2 Q.B. 41—D.

Open Channel by Roadside—"Sewer"—Liability of Local Authority.—An open channel or surface-water drain alongside of a public road, and taking surface-water from the road and rain-water from adjoining houses, is a "sewer" within the meaning of the Public Health Act, 1875, and vests in the local authority under section 18 of the Act, and they will be responsible for its cleansing under section 19, and will be liable in damages if injury is caused by sewage-matter wrongfully flowing into and accumulating in it. *Kinson Pottery Co. v. Poole Corporation* (68 L. J. Q.B. 819; [1899] 2 Q.B. 41) distinguished. *Wilkinson v. Llandaff and Dinas Powis Rural Council*, 73 L. J. Ch. 8; [1903] 2 Ch. 695; 89 L. T. 462; 52 W. R. 50; 68 J. P. 1; 2 L. G. R. 174; 20 T. L. R. 30—C.A.

(2) Sewering.

Duty of Local Authority to Furnish—Default—Remedy—Complaint to Local Government Board—Mandamus.—An action for a *mandamus* VOL. II.

to compel a local authority to furnish necessary sewers for effectually draining their district in accordance with section 15 of the Public Health Act, 1875, will not lie at the instance of an aggrieved individual, the exclusive remedy for the default by the local authority in the performance of their duty being by complaint to the Local Government Board under section 299 of the Act. *Pasmore v. Oswaldtwistle Urban Council*, 67 L. J. Q.B. 635; [1898] A.C. 387; 78 L. T. 569; 62 J. P. 628—H.L. (E.)

"Satisfaction of urban authority."—The existence of sewers under a street for the independent drainage of particular houses, and the fact that the street has become vested in the urban authority, are not sufficient to shew that the street has been sewered as a whole. Still less can the legal assumption be made that such a street has been sewered "to the satisfaction of the urban authority" within section 150 of the Public Health Act, 1875, when notices to sewer have been given by them, and proceedings taken under that section. *Handsworth Urban Council v. Derrington*, 66 L. J. Ch. 691; [1897] 2 Ch. 438; 77 L. T. 73; 46 W. R. 163; 61 J. P. 518—Kekewich, J. See *Rishton v. Haslingden Corporation*, 67 L. J. Q.B. 387; [1898] 1 Q. B. 294—D.

"Street"—"Highway repairable by the inhabitants at large"—Street "sewered to the satisfaction of the urban authority."—An urban authority proposed to do certain sewerage works under the Private Street Works Act, 1892, in a street within their borough. The street in question was about eight feet in width, and was laid out before the year 1816; it ran between the back premises of two rows of houses, and formed a means of communication between two old highways which ran at right angles to it. It had always been kept open to these two highways, and no barrier had ever been put up in any part of it. It had always been used without interruption as a footway, but there was some evidence of interruption to its use as a carriage-way. There was no evidence of public repairs, and the alleged private repairs consisted solely of the occasional removal of refuse, &c. A drain ran through the back yards of the houses on one side of the street and carried their drainage, and also the drainage of some of the houses on the other side of the street, into a sewer in one of the above-mentioned highways. It was admittedly an insufficient drain, but had existed in its present condition for about seventy years, nor had its sufficiency ever been questioned until notice was given of the proposed works:—*Held*, on a case stated after the hearing and determination of objections by the owners of premises fronting, adjoining, and abutting upon the street to the provisional apportionment amongst them of the expenses of the proposed works, that the street was a highway repairable by the inhabitants at large, and therefore not a "street" within the meaning of section 5 of the Act of 1892, and that the expenses of the proposed works must consequently be borne by the urban authority. *Handsworth Local Board v. Taylor* (69 L. T. 798) explained. *Rishton v. Haslingden Corporation*, 67 L. J. Q.B. 387; [1898] 1 Q.B. 294; 77 L. T. 620; 62 J. P. 85—D.

Right to Support—Subjacent Minerals—Ad-

adjacent Lands.—In 1878 W., the predecessor in title of the plaintiffs, conveyed to the defendants, excepting the minerals, lands on which the defendants constructed sewage works. The compensation was duly paid. In 1878 the defendants also constructed an outfall sewer through lands the property of W., under the powers of the Public Health Act, 1875. The compensation was determined by arbitration under that Act, and was duly paid:—*Held*, that, as regarded the sewage works, the defendants had acquired by the conveyance a right of support by the subjacent minerals and the adjacent lands of W. for the land conveyed and for any buildings or works reasonably in the contemplation of the parties to the conveyance; and that, as regarded the outfall sewer, the defendants had acquired by virtue of the Public Health Act, 1875, having regard to *Dudley Corporation and Dudley's (Earl) Trustees, In re* (51 L. J. Q.B. 121; 8 Q.B. D. 86), a right to have it supported by the land in which it was laid, and probably also by the adjacent lands of W.; that this right must be deemed to have been taken into consideration by the arbitrator and to be covered by the award; and that the defendants were not deprived of the above rights by the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, since the sewage works and outfall sewer, being sanitary works in respect of which rights of support had been acquired by the defendants before the passing of that Act, and in respect of which rights no compensation was at the passing of the Act recoverable, were by section 5 altogether excepted from the operation of the Act. *Jary v. Barnsley Corporation*, 76 L. J. Ch. 593; [1907] 2 Ch. 600; 97 L. T. 507; 71 J. P. 468; 5 L. G. R. 1145; 23 T. L. R. 639—Parker, J.

Charge on Owners for Expenses.—By its local Acts a corporation was empowered to constitute a drainage district within the borough and to assess and apportion a due proportion of the original cost of the drain or sewer among the owners of the land or ground within the district, such assessment to be on the full net annual value of such property as ascertained by the valuation list for the time being in force, or, if there were none, by the rate for the relief of the poor made next before the making of such assessment:—*Held*, that an assessment made in 1898 upon the owners of property within the district at the date of the completion of the works in 1891 upon the valuation list in force at that date was improper; the valuation list in force at the date of the assessment should have been taken. *Newcastle-upon-Tyne Corporation v. Houseman*, 63 J. P. 85—Byrne, J.

Tidal Stream — "Sewer."—A tidal stream may by virtue of its user be converted into a sewer. *Id.*

Entry on Private Land without Notice—Erection of Pumping Station—"Sewer."—A local authority has no right to carry a sewer under private property without previously giving the notice required by section 16 of the Public Health Act, 1875. A pumping station is not a "sewer" within section 16 of the Act; but it is, within section 27, an apparatus "for distributing or otherwise disposing of sewage," and consequently the land required for such pumping station must be purchased by the local autho-

riety. *King's College, Cambridge v. Unbridge Rural Council*, 70 L. J. Ch. 844; [1901] 2 Ch. 768; 85 L. T. 303—Byrne, J.

Right of Local Authority to Drain into Intercepting Sewer—Transferred Area.—By virtue of the Brighton Intercepting and Outfall Sewers Act, 1870, the Hove Commissioners Act, and the order of the County Councils of East and West Sussex made in 1893 and duly confirmed, which transferred the parish of Aldrington from Steyning Union to Hove Urban Sanitary District, the Corporation of Hove are entitled to discharge all the sewage of the borough of Hove, as also the sewage of that part of the borough which was within the parish of Aldrington, into the intercepting sewers constructed by and vested in the Brighton Intercepting and Outfall Sewers Board. *Brighton Intercepting and Outfall Sewers Board v. Hove Corporation*, 68 J. P. 565; 2 L. G. R. 1255; 20 T. L. R. 760—H.L. (E.)

Withdrawal of Notice to Take Land for Sewer—Arbitration—Jurisdiction—Costs.—A local authority served a notice, under section 16 of the Public Health Act, 1875, on the owner of land, of its intention to carry a sewer through such land. Subsequently, the owner gave notice claiming compensation for the damage or injury to be sustained by her by the construction and execution of the drainage works, and requiring arbitration. Both parties appointed arbitrators, but after they had met the local authority withdrew its notice—the works not having been commenced—and offered to pay the owner's taxed costs up to the time of such withdrawal notice; but the owner refused this offer, and went on with the arbitration. The arbitrators awarded her 10% as compensation for the damage she had sustained, and also costs:—*Held*, that they had no jurisdiction to award either damages or costs in such circumstances. *Davis v. Witney Urban Council*, 63 J. P. 279—C.A.

Construction of Sewers—Towing-path—"Interruption" of Traffic.—A temporary interference with the traffic on a towing-path, during the laying of a sewer through the path, is an interference with the towing-path so as to interrupt the traffic thereof, within the meaning of section 327 of the Public Health Act, 1875, notwithstanding that the work is carried out so as not to interrupt the traffic over more than half the path at a time, and so as to avoid as far as possible any interference with the towing of vessels from the path. The powers of the Act for the laying of sewers consequently do not authorise the laying of a sewer through a towing-path to which the above-mentioned section applies without such consent as is there mentioned. *Thames Conservators v. Walton-upon-Thames Urban Council*, 96 L. T. 555; 71 J. P. 202; 5 L. G. R. 274—Phillimore, J.

Trespass by Sanitary Authority in Constructing Sewer—Cutting of Sewer by Owner of Land Trespassed on—Injunction claimed by Sanitary Authority—Costs.—A sanitary authority constructed a sewer under the bed of a goit which supplied water to the defendant's mill without giving the defendant notice as required by the Public Health Act, 1875, s. 32, whereupon the defendant cut the sewer:—*Held*, in an action

by the sanitary authority for an injunction to restrain the defendant from interfering with the sewer, that the sanitary authority had no right to carry their sewer under the goit, but that the defendant having cut the sewer, causing thereby public inconvenience and risk of disease, was not entitled to costs. *Held, further*, that the defendant was within his rights in putting in a counterclaim for damages, as the sanitary authority had resisted his title and given him no opportunity of agreeing upon damages. *Cleckheaton Urban Council v. Firth*, 62 J. P. 536—Kekewich, J.

Interference with Treatment or Utilisation of Sewage—Laundry Effluent.]—Section 45 of the Bradford Tramways and Improvement Act, 1897, prohibits, under a penalty, the discharge into the sewers of the city of Bradford of “any refuse from any manufactory or work that would interfere with the treatment or utilisation of the sewage.” On a prosecution under the section in respect of the discharge of the effluent from a laundry into the sewers, the magistrate held that, having regard to the preamble to the Act, a laundry was not a “work” within the section. He also found, on certain evidence, that the effluent would not interfere with the treatment or utilisation of the sewage:—*Held*, that, in view of this finding, the magistrate’s decision must stand, whether he was right or not on the question whether a laundry was a “work” within the section. *Garfield v. Yorkshire Laundries*, 3 L. G. R. 1192; 69 J. P. 411—D.

Prescriptive Right of Drainage—Trade Effluents—Pollution.]—Where a local authority have for some years allowed effluents produced in the course of a trade or manufacture to be discharged into their sewers they are not justified under the provisions of the Rivers Pollution Prevention Act, 1876, s. 7, in cutting off the connection made with their sewer merely because the nature of the trade effluent is such that it renders the disposal by irrigation or otherwise of the sewage matter less efficient than it might otherwise be. *Eastwood v. Honley Urban Council*, 70 L. J. Ch. 313; [1901] 1 Ch. 645; 84 L. T. 169; 49 W. R. 308—C.A.

Drain Constructed on Private Land—Right of other Persons to Connect with Sewer.]—The owner or occupier of premises is not entitled under section 21 of the Public Health Act, 1875, to connect his drains with a sewer on private ground where that sewer has only become such by reason of the fact that it receives the drainage of two or more buildings. Where, therefore, such a connection was made by a local authority at the request of the owner of premises, the owners of the land in which the sewer was situated were held to be justified in removing the connecting pipe. *Wood v. Baking Tenants, Ltd.*, 76 L. J. K.B. 764; [1907] 2 K.B. 390; 97 L. T. 520; 71 J. P. 456; 5 L. G. R. 1055—D.

Right to Pollute Watercourse.]—A private Act of Parliament enacted that “No person shall without the consent of the commissioners . . . open any new drain or other work into any of the drainage works of the commissioners . . . and no person shall cause any filthy or unwholesome water, or washings of manu-

factories or mines, or other foul or poisonous liquid, to flow into any watercourse within the jurisdiction of the commissioners,” and imposed penalties for the violation of the prohibitions. The section contained a proviso that “this section shall not apply to any person having a legal right to cause such water, washing, or liquid as aforesaid to flow into any existing river, stream, or watercourse.” Before and at the time of the passing of the Act the sewage of a town flowed into a tidal river within the jurisdiction of the commissioners. The urban sanitary authority proposed to remodel their system of drainage, and to make a new outfall into the river, in place of those previously existing:—*Held*, that, assuming the tidal river to be a watercourse within the meaning of the Act, the case fell within the above-mentioned proviso, and that the commissioners had no power to prevent the carrying out of the new drainage works. The exemption in the proviso is not to be restricted to the precise amount or manner of pollution going on at the time of the passing of the Act. *Somersetshire Drainage Commissioners v. Bridgwater Corporation*, 81 L. T. 729—H.L. (E.)

Works Constructed on Land Belonging to Local Authority—Compensation—Connection with Sewers Laid in Claimant’s Land—Injurious Affecting Claimant’s Land—General System of Sewerage.]—A local authority, under their statutory powers, laid sewers through land belonging to the claimant. The sewers were connected with a pumping station and reservoir constructed by the local authority on adjoining land which had never belonged to the claimant. The claimant’s land was depreciated in value by reason of the contemplated user by the local authority of the pumping station and reservoir:—*Held*, that the claimant was not entitled to compensation in respect of such depreciation, notwithstanding that the pumping station and reservoir and the sewers laid under his land together formed one system of sewerage. *Horton v. Colwyn Bay Urban Council*, 76 L. J. K.B. 91; [1907] 1 K.B. 14; 96 L. T. 84; 71 J. P. 69; 5 L. G. R. 22; 23 T. L. R. 75—Bigham, J. Affirmed in C.A., 77 L. J. K.B. 215; [1908] 1 K.B. 327; 72 J. P. 57; 6 L. G. R. 211.

Persons Outside Metropolitan Area—Public Body—Ultra Vires Agreement.]—A parish outside the metropolitan area cannot send its sewage into any sewer of any parish within that area without the consent of such parish; but a parish within the area cannot make any binding agreement for any definite time to receive sewage from a parish without the area—they can only grant revocable licences for such a purpose. Decision of HALL, V.C., in *Metropolitan Board of Works v. London and North-Western Railway* (49 L. J. Ch. 355; 14 Ch. D. 521), on this point approved. *St. Mary, Islington, Vestry v. Hornsey Urban Council*, 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 580; 48 W. R. 401—C.A.

Estoppel—Laches and Acquiescence.]—A local authority, being a public body with public duties, are not estopped from asserting a right to put an end to a nuisance by the fact that they had formerly permitted and encouraged the acts which cause the nuisance, it being beyond their power to make any binding agree-

ments to permit such acts. *Great North-West Central Railway v. Charlebois* (68 L. J. P.C. 25; [1899] A.C. 114) followed. *Ib.*

Injunction against Local Authority.]—The Court will not grant an injunction compelling a local authority to close sewers under their control, which are in daily use, unless it is absolutely essential to do so, but will allow reasonable time for the local authority to make other arrangements for the disposal of its sewage. Order made declaring that the defendants were not entitled to send sewage into the plaintiffs' sewers without the plaintiffs' consent, with liberty for the plaintiffs to apply to the Judge at the expiration of twelve months from the date of the order for an injunction to enforce their rights. *Ib.*

Insertion in Provisional Apportionment—Premises extra commercium—Land used as Public Pleasure Ground.]—A provisional apportionment of the expenses of sewerage &c. a street, made under section 6 of the Private Street Works Act, 1892, should contain all premises fronting, adjoining, or abutting on such street, whether the owners of such premises are chargeable with such expenses or not. *Herne Bay Urban Council v. Payne*, 76 L. J. K.B. 685; [1907] 2 K.B. 130; 96 L. T. 666; 5 L. G. R. 631; 71 J. P. 282; 23 T. L. R. 442—D.

Land was purchased by a local authority under the powers conferred by section 164 of the Public Health Act, 1875, and under the covenants contained in the conveyance to them they were bound to keep such land open as recreation and pleasure grounds for the use of the public for ever. *Held*, that such land was not exempt, as being *extra commercium*, from paying the amount which might be apportioned in respect thereof for the above expenses. *Ib.*

(3) Vesting in Local Authority.

Sewer to Divert Surface Water from Quarry—“Made by any person for his own profit.”]—A sewer constructed by a landowner upon his land for the purpose of diverting surface water running on to his land from a public road and preventing it from entering a quarry situate on his land and increasing the expense of working it, is a sewer “made by any person for his own profit” within the meaning of section 13, subsection 1 of the Public Health Act, 1875, and therefore does not vest in the local authority under that section. *Croysdale v. Sunbury-on-Thames Urban Council* (67 L. J. Ch. 585; [1898] 2 Ch. 515) approved. *Sykes v. Sowerby Urban Council*, 69 L. J. Q.B. 464; [1900] 1 Q.B. 584; 82 L. T. 177; 64 J. P. 340—C.A.

Sewer Vesting in Landowner—Sewer made for “Profit”—No Direct Money Payment—Discharge of Surface Water on Land.]—The word “profit” in section 13 of the Public Health Act, 1875, which contains an exemption of “sewers made by any person for his own profit” from sewers which vest in the local authority under that section, is not to be restricted to a direct money payment. *Croysdale v. Sunbury-on-Thames Urban Council*, 67 L. J. Ch. 585; [1898] 2 Ch. 515; 79 L. T. 26; 46 W. R. 667; 62 J. P. 520—Stirling, J.

A sewer made not for sanitary or ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, is a sewer made for the “profit” of the occupier. *Ib.*

When, therefore, a landowner made a line of pipes from a highway to a pond in an adjoining field to enable him to use the pond for feeding his cattle, the supply of water being otherwise inadequate for that purpose, he was held to have done so for his own profit within the exception. *Ib.*

The pond in question was not part of the drainage system under the control of the local authority, and consequently section 67 of the Highway Act, 1835, which only authorised the making and keeping open of ditches and drains in and through lands adjoining a highway, did not empower the local authority, except with the leave of the owner, or in due exercise of any statutory powers vested in them, to discharge the surface water from the highway into the pond. *Ferrand v. Hallas Land and Building Co.* (62 L. J. Q.B. 479; [1893] 2 Q.B. 135) and *Minehead Local Board v. Luttrell* (63 L. J. Ch. 497; [1894] 2 Ch. 178) discussed and applied. *Ib.*

Railway Accommodation Works.]—Drains not used for the drainage of one building only are “sewers” within sections 4 and 13 of the Public Health Act, 1875, whether they have carried sewage or not. *London and North-Western Railway v. Runcorn Rural Council*, 67 L. J. Ch. 324; [1898] 1 Ch. 561; 78 L. T. 343; 46 W. R. 484; 62 J. P. 643—C.A.

For the purposes of the second exception to section 13, there is no difference between drains made in exercise of powers and drains made in the performance of statutory duties. *Ib.*

The second exception to section 13 is not confined to drains made under Acts passed expressly for draining, preserving, or improving land. The question is whether the drains made under any local Act are made and used for those purposes. *Ib.*

Railway Acts must be read as if all the sections of the Railway Clauses Consolidation Act, 1845, were written into them; therefore, drains constructed under section 68 of the Act of 1845, as incorporated into a railway company's special Act of 1846, must be treated as having been made under the special Act. Such drains are made under a local and private Act within the second exception to section 13 of the Public Health Act, 1875, and do not vest in the local authority. *Ib.*

“Local or private Act of Parliament.”]—A railway company's special Act is a “local or private Act” within section 13 of the Public Health Act, 1875, although in the special Act itself it is provided that “this Act shall be a public Act.” *Ib.*

Long User.]—In 1859 or 1860 an estate was laid out for building purposes and a road constructed through it. A twelve-inch drain was

at the same time laid from end to end of the road, which discharged its contents into a culvert and then into a river. Houses were built from time to time in the road, and some of the owners of these houses, as early as 1876, connected their drains with the twelve-inch drain, but some of the other houses in the road drained into cesspools. In 1882 the local authority's surveyor was aware of at least one connection from a house with the twelve-inch drain:—*Held*, that the twelve-inch drain was a sewer and had vested in the local authority, and that it must be inferred that the local authority had accepted it as laid to their satisfaction. *Wimslow Urban Council v. Sibbottom*, 70 J. P. 537; 5 L. G. R. 80—Neville, J.

Vesting in Local Authority.—See *Pemsel v. Tucker*, post, VENDOR AND PURCHASER.

(4) Duty to Cleanse.

Duty of Local Authority to Cleanse Sewer—Remedy for Default—Action for Damages—Complaint to Local Government Board.—An action for damages against a local authority will lie at the suit of an individual whose property has been injured by the neglect of the local authority to perform the duty imposed by section 19 of the Public Health Act, 1875, to cleanse the sewers belonging to them. *Baron v. Portslade-by-Sea Urban Council*, 69 L. J. Q.B. 899; [1900] 2 Q.B. 588; 83 L. T. 363; 48 W. R. 641; 64 J. P. 675—C.A.

(5) Surface Water.

Discharge into Natural Stream—Right of Local Authority.—A local authority, when draining their district under the powers of the Public Health Act, 1875, and the Private Street Works Act, 1892, have, under sections 15, 16, and 17 of the Act of 1875, a right to discharge surface water into a natural stream or watercourse or canal on land belonging to another person within their district, so long as such surface water is, as required by section 17, free from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse. *Durrant v. Branksome Urban Council*, 66 L. J. Ch. 653; [1897] 2 Ch. 291; 76 L. T. 739; 46 W. R. 134—C.A. Affirming, 61 J. P. 472—North, J.

Deleterious Matter.—Sand and silt are not “deleterious matter” within the meaning of section 17 if the stream is already naturally charged therewith. *Ib.*

Damage—Compensation.—Any damage caused by the proper exercise by the local authority of the right in question is a matter for compensation under section 308 of the Act of 1875, and forms no ground for an injunction against the local authority or for an action for damages by the owner of the land on which is the bed of the stream. *Ib.*

Discharge into Drain of Solid Sewage—Liability of Occupiers—“Sewer”—Notice to Local Authority.—A person who commits a nuisance at common law by draining faecal matter into a

sewer of the local authority, through which it passes on to the plaintiff's land, cannot justify himself under the Public Health Act, 1875, s. 21, without shewing that he has fulfilled the requirements imposed on him by that section. *Graham v. Wroughton*, 70 L. J. Ch. 673; [1901] 2 Ch. 451; 84 L. T. 744; 49 W. R. 643; 65 J. P. 710—C.A.

Per BYRNE, J.—An owner or occupier has no right under section 21 of the Public Health Act, 1875, to pass faecal matter into a drain used only for the purpose of carrying off rain and slop-water, although it may be a “sewer” of the local authority within the meaning of section 4. *Kinson Pottery Co. v. Poole Corporation* (68 L. J. Q.B. 819; [1892] 2 Q.B. 41) followed by BYRNE, J. *Ib.*

Sewer Made for “Profit”—Absence of Direct Profit—Vesting of Sewer in Local Authority.—A sewer constructed by a landowner in order to prevent surface water from running into the workings of a stone quarry upon his land, but which is not directly profitable to him, is not a sewer made by him “for his own profit” within the meaning of section 13, sub-section 1, of the Public Health Act, 1875, and therefore vests in the local authority. *Sykes v. Sowerby Urban Council*, 68 L. J. Q.B. 652; [1899] 1 Q.B. 979; 80 L. T. 392; 47 W. R. 560—D.

(6) Private Drain.

Single Pipe Draining Several Houses—Different Owners—Nuisance on Premises of One Owner—Liability of Owner to Abate Nuisance—“Single private drain.”—Where two or more houses belonging to different owners are drained by a single pipe passing through the lands on which the houses are situate into the sewer of a local authority, the authority may, if it has adopted section 19 of the Public Health Acts Amendment Act, 1890, upon written application complaining of a nuisance in the pipe being made to them, treat the pipe as a single private drain within the meaning of that section, and may follow the procedure of section 41 of the Public Health Act, 1875, with respect to it, and, if it be found that the whole defect may be remedied by works executed upon the premises of one owner only, may serve that one owner only with notice to abate the nuisance, and, if he does not comply with the notice, may execute the necessary works and recover the whole of the expenses incurred from that one owner only. *Thompson v. Eccles Corporation; Haedicke v. Friern Barnet Urban Council*, 74 L. J. K.B. 130; [1905] 1 K.B. 110; 91 L. T. 750; 53 W. R. 211; 69 J. P. 45; 3 L. G. R. 20; 21 T. L. R. 49—C.A.

The apportionment of expenses for which provision is made by section 19 of the Public Health Act, 1890, is only applicable where a defect is found to exist on the premises of more than one owner, and the expenses have to be distributed among the different owners liable. *Eastbourne Corporation v. Bradford* (65 L. J. Q.B. 571; [1896] 2 Q.B. 205) approved. *Ib.*

— **Drain Emptying into Cesspool—Undertaking by Owner to Treat Drain and Cesspool as**

ivate, and to Cleanse Same—Nuisance at Cesspool—Liability of Owner as “person by whose act, default, or sufferance nuisance arises.”]—The appellant, a builder who had built houses on the south side of a certain road, submitted plans to the local authority for a scheme of drainage for the houses, and the plans were accepted subject to the appellant entering into an undertaking with the local authority, which he did; and accordingly a drain or sewer, with which each house was connected by a single pipe, was constructed along the middle of the road for a distance of about 1,200 feet, communicating with the surface by manholes, and terminating at the road at a point at which it was connected with a large cesspool constructed on the adjoining land, of which the appellant was lessee in possession. Several of the houses were connected with the drain, and were drained through the drain into the cesspool as the ultimate outlet. The appellant was not the occupier of any of the houses, but was, within the meaning of the Public Health Acts, the owner of six of them and of the land on which the cesspool was built; and in the undertaking given to the local authority he undertook that the drains should, for all purposes of the Public Health Acts, be private drains, and that the drains and cesspool could be cleaned and maintained by him. A nuisance existed at the cesspool from the overflowing therefrom of sewage:—*Held*, on the authority of *Meador v. West Cowes Local Board* 1 L. J. Ch. 561; [1892] 3 Ch. 18, that the appellant was the person by whose act, default, or sufferance the nuisance arose, and that the obligation to clean out the cesspool and abate the nuisance was upon him and not upon the local authority, notwithstanding that the drain received the drainage of more than one house. *Mutt v. Snow*, 89 L. T. 802; 67 J. P. 454; L. G. R. 222—D.

Per CHANNELL, J.—Even if the drain became a sewer within the meaning of the Public Health Act by reason of its receiving the drainage of more than one house, yet, as between the immediate parties, the local authority on the one hand and the appellant who had given such an undertaking on the other, the appellant would still be the person by whose act or default the nuisance arose, although third parties might have a right to say that as between them and the local authority the whole had vested in the local authority as a sewer, and that the local authority were liable to abate the nuisance. *Ib.*

“Single private drain”—Drain constructed on Private Ground to which no Public Access—Ability to Repair.]—A drain constructed upon private ground to which the public have not access is a private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890. Therefore, if such drain becomes a nuisance, a local authority, who have adopted the Act of 1890, may take proceedings under section 41 of the Public Health Act, 1875, against any owner of premises connected with the drain by a branch drain. *Hill v. Hair* 4 L. J. M.C. 164; [1895] 1 Q.B. 906 dismissed and doubted. *Seal v. Merthyr Tydfil Urban Council*, 67 L. J. Q.B. 37; [1897] 2 Q.B. 43; 77 L. T. 308; 61 J. P. 551—D.

Defective Drain—Single Private Drain—Repair.]—Section 41 of the Public Health Act,

1875 (which deals with the examination of drains, privies, &c., on complaint of nuisance), applies to all cases, including the case of a “single private drain,” within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, in places where the latter Act is in force, where the drain in question is a nuisance or injurious to health. *Fulham Vestry v. Solomon*, (65 L. J. M.C. 33; [1896] 1 Q.B. 198) distinguished. *Southwold Corporation v. Crowdy*, 67 J. P. 278; 1 L. G. R. 899—D.

Erection of House—Drains Necessary for Effectual Drainage—Surveyor's Report—Jurisdiction of Local Authority.]—The only matters which the local authority are entitled to take into consideration under section 25 of the Public Health Act, 1875, in satisfying themselves whether the construction of a proposed drain or drains to a newly erected house is such as is necessary for the effectual drainage of the house, are the size, material, level, and fall of the drains. If they consider the benefit of a district generally in respect of a system for the best way of the ultimate disposal of the sewage they are not acting within the scope of the section, which only gives them power to require the owner of each house to provide the drain necessary for the effectual drainage of his own house. *Mattheus v. Strachan*, 70 L. J. K.B. 806; [1901] 2 K.B. 540; 85 L. T. 68; 49 W. R. 651; 65 J. P. 789—D.

New Drainage—Part found Necessary.]—Section 16 of the Glasgow Police (Amendment) Act, 1890, enacts that if the drains of any house, &c., are found to be defective, the owner of the premises shall be bound, immediately on an “order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and, failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner.” The commissioners having found that the drains of a block of houses were defective, issued an order to the owners to repair the same, and, they having made default, the commissioners proceeded to execute the work themselves; but, instead of repairing the old drain, they constructed a new drain on a different site and outfall into the main sewer. In an action for the expenses, the Court of Session assailed the owners upon the ground that section 16 of the Act of 1890 did not warrant the formation of a new system of drainage. This House having remitted the case to the Court of Session to find whether the commissioners had considered that the new drainage was necessary, that Court found that part of the drainage had been considered necessary, but the rest had not:—*Held*, that the part considered necessary must be paid for by the owners, but not the rest. *Glasgow Corporation v. McOmish*, [1898] A.C. 432—H.L. (Sc.)

New House—Block of Two Houses—Combined Drain—Necessity of Separate Drain for each House.]—An urban authority have power under section 25 of the Public Health Act, 1875, to require in respect of each newly built house the construction of a separate drain for the drainage of each such house, and their powers under that section are not limited to questions

as to the size, materials, and level of the drain. The respondent deposited with the urban authority notice of his intention to erect a block of two houses, semi-detached, with a plan which shewed a combined drain for the two houses. The urban authority on the report of their surveyor disapproved on the ground of the unsatisfactory provisions for drainage, and made an order, under section 25 of the Public Health Act, 1875, for the construction of one drain for each house, to be properly constructed and to be connected with the public sewer:—*Held*, that section 25 required a separate drain to be constructed for each house, and that a combined drain for the block of two houses was not a compliance with the provisions of the section and that the urban authority had power under the section to make an order for the construction of a separate drain for each house. *Woodford Urban Council v. Stark*, 86 L. T. 685; 66 J. P. 536—D.

Adjoining Owners—Joint Drain—Work Done by One Owner—Right of Contribution.]—Where an adjoining owner does work on a common drain on his premises in pursuance of a sanitary notice, he cannot recover a proportion of the expenses of such work from his adjoining owner, although the drainage of such last-mentioned owner passes through such common drain and another notice has been served upon him in respect thereof. *Reeve v. Sadler*, 88 L. T. 95; 51 W. R. 603; 67 J. P. 63; 1 L. G. R. 441—D.

Inspection Chamber—Right to Break up Foot-pavement.]—The occupier of a house in a street has no right to break up the footway of the street for the purpose of constructing an inspection chamber under the footway in a drain connecting the drainage of his house with the public sewer under the street. *Att.-Gen. v. Ashby*, 97 L. T. 479; 5 L. G. R. 1192; 71 J. P. 387; 23 T. L. R. 489—Joyce, J.

Notice to Repair Given Jointly to Several Owners of Houses Drained Thereby—Validity of Notice.]—Where several houses belonging to different owners are drained by a single private drain which becomes a nuisance and injurious to health, and the local authority, acting under the powers conferred upon them by section 41 of the Public Health Act, 1875, and section 19 of the Public Health Act, 1890, serve upon each of the different owners a notice addressed to them jointly to do the necessary works for the abatement of the nuisance, the fact that any one of such owners would be compelled to go upon the premises of the others in order to execute the necessary works is no bar to the validity of the notice; and therefore the local authority, upon non-compliance with the notice, are entitled to execute the works themselves and recover the expenses from the owners in the manner provided by section 19 of the Act of 1890. *Lancaster v. Barnes Urban Council*, 67 L. J. Q.B. 744; [1898] 1 Q.B. 855; 78 L. T. 355; 46 W. R. 623; 62 J. P. 405—D.

A person served with a notice in respect of a single private drain under section 19 of the Public Health Act, 1890, does not incur any penalty by reason of his neglect to comply with its requirements. *Ib.*

(7) Inspection by Local Authority.

Entry without Asking Permission—Execution of Statutory Powers.]—Where a local authority and their officers, of their own motion and without asking any person's permission, enter premises for the purpose of examining as to the existence of any nuisance thereon, they are not employed in the execution of the Public Health Act, 1875, inasmuch as section 102 of the Act does not authorise entry by the local authority without permission first being requested. Therefore the owner of the premises cannot be convicted under such circumstances upon an information preferred against him under section 306 of the Act for wilfully obstructing the local authority in the execution of the Act. *Consett Urban Council v. Crawford*, 72 L. J. K.B. 571; [1903] 2 K.B. 183; 88 L. T. 836; 51 W. R. 669; 67 J. P. 309; 1 L. G. R. 558—D.

"House" — School without Boarders.]—“House” in section 91, sub-section 5 of the Public Health Act, 1875, includes a day school where there are no boarders and where none of the members of the staff reside. *Wimbledon Urban Council v. Hastings*, 87 L. T. 113; 67 J. P. 45—D.

Overcrowding — Order to Inspect — Evidence as to Reasonable Grounds—Form of Order.]—Where by virtue of section 102 of that Act an application is made to a Justice for an order to enter premises where a nuisance is alleged to exist, such Justice, although he has not to decide whether a nuisance in fact exists, may consider whether there are reasonable grounds for suspecting there is a nuisance, and for that purpose may receive evidence as to the true state of the facts. If a Justice makes an order for the officer to enter to inspect, such order ought to be made in reference to a particular subject-matter. *Ib.*

(8) Cesspools.

Conduit—Local By-law.]—B., the owner of certain houses, constructed a series of cesspools for their drainage on his own land. He then constructed a conduit, which conveyed the overflow therefrom to a larger cesspool. He was summoned for constructing these cesspools so as to have an outlet into a sewer—namely, the conduit and the large cesspool—contrary to the local by-law. The magistrates were of opinion that the conduit, being used for the drainage of several dwelling-houses occupied by different persons, was a sewer, and that an offence had been committed:—*Held*, that the magistrates were wrong, and that the appellant had not constructed these cesspools contrary to the by-law. *Button v. Tottenham Urban Council*, 78 L. T. 470; 62 J. P. 423; 19 Cox C.C. 36—D.

Omission to Construct—Want of Structural Convenience—Drainage—Liability of Owner.]—The appellants' predecessors in title deposited with the respondents a plan providing for the draining of certain houses into cesspools. The cesspools were not, however, constructed, and the appellants' predecessors without permission

turned the slop and scullery water from the houses into a surface water-drain made by the respondents upon a highway upon which the houses abutted. The slop and scullery water passed through the drain into an open ditch and caused a nuisance. The respondents had not constructed any sewer by means of which the appellants could drain their houses. Upon a summons under section 95 of the Public Health Act, 1875, the Justices made an order upon the appellants to abate the nuisance:—*Held*, that the nuisance arose from the want of a “structural convenience” within the meaning of section 94, and that the order was therefore properly made; and *held*, further, that, although the surface-water drain was a “sewer” within the definition in section 4, the appellants, even if they had given the notice prescribed by section 21, would not have been entitled to use it to carry off their slop and scullery water. *Kinson Pottery Co. v. Poole Corporation*, 68 L.J. Q.B. 819; [1899] 2 Q.B. 41; 81 L. T. 24; 47 W. R. 607; 63 J. P. 580—D.

(9) Privies and Water-closets.

Substitution of Water-closets for Privies—Jurisdiction.—Section 42 of the Manchester Corporation Waterworks and Improvement Act, 1867, provides that the corporation “may,” in any case where a dwelling-house within the city shall be without an ash-pit, or without an ashpit of a construction and size approved by the corporation, order the owner of such house to provide such an ashpit, or to make such alteration, reparation, or enlargement of the existing ashpit as in the opinion of the corporation the circumstances of the case may require. By section 34 of an amending Act of 1869 it is provided that in construing the above enactment “the expression ‘ashpit’ shall be held to include a ‘privy.’” By a clause in a provisional order of the Local Government Board, confirmed by an Act of 1881, it is provided that for the purposes of section 42 of the Act of 1867, and section 34 of the Act of 1869, “the expressions ‘ashpit’ and ‘privy’ shall extend to and be deemed to include any water or other closet for the reception of faecal matter, and the apparatus connected therewith”:—*Held*, that these enactments empowered the corporation to order the substitution of one kind of sanitary convenience such as a water-closet, for another such as a privy. *Agnew v. Manchester Corporation*, 67 J. P. 174; 1 L. G. R. 9—D.

Cleansing Undertaken by Local Authority—Failure to Eradicate Fever Germs—Substitution of Water-closets—Duty of Local Authority.—Where a local authority has taken upon itself, under section 42 of the Public Health Act, 1875, the cleansing of privies belonging to cottage property, but has, after notification of an outbreak of typhoid fever, failed to eradicate fever germs which have penetrated crevices in the brickwork and cause a nuisance, such authority cannot under section 94 call upon an owner of the property to abate the nuisance by abolishing privies and substituting water-closets. *Barnett v. Laskey*, 68 L. J. Q.B. 55; 79 L. T. 408; 63 J. P. 5—D.

The word “cleansing” in section 42 has a

wide meaning, and includes removal of matter which causes the nuisance. *Id.*

Nuisance—Cleansing of “earth-closets privies ashpits and cesspools”—Whether to be Read Conjunctively or Distributively.—The words “earth closets privies ashpits and cesspools” in section 42 of the Public Health Act, 1875, are to be read distributively. Therefore a local authority may, under the section, themselves undertake or contract for the cleansing of earth closets, privies, and ashpits, without also undertaking or contracting for the cleansing of cesspools. *Stainland Industrial Corn and Provision Society v. Stainland Urban Council*, 75 L. J. K.B. 190; [1906] 1 K.B. 233; 94 L. T. 214; 54 W. R. 282; 70 J. P. 150; 4 L. G. R. 295—D.

Defective Water-closet—Notice to Provide Particular Kind of Water-closet—Validity of Notice.—A notice to the owner of a house with defective sanitary accommodation, calling upon him to provide a particular kind of closet, is not within section 36 of the Public Health Act, 1875, and is therefore bad. *Wood v. Widnes Corporation*, 67 L. J. Q.B. 254; [1898] 1 Q.B. 463; 77 L. T. 779; 46 W. R. 293; 62 J. P. 117—C.A.

The plaintiff R. was the owner of a house, and on November 24, 1897, the defendants served on him a notice that as the house was without a sufficient water-closet, he was “to provide a sufficient water-closet to the said house according to the specification given by this notice,” and then followed the usual notice that if the work was not done the authority would enter and do the work, and a specification of the kind of water-closet to be put in. In an action for an injunction to restrain the authority from entering,—*Held*, that the notice was bad on the ground that it did not allow the owner to comply with it by providing any other “sufficient” water-closet than that specified, although it was not given in pursuance of a general resolution without regard to the particular requirements. *Semble*, that it might be bad also for leaving out the words “earth closet or privy,” which according to section 36 of the Public Health Act, 1875, the premises should be without before the notice can be given. In such a case the remedy of the plaintiff is not by appeal to the Local Government Board under section 263 of the Public Health Act, 1875; appeals to that body lie only in cases where the question arises as to the sufficiency. *Robinson v. Sunderland Corporation*, 78 L. T. 194; 62 J. P. 216—Ridley, J.

Provisional Order—Sewer Accommodation—Provision by Owners—Appeal—Expenses of Alterations—Justices to make such Order “as to them may seem equitable.”—By the Bootle Provisional Order, 1897, when a sewer and water-supply sufficient for the purpose were reasonably available, the appellants could, by written notice to the owner of any building, require any existing closet accommodation provided at or in connection with the building to be altered so as to be converted into a water-closet complying with the by-laws in force and communicating with the sewer. If the owner failed to comply with the notice, the appellants could do the work specified in the notice and recover

the expenses from the owner. If any person deemed himself aggrieved by any of the requirements of the appellants, or as to the reasonableness of any expenses wholly or partially recoverable from him, he could appeal to the Justices, and they might make such order in the matter as to them might seem equitable. The respondent, the owner of certain houses, was served with a notice requiring him to alter the closet accommodation into water-closets. On an appeal to Justices they held that the requirements of the corporation as to the alterations in the closet accommodation were reasonable, and they ordered him to comply with the notice. They further ordered that the expense of doing the work should be borne in equal shares by the appellants and the respondent:—*Held*, that the Justices had power to make any order as to the expenses that appeared to them reasonable. *Boyle Corporation v. Owens*, 87 L. T. 74; 66 J. P. 357—D.

Notice to Provide Particular Kind of Water-closet for Each House—Specification—Validity of Notice.—Under section 21 of the Bradford Improvement Act, 1873, the corporation might "in any case where a dwelling house within the borough shall be without a privy, water-closet, or earth closet, or an ashpit, or without a privy, water-closet, or earth closet, or an ashpit of a construction and size approved by the corporation, require the owner of such house, by notice . . . to provide such a privy, water-closet, or earth closet, or such an ashpit or to make such reparation and alteration of the existing privy, water-closet, or earth closet, or ashpit as in such notice shall be stated":—*Held*, that the corporation might lawfully require the owner of houses to provide a water-closet and ashpit for each house, according to a specification attached to the notice, in the place of existing privies and ashpits which were of good construction and sufficient for the accommodation of the houses, although each house was not provided with a separate privy and ash-pit. *Smith v. Greenwood*, 76 L. J. K.B. 1129; [1907] 2 K.B. 385; 96 L. T. 730; 71 J. P. 353; 5 L. G. R. 660—D.

(10) Public Convenience.

Erection of—"Proper and convenient situation"—Adjoining Owner.—Section 39 of the Public Health Act, 1875, does not empower an urban authority to provide a public urinal in such a position as in fact to cause a nuisance to neighbouring property, even though the authority *bona fide* consider that the situation selected is proper and convenient, and even though the result of providing the urinal may be to obviate an existing nuisance. *Leyman v. Hesse Urban Council*, 67 J. P. 56; 1 L. G. R. 76—Joyce, J.

(11) Negligence of Local Authority.

River—Drainage Operations—Increased Flow—Flooding—Statutory Powers.—Where a drainage board in the exercise of its statutory powers deepened and widened the bed of a river and diverted into it another stream, thereby materially increasing the volume of water in the river, but failed to exercise due care in periodically cleansing the river bed (the neces-

sity for which was due to the operations of the board), whereby the river became so choked with accumulations of silt and mud that after some heavy rains it overflowed its banks and did serious damage to the lands of the plaintiffs, it was held that the board was liable; that the matters complained of gave the plaintiffs a right at common law, and that the statute (under which the board claimed immunity) afforded a justification only for acts done under it with due care, not for acts done negligently. *Bligh v. Rathangan River Drainage Board*, [1898] 2 Ir. R. 205—Q.B. D.

Sewer—Insufficiency of Drainage.—A local authority which pours offensive matter into a receptacle or channel insufficient for the purpose, and thereby causes damage to private property, is guilty of negligence, and liable in damages to the owner of such property; and it is no defence that the system was sufficient at the time of its construction. *Hawthorn Corporation v. Kammulwik*, 75 L. J. P.C. 7; [1906] A.C. 105; 93 L. T. 644; 54 W. R. 235; 22 T. L. R. 28—P.C.

Defective Manhole—Injury to Person on Road.—Where it was found that a manhole of a sewer was defective, that its defects were due to improper construction, and that owing to these defects the plaintiff, who was riding a motor cycle on the road, was upset and injured, it was held that the plaintiff was entitled to recover damages from the defendants. *Winslow v. Bushey Urban Council*, 72 J. P. 64—Coleridge, J.

Discharge of Sewage into Sea.—See FISHERY, col. 866, and NUISANCE.

(12) Offences, Proceedings for.

Continuing Offence—Work Executed in Contravention of By-law—Continuance in Same State—Continuing Offence not Charged in Information—Notice.—By the Public Health Act, 1875, s. 158, where the execution of any work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence. A builder was charged upon an information with having constructed certain drainage work contrary to a by-law. A continuing offence was not charged in the information, but a written notice had been previously served upon him in which he was warned that he was liable to penalties for every day the offence continued:—*Held*, that he was rightly convicted of a continuing offence from the date when the notice was given, notwithstanding that the continuing offence was not charged in the information, because section 158 of the Public Health Act, 1875, applied, and under that section it was unnecessary to charge the continuing offence as a separate offence. *Airey v. Smith*, 76 L. J. K.B. 766; [1907] 2 K.B. 273; 96 L. T. 691; 71 J. P. 285; 5 L. G. R. 713; 23 T. L. R. 447—D.

(13) Other Matters.

Expenses—Liability of Tenant under Covenant in Lease.—See LANDLORD AND TENANT, col. 1244.

Sanitary Works—Expenses—Tenant for Life and Remainderman.]—See SETTLED LAND.

Sewage—Pollution of Oyster Beds—Prescription.]—See FISHERY.

Urban Council—Liability of, for Discharge of.]—See FISHERY.

(ee) *Slaughter-houses.*

Grant of Licence—Death of Licence-holder—Determination of Licence.]—A licence for a new slaughter-house, under sections 125 and 126 of the Towns Improvement Clauses Act, 1847, is a personal licence to the licensee to slaughter animals on the particular premises, and determines on the death of the licensee. *Goodwin v. Sale*, 76 L. J. K.B. 654; [1907] 2 K.B. 278; 96 L. T. 694; 5 L. G. R. 641; 71 J. P. 303; 23 T. L. R. 453—D.

Condition Limiting Duration to Less than Twelve Months—Premises used as Slaughter-house after Expiration of Licence but within Twelve Months of Grant—Conviction of Occupier.]—It is beyond the power of a local authority under section 29 of the Public Health Acts Amendment Act, 1890, to impose a condition in a slaughter-house licence limiting the duration of the licence to less than twelve months. The appellant obtained from the respondents on August 22, 1906, a slaughter-house licence in respect of certain premises, the licence stating that it was to continue in force until December 31, 1906. In January, 1907, the appellant applied for but was refused a renewal of the licence. On February 4, 1907, he used the premises in question as a slaughter-house, and in respect of that he was summoned and convicted:—*Held*, that the conviction must be quashed, as the respondents had no power to limit the duration of the licence to less than twelve months; that the licence granted on August 22, 1906, must be read as containing a recital of section 29 of the Public Health Acts Amendment Act, 1890, under which it was granted; and that the condition inserted in the licence was repugnant to the grant, and therefore void. *Taylor v. Winsford Urban Council*, 76 L. J. K.B. 897; [1907] 2 K.B. 396; 97 L. T. 401; 71 J. P. 375; 5 L. G. R. 786—D.

(ff) *Streets.*

(1) *Generally.*

“Street” — Passage — Cul-de-sac — Premises Abutting Thereon without Right of Access Thereof.]—A passage forming a *cul-de-sac* and not dedicated as a highway may be a “street” within section 150 of the Public Health Act, 1875, and the owner of premises abutting thereon will in such case be liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding that he has no right of access to it. *Walthamstow Urban Council v. Sandell*, 2 L. G. R. 835; 68 J. P. 509—Buckley, J.

Footpath—Dedication.]—The defendant, who held under a lease for a long term of years, had built on the lands a number of cottages,

and had made, for the benefit of the tenants of the cottages, a footpath on the lands in front of the cottages and bordering the street in question, the whole forming apparently a street consisting of a roadway and this footpath. The order for paving, &c., included this footpath:—*Held*, that there was jurisdiction to make the order in respect of the footpath. *Belfast Corporation v. Hill*, [1904] 2 Ir. R. 105—K.B. D.

Vesting in Local Authority—Extent of Vesting—Fee-simple Acquired by Turnpike Trustees.]

—Under section 149 of the Public Health Act, 1875, only so much of the actual soil of a street vests in the urban authority as may be necessary for the control, protection, and maintenance of the street as a highway for public use; and whether the owners of the fee-simple of the land at the time of vesting were the trustees of a turnpike road, or anybody else, the whole of the land does not vest. An urban council, therefore, have no right to interfere with the passage of wires for conveying electric current in the air over a street in their district if the wires do not encroach upon the stratum of air which would be reasonably required for the use of the street as a street. *Turnbridge Wells Corporation v. Baird* (65 L. J. Q.B. 451; [1896] A.C. 434) followed. *Finchley Electric Light Co. v. Finchley Urban Council*, 72 L. J. Ch. 297; [1903] 1 Ch. 437; 88 L. T. 215; 51 W. R. 375; 67 J. P. 97; 1 L. G. R. 244—C.A.

Property in—Portion of Street taken by Tramway—Compensation to Corporation.]—The vesting of a street in a municipal authority vests no property in such authority beyond the surface of the street and such portion as may be absolutely necessary to its repairs and management, but does not vest the soil or land in them as owners. Where, therefore, part of a street is converted into a tramway there is no taking of property, and no compensation is payable to the municipal authority. *Sydney Municipal Council v. Young*, 67 L. J. P.C. 40; [1898] A.C. 457; 78 L. T. 365; 46 W. R. 561—P.C.

Road made by Railway Company on Land Acquired under Special Act—Intention of Company to Use as Street—Ultra Vires.]—A railway company made a road upon land acquired by them in 1848 under their statutory powers. The road led from a road which was intercepted by their railway to another road. In the conveyance to them of the land on which the road was made the company gave the vendor a right of way over it, and covenanted to pave it. In 1860, when conveying to a purchaser superfluous land fronting on the road, the company again covenanted to leave it open and unbuilt upon, and use it only as a street or road. The road had been used in accordance with those deeds ever since. In 1900 the local authority sought to make the company liable for a proportion of the cost of making up the road under section 150 of the Public Health Act, 1875, on the footing that it was a street within the Act:—*Held*, that there was nothing in the facts inconsistent with the inference that the road was an accommodation road within section 68 of the Railways Clauses Consolidation Act, 1845; that, whether this was so or not, the circumstances shewed that the promoters of the railway must have ac-

quired the land for the purpose of a road, and that they intended so to use it, and the Court would not now assume that that was inconsistent with the purposes of the company's special Act; and that the local authority could exercise the powers of section 150 of the Act of 1875 with respect to it. *Stretford Urban Council v. Manchester, South Junction, and Altrincham Railway*, 1 L. G. R. 683; 68 J. P. 59—C.A.

Per VAUGHAN WILLIAMS, L.J.—Where to deal with a street under the powers of section 150 of the Public Health Act, 1875, would be inconsistent with the appropriation of the land to the purposes defined by the special Act of a railway company, the powers of section 150 cannot be applied. That appears from *City and South London Railway v. London County Council* (60 L. J. M.C. 149; [1891] 2 Q.B. 513); *London County Council v. London School Board* (62 L. J. M.C. 30; [1892] 2 Q.B. 606), and *Mulliner v. Midland Railway* (48 L. J. Ch. 258; 11 Ch. D. 611). *Per ROMER, L.J.*—Where a railway company cannot use a portion of their property except as a road, it is within their powers to allow the public to use it. That appears from *Grand Junction Canal Co. v. Petty* (57 L. J. Q.B. 413; 21 Q.B. D. 273). *Ib.*

(2) New Street.

Decisions on the meaning of "new street" in the Public Health Act, 1875, govern the construction of the same words in the Towns Improvement Clauses Act, 1847, being *in pari materia*. *Att.-Gen. v. Rufford*, 68 L. J. Ch. 179; [1899] 1 Ch. 537; 80 L. T. 17; 47 W. R. 405; 63 J. P. 232—North, J.

Building on the Sides of Old Highway.]—Wherever buildings are erected on opposite sides of a highway so as to limit and define the breadth of the roadway, the highway so far as it lies between those buildings is a "new street." *Ib.*

"Laying out new street" — By-laws — Penalties — Injunction.]—The by-laws of an urban authority, framed under section 157 of the Public Health Act, 1875, made certain provisions with respect to the laying out of new streets, as to level, width, construction, and the like. By-law 97 provided that every person who should offend against the foregoing by-laws should be liable to penalties; and by-law 98 that if any work, to which any of the by-laws relating to new streets and buildings might apply, should be begun or done in contravention of any such by-law, then, if such person should fail to shew sufficient cause why such work should not be removed, altered, or pulled down, the sanitary authority should be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work. The defendants owned a piece of land within the jurisdiction of the urban authority and abutting on two public highways, H. Lane and T. Road, the latter being a main road. On this land they erected certain houses without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses. They had not attempted to alter or

interfere with the roadway either of H. Lane or T. Road. The plaintiffs claimed an injunction to restrain the defendants from erecting or continuing the erection of any building upon, and from laying out any new street intended for use as a carriage-road, upon or in connection with the defendants' land in contravention of the above by-laws; and for an order on the defendants to remove, alter, or pull down all the works begun or done by the defendants contrary to the by-laws; or, alternatively, a declaration that the plaintiffs were entitled to remove, alter, or pull down the same:—*Held*, first, that, apart from the merits of the case, the by-laws could not be enforced in the High Court by an action by the plaintiffs for an injunction without the Attorney-General being a party to the action; and, secondly, that the defendants were not laying out or constructing a new street within the meaning of the by-laws. *Att.-Gen. v. Ashbourne Recreation Co.* (72 L. J. Ch. 67; [1903] 1 Ch. 101) considered and approved. *Devonport Corporation v. Tozer*, 72 L. J. Ch. 411; [1903] 1 Ch. 759; 88 L. T. 113; 52 W. R. 6; 1 L. G. R. 421; 67 J. P. 269—C.A.

— Part of Reserved Strip Thrown into Road.]—The appellant purchased a piece of land which abutted on and fronted for a considerable distance an old occupation road. He obtained a right of way for himself, his purchasers and tenants, for foot and vehicular traffic over the road. He divided his land into plots, and sold four of them; but he reserved a strip of land, six feet wide, extending along the whole front of the plots for sale, between the plots and the road. Houses were built upon the plots sold, and when they were being built the appellant took down the hedge between the reserved strip and the road opposite these plots, and threw these portions into the road:—*Held*, that this was not evidence that the appellant intended to make or lay out a new street within the meaning of by-laws which required notice to the local authority before any person should "intend to make or lay out any new street." *Fellowes v. Sedgley Urban Council*, 70 J. P. 412; 4 L. G. R. 970—D.

— Replacing Fences by Wall.]—The by-laws of a borough required that in the laying out of certain streets the width of the same should be thirty-six feet at the least. In a certain road within the borough to which the by-law would be applicable the appellant's property was bounded by a wooden fence from which to the wall on the other side of the road the distance was less than thirty-six feet. The appellant removed such fence, substituting a wall on the same site:—*Held*, that in so doing he had not laid out a new street contrary to the by-law. *Bushell v. Creer*, 64 J. P. 600—D.

Channelling — By-law — Unreasonableness.]—A by-law of a local authority which requires that a person who constructs a new street, over a certain width, shall construct it in a certain way—namely, "with channels not less than 12 inches wide and 6 inches deep either of granite cubes laid on a bed of cement concrete at least 6 inches in thickness, or otherwise in a suitable manner and with suitable materials"—is not void, either as being inconsistent with section 150 of the Public Health Act, 1875, and sections 6 and 7 of the Private Street Works

Act, 1892, inasmuch as those sections deal with different persons—namely, the persons called upon to pay for the making up of roads, who have a right of appeal—or for uncertainty, inasmuch as the by-law only sets up a standard, and then gives a reasonable latitude if that standard is not necessary. *Leyton Urban Council v. Chew*, 76 L. J. K.B. 781; [1907] 2 K.B. 283; 96 L. T. 727; 71 J. P. 355; 5 L. G. R. 837—D.

Naming—Name put up by Local Authority—Obliteration by Owner—Right of Owner to Name].

—The owner of a building estate submitted to the local authority plans of proposed new streets, one of which was called thereon "M. Avenue," and the plans were approved by the local authority, and in an agreement and correspondence between the owner and the local authority the proposed street was referred to by that name. On the street being formed the owner put up that name at one end thereof by means of a notice-board affixed to a post. Subsequently the local authority passed a resolution that the street should be called "C. Avenue," and, notwithstanding the objection of the owner, put up that name on a house at the end of the street belonging to him. The owner thereupon caused the name "C. Avenue" to be obliterated, and was convicted by the Justices of an offence under section 64 of the Towns Improvement Clauses Act, 1847. On an appeal by Case stated, —*Held*, that the section gave the local authority in the first instance the right to put up the name of the street; that they had not determined that it should be called "M. Avenue," but "C. Avenue"; that in proceedings against him under the section the owner was not entitled to take the objection that "C. Avenue" was not the proper name of the street; and that he had been rightly convicted. *Semble*, that the section does not give the local authority a right to alter the well-known name of an old street. *Collins v. Hornsey Urban Council*, 70 L. J. K.B. 802; [1901] 2 K.B. 180; 84 L. T. 839; 49 W. R. 620; 65 J. P. 600; 20 Cox C. 8—D.

Air-space and Ventilation—One "domestic building" — Occupation — Communication.]—Defendants were proposing to erect a long construction on a strip of land extending for about a hundred yards from D. Road, within the district to which the by-laws of an urban district council applied, along the Great Northern Railway. The erection consisted of three blocks of stables and coach-houses, with lofts above joined by two lower brick and slate "lean-to's," which were also suitable to be fitted as stables. There was communication from end to end leading to a garden and the termination of the stables remote from D. Road. On the remaining side there was a paved yard and fence. There was ventilation, but no "air-space" on the side towards the railway. The by-laws of the urban sanitary authority required an open space of twenty-four feet in front and two hundred square feet, exclusively belonging to such building, in the rear of any new domestic building. If the stables and coach-houses fronted on D. Road the by-laws had been complied with. The council asserted that the erection constituted more than one building not fronting on D. Road, and that the defendants' plans infringed the by-laws as to laying

out new streets:—*Held*, that the erection constituted one building, and that the by-laws as to air-space were not infringed. *Att.-Gen. v. Melville*, 93 L. T. 612; 4 L. G. R. 166; 70 J. P. 17—*Exekewich*, J.

Deviation — Public Benefit — Recoupment — Land not Actually Required for Works.]—By a private Act of Parliament a corporation were authorised (*inter alia*) to make certain "street works" within the limits of lateral deviation shewn on their deposited plans; and to take "for the purpose of the street works the lands shewn on the deposited plans in connection therewith and which they may require for the purposes thereof respectively":—*Held*, on the construction of the entire Act, that it did not authorise the corporation to take land shewn on the plans, but not actually required for street works, for the purpose of re-selling the same at a profit. *Donaldson v. South Shields Corporation*, 68 L. J. Ch. 162; 79 L. T. 685—C.A.

(3) *Building.*

(i.) *Deposit of Plans.*

Refusal—Grounds of — Mandamus to Local Authority.]—A prerogative writ of *mandamus* will not be granted to compel a local authority to approve plans of a proposed building which the local authority has in good faith refused to approve upon the ground that the building would contravene the provisions of the Public Health (Buildings in Streets) Act, 1888, by being brought forward beyond the front main wall of the building on one side thereof in the same street. *Reg. v. Eastbourne Corporation*, 83 L. T. 338; 64 J. P. 724—C.A.

Rejection of Plans with Undertaking Indorsed Thereon—New Plans Submitted and Approved—Whether Undertaking Binding as to New Plans.]—Certain building plans which had indorsed thereon a particular undertaking were submitted to a borough council for approval, but were rejected. Subsequently new plans were submitted and approved:—*Held*, that the undertaking indorsed on the rejected plans could not be held to apply to the approval plans. *Hall v. Eastbourne Corporation*, 69 J. P. 369—Lord Alverstone, C.J.

Conversion of Existing Building — "New dwelling-house."]—By section 63 of the Eastbourne Improvement Act, 1885, it was provided (*inter alia*) that the conversion into two or more dwelling-houses of any building constructed originally as one dwelling-house, and the conversion into one dwelling-house of two or more buildings constructed originally as separate dwelling-houses should be deemed to be the erection of a new building. By a by-law made by the corporation it was provided that no new dwelling-house should be let or occupied until duly certified. Certain buildings originally constructed as a block of three shops were subsequently altered to one shop with one dwelling-house over same, and then divided into three shops, with three separate dwellings over same:—*Held*, that this re-conversion constituted a "new dwelling-house" within the meaning of the Act and by-law. *Ib.*

Plans Null and Void if Work Specified Thereon not Commenced within Three Years—Deposit of Plans shewing Number of Houses—Some Houses Commenced before and some after Expiration of Three Years from Deposit—Necessity for Fresh Deposit.]—A local Act provided that the deposit with the corporation of building plans should be null and void if the execution of the work specified thereon was not commenced within three years from the date of such deposit. A builder, having deposited a plan shewing thereon a number of houses proposed to be erected by him, commenced some of them within the period of three years from the date of the deposit of the plan, and commenced others after the expiration of that period:—*Held*, that the plan deposited could not be treated as one plan for the whole of the buildings shewn thereon, but as a number of plans for the different buildings, and that therefore such deposit was null and void as regards that portion of the work which was not commenced until after the expiration of the three years. *Harrogate Corporation v. Dickinson*, 78 L. J. K.B. 262; [1904] 1 K.B. 468; 90 L. T. 41; 68 J. P. 202; 2 L. G. R. 525—C.A.

Subsequent Change of Character—Building used for the Purposes of Habitation.]—Plans of a new building were deposited with a sanitary authority in May, 1894, describing the building otherwise than as a dwelling-house, and were duly approved and passed. On March 28, 1898, plans of alterations to the building described as “revised plans of proposed domestic conversion,” were also deposited with the borough surveyor, but were never either approved or disapproved in writing by the sanitary authority. The proposed alterations were carried out before October 3, 1898. Between October 24 and November 8 the occupier’s wife and child lived on the premises. On December 14, 1898, the occupier was charged before the magistrates with wilfully using within the above-mentioned dates the premises for the purpose of habitation by a person other than a person placed therein to take care thereof, and the family of such person, contrary to section 33 of the Public Health Acts Amendment Act, 1890. It was contended on behalf of the defendant that the alterations to the premises set out in the plans deposited on March 28 were for the conversion into dwelling-houses of buildings not originally constructed for human habitation within the meaning of section 159 of the Public Health Act, 1875; that the sanitary authority within one month should have signified in writing their approval or disapproval of the same, pursuant to section 158 of that Act; and that the sanitary authority not having signified such approval or disapproval no proceeding could be taken against the defendant under section 33 of the Act of 1890. The magistrates upheld that contention, and dismissed the case:—*Held*, on appeal to the Divisional Court, that section 33 of the Public Health Acts Amendment Act, 1890, had been contravened, and that the case must go back for a conviction. *Fulford v. Blatchford*, 80 L. T. 627; 19 Cox C.C. 308—D.

Water Tower Erected under Special Act—District Council’s By-laws under Public Health Act, 1875—Notices by Water Company to District Council.]—A water company, empowered by

their special Act merely to erect a high-service water tower in a particular situation, are not exempt from the by-laws of a district council made under section 157 of the Public Health Act, 1875, requiring the delivery of certain notices before building has been commenced. *Uckfield Rural Council v. Crowborough Water Co.*, 68 L. J. Q.B. 1009; [1899] 2 Q.B. 664; 81 L. T. 539; 48 W. R. 63—D.

Approval of Building Plans—Power of Local Authority to Contravene By-laws.]—A local authority empowered to make by-laws has no power to sanction a contravention of by-laws properly so made; and therefore the approval by a local authority of building plans which contravene the by-laws made by that authority is illegal and inoperative. *McIntosh and Pontypridd Improvements Co., In re* (61 L. J. Q.B. 164), approved and followed. *Yabbicom v. King*, 68 L. J. Q.B. 560; [1899] 1 Q.B. 444; 80 L. T. 159; 47 W. R. 818; 63 J. P. 149—D.

An Act of Parliament contained a proviso relating to building plans “approved” by the local authority for the district to which the Act applied:—*Held*, that the proviso related only to plans legally approved by the local authority, and did not extend to plans to which, under the circumstances above set out, an actual but illegal approval had been given. *Ib.*

Repeal of By-laws by New By-laws—Approval of Plan under Old By-laws—Part of Work Carried out under Old By-laws—Right to Complete Work according to Approved Plan—“Work commenced” before Date of New By-laws.]—A street plan comprising a number of streets, including a terrace, was deposited by an owner of a building estate with the local authority and was approved, and the terrace and some, but not all, of the streets had been formed according to the plan. A house plan for a number of houses in the terrace was afterwards approved by the local authority, and after some of these houses had been built the local authority repealed their by-laws, under which these plans had been approved, “except as regards any work commenced” before the date of the new by-laws. Before the repeal of the old by-laws a builder gave notice of his intention to build a number of houses in the terrace to the construction of which the local authority had given their approval, and he had put in some foundations. After the new by-laws came into force the builder commenced to erect one of the houses which was in accordance with the old by-laws, but was not in accordance with the new by-laws as to the thickness of the party-walls. Upon a summons against the builder for unlawfully erecting the building without complying with the new by-laws, the Justices found that the building was not “work commenced” before the new by-laws, and convicted the builder:—*Held*, that the approval of the plans of the building scheme and of the proposed terrace of houses and the carrying out of part of the work under the plans did not confer an absolute right to complete the work in accordance with the plans and by-laws then in force, and did not entitle the builder to say that, because some of the work had been commenced before the repeal of the by-laws, a building commenced after such repeal was “work commenced” before such repeal, so as to exempt

him from the operation of the new by-laws; that the question whether work had been commenced or not within the meaning of the repealing by-law is a question of fact for the Justices, and that there was evidence before them upon which they could properly find that the building was not work commenced, and that the builder was properly convicted. *White v. Sunderland Corporation*, 88 L. T. 592; 67 J. P. 199; 1 L. G. R. 483—D.

— **Whether Fresh Plans Requisite.**—In 1894 two building plans were deposited by the defendant with, and approved by, the local authority. The local Act (*inter alia*) provided that the deposit of plans should be null and void if the execution of the buildings shewn therein was not proceeded with within three years from the date of such deposit. In 1901 the by-laws which were in operation when the plans were deposited by the defendant were repealed and new by-laws substituted, which provided (*inter alia*) that the former by-laws should continue to apply to works already commenced, and to buildings in respect of which plans had been approved prior to the new by-laws becoming operative. Subsequent to the new by-laws coming into force the defendant (who had by that time completed certain of the works shewn on the plans) commenced to erect the remaining buildings shewn on the plans:—*Held*, that as regards such later buildings, the deposit of the plans was null and void, as the work had not been commenced within three years from the deposit, and as the plan of each house, &c., although included in the two plans deposited, must be considered a separate plan. *Harrogate Corporation v. Dickinson*, 88 L. T. 299; 67 J. P. 100; 1 L. G. R. 275—Wright, J.

Statutory Duty to Decide whether Plans should be Approved—Action against Local Authority for Maliciously Refusing to Approve Plans.—An action will not lie against a local authority for maliciously refusing to approve building plans which have been submitted to them under the provisions of a statute which confers on them the duty of deciding whether such plans should be approved. *Davis v. Bromley Corporation*, 77 L. J. K.B. 51; [1908] 1 K.B. 170; 71 J. P. 513; 5 L. G. R. 1229; 97 L. T. 705; 24 T. L. R. 11—C.A.

“Open space”—**Keeping.**—*See BUILDING, supra*, col. 1327, and 6 Edw. 7 c. 25.

(ii.) Building Line.

Erection of House beyond—Statutory Penalty—Rights of Adjoining Owners—Indictable Offence.—Section 3 of the Public Health (Buildings in Streets) Act, 1888, in forbidding the erection of a building beyond the building-line of a street without the written consent of the urban authority, has created a statutory offence, and provided a penalty for a breach of the section. The urban authority alone has the power of exacting the penalty for the breach, for the section has not created rights in individuals, but general rights for the benefit of the inhabitants of a particular borough or district, and an individual therefore has no right of action under the section. *Mullis v. Hubbard*, 72 L. J. Ch. 593; [1903] 2 Ch. 431;

88 L. T. 661; 51 W. R. 571; 67 J. P. 281; 1 L. G. R. 769—Farwell, J.

Erection of, beyond Front Main Wall of Building on Either Side—Dismissal of Information—Justices Equally Divided—Subsequent Information for Continuing Offence.—Where Justices are equally divided upon the hearing of an information laid under section 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting a building in a street beyond the front main wall of the building on either side thereof, the proper course for the Justices to take is to adjourn the case in order that a re-hearing may be had before a reconstituted bench. If, however, the Justices dismiss the information, a subsequent information for continuing the offence will not lie against the same party if the circumstances remain the same. As long as the dismissal of the first information stands, it exists as a decision between the same parties upon the same subject-matter given by a competent tribunal, and the second bench of Justices has no power to re-open the hearing. *Kinnis v. Graves*, 67 L. J. Q.B. 583; 78 L. T. 502; 46 W. R. 480; 19 Cox C.C. 42—D.

Bringing Forward of Houses beyond the Front Main Wall of House “on either side thereof”—House Brought Forward beyond House on one Side, but not beyond House on the other Side.—Section 3 of the Public Health (Buildings in Streets) Act, 1888, which, in urban districts, prohibits the erection &c. of a building in any street beyond the front main wall of the house or building on “either side thereof” in the same street, without the consent of the urban authority, is infringed, if a house or building is erected &c. without such consent beyond the front main wall of the adjoining house on one side, although it does not project beyond the front main wall of the adjoining house on the other side. *Anderson v. Richards*, 4 L. G. R. 404; 70 J. P. 231—D.

Part of Front Wall “taken down to be rebuilt or repaired”—Removal of Stone Sill to Enlarge Window-frame—Work done Contrary to Owner's Instructions.—Section 17 of the Bristol Improvement Act, 1847, provides that where any part of the front or external wall, &c., of a house or building already erected in any street, &c., “shall be taken down to be rebuilt or repaired,” the entire of such wall shall be built or rebuilt or repaired, as the case may be, so as to be carried up perpendicularly, save for certain projections, and to range with the general line of the street, or be erected or built in such other situation as may be determined as in the section provided. The respondents, desiring to alter one of the front windows of an ancient beerhouse belonging to them, situated in a street in Bristol, employed a master-builder to carry out the work. In doing the work a workman employed by the master-builder, without instructions from the respondents or the master-builder, and contrary to their intentions, removed the stone sill of the window and replaced it with brickwork:—*Held*, without deciding whether the stone sill was part of the front or external wall of the beerhouse, within the meaning of the above section, that the sill, having been removed by mistake and contrary to the intention of the parties, had not been “taken down to be rebuilt or repaired,” and therefore that the section did not apply. *Yabbi-*

come v. *Bristol Brewery*, 67 J. P. 261; 1 L. G. R. 477—D.

Waterworks.—The Public Health (Buildings in Streets) Act, 1888, is an "Act for improving the sanitary condition of towns and populous districts," within the meaning of section 93 of the Waterworks Clauses Act, 1847. Therefore, if the Act of 1847 is incorporated by the special Act of a waterworks company, the company is liable to be convicted upon an information under section 3 of the Act of 1888 for erecting a building in a street beyond the front main wall of the house or building on either side thereof, inasmuch as the effect of section 93 of the Act of 1847 is to make the company subject to the provisions of the Act of 1888. *Grand Junction Waterworks v. Hampton Urban Council* (No. 2), 67 L. J. Q. B. 903; 79 L. T. 176—D.

Infringement—Statutory Remedy—Penalty—Conviction—Subsequent Action by Attorney-General for Injunction—Laches—Mandatory Order to Pull Down.—The penalty prescribed by section 3 of the Public Health (Buildings in Streets) Act, 1888, for a breach of the prohibition in the first part of the section against infringing the building-line is not the only remedy for the offence. It is a public general Act, and an injunction will lie at the suit of the Attorney-General on behalf of the public to restrain the infringement of the building-line, and in a proper case a mandatory order to pull down will be made, even although the offender has been previously convicted and fined under the section for the offence by a Court of summary jurisdiction. *Att.-Gen. v. Ashbourne Recreation Ground Co.* ([1903] 1 Ch. 101) followed. *Att.-Gen. v. Wimbledon House Estate Co.*, 73 L. J. Ch. 593; [1904] 2 Ch. 34; 91 L. T. 163; 68 J. P. 341; 2 L. G. R. 828; 20 T. L. R. 489—Farwell, J.

Observations on imputing *laches* to the Attorney-General and the relators in an action for injunction where the latter are a local authority. *Ib.*

— Pulling Down New Building not in Accordance with By-laws.—Where the by-laws as to new buildings made under section 157 of the Public Health Act, 1875, provide for the pulling down of a new building erected in contravention of such by-laws, the local authority may cause a new building so erected to be pulled down, although no plans of such building have been deposited and the local authority have consequently not disapproved plans of the building. The power of the local authority to pull down a new building under such by-laws does not cease on the expiration of six months from the completion of the building. *Fairbrass v. Canterbury Corporation*, 67 J. P. 181; 1 L. G. R. 181—D.

Bringing Forward House—Written Consent of Local Authority to Plans.—Plans were deposited with an urban authority by a builder which shewed an intended bringing forward of certain windows in a house beyond the front main wall of the houses on either side thereof. Attention was not specifically called to the proposed projection, but the plans were submitted to the urban authority's surveyor and

to two committees, by whom they were approved, such approval being stamped on the plans, which were also signed by the chairmen of the two committees. Such approval was confirmed by the urban authority:—*Held*, that there had been a "written consent" of the urban authority within the meaning of section 3 of the Public Health (Buildings in Streets) Act, 1888. *Merrett v. Charlton Kings Urban Council*, 67 J. P. 419—D.

Continuing Offence—Retaining Control.—A person who erects a new building in contravention of a by-law made under section 157 of the Public Health Act, 1875, cannot be convicted of the continuing offence, under section 158 of that Act, consisting in the continued existence of the building in such a form or state as to be in contravention of the by-law, unless he retains such control over the building as renders him in fact responsible for the continued existence of the building in that state. *Pomeroy v. Malvern Urban Council*, 89 L. T. 555; 1 L. G. R. 825; 67 J. P. 375—D.

— Sale of Building—Liability of Purchaser.—By section 3 of the Public Health (Buildings in Streets) Act, 1888, "It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same." "Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority":—*Held*, that a purchaser of a building erected in contravention of the section, who allowed it to remain in the same state after written notice from the urban authority, was not a "person offending" against the enactment, and could not be convicted of allowing the offence to continue. *Blackpool Corporation v. Johnson*, 71 L. J. K. B. 485; [1902] 1 K. B. 646; 87 L. T. 28; 20 Cox C. C. 276—D.

(4) *Paving and Sewering.*

"Owner"—Premises Let at a Rack-rent.—F. held certain premises in the city of Dublin under a lease from A. at the yearly rent of 34*l.* The poor-law valuation was 38*l.* F. had sublet portions of the premises to weekly tenants, and received from these lettings 107*l.* a year. F. was herself in occupation of the residue of the premises, the letting value of which was estimated at 19*l.* 10*s.* a year:—*Held*, that F. was the "owner" of the premises within the meaning of section 2 of the Public Health (Ireland) Act, 1878, where the definition of "owner" is the same as in section 4 of the English Act of 1875. *Rice v. White*, [1904] 2 Ir. R. 8—K. B. D.

— Change of Ownership before Demand for Payment.—At the date of the making and publishing of an order for the paving &c. of a street the defendant was an owner of lands, subject to a mortgage, adjoining the street in

question, and he continued as owner for more than a month after the last publication of the order. The defendant never executed the required works, and his share of their estimated expense was demanded from him by the plaintiffs. At the time of making such demand the defendant had ceased to be owner, the mortgagees having entered into possession and receipt of rents:—*Held*, that the defendant was liable for the amount demanded notwithstanding that he had ceased to be owner when the demand was made. *Belfast Corporation v. Hill*, [1904] 2 Ir. R. 105—K.B. D.

Lands and Heritages "fronting and abutting" on Street—Railway.—A railway line ran alongside a private street on an embankment at a height considerably above the level of the street. The line was fenced from the street by a wall at the bottom of the embankment, built by the railway company on their own ground. The corporation served a notice on the company as the "owner of lands and heritages fronting or abutting" on the street, to make up and complete the street. The railway company contended that the street was a private street of which they had no beneficial use and that they had no right of access thereto:—*Held*, that the railway company being owners of lands which in fact fronted and abutted on the street in question, they were liable to contribute to its construction and maintenance. *Caledonian Railway v. Edinburgh Corporation*, 3 F. 645—Ct. of Sess.

Service of Notice on "Owner" — Affixing Notice on Land.—The name and address of the owner of a strip of land being unknown to the clerk who had charge of the service of notices (although known to the local authority's surveyor), a notice to "the owner" of a strip of land requiring the street on which the strip abutted to be sewered, &c., was served under section 267 of the Public Health Act, 1875, by posting same on a conspicuous part of the said strip of land:—*Held*, that the notice was properly served. *Sharpley v. Bear*, 67 J. P. 442—D.

No Objection to Provisional or Final Apportionment — Subsequent Objection.—Where statutory notices in connection with private street works were served on estate agents as "owners" within the meaning of section 4 of the Public Health Act, 1875, and they took no objection to the final or provisional apportionment of expenses,—*Held*, that an objection by them after the completion of the works and the final apportionment made, that a wall fronting the street on which the work was done was the property of other persons, was taken too late, and that they were liable for their proportion of the expenses. *Wallasey Urban Council v. Walker*, 70 J. P. 199; 4 L. G. R. 1042—Bray, J.

Sufficiency of Notice.—Under the Blackburn Improvement Act, 1882, s. 3, a "backroad" is defined as "a road upon which the backs alone of buildings abut." In a notice under the Act requiring the owners to make up certain roads, two roads were described as "backroads between E. Street and K. Street." On one side of each of these two roads the sides and not the backs of houses in E. Street and K. Street abutted:—*Held*, that as no one could

be misled by the misdescription the notice was sufficient. *Blackburn Corporation v. Sanderson*, 71 L. J. K.B. 590; [1902] 1 K.B. 794; 86 L. T. 304; 66 J. P. 452—C.A.

Limitation of Time—Summary Remedy—Alternative Procedure.—By the Blackburn Improvement Act, 1882, s. 232, damages &c. incurred by the corporation in making up the roads may be recovered summarily before Justices, subject to a limitation of six months imposed by reference to the Summary Jurisdiction Act, 1848, s. 11, "or, if the corporation think fit, in the Superior Courts or any Court of competent jurisdiction":—*Held*, that the limitation of six months is not applicable to proceedings in the High Court. *Ib.*

Tottenham Local Board v. Rowell (46 L. J. Ex. 432; 1 Ex. D. 514) and *West Ham Local Board v. Maddams* (40 J. P. 470) distinguished; and *Hammersmith Vestry v. Lowenfeld* (65 L. J. Q.B. 662; [1896] 2 Q.B. 278) doubted. *Ib.*

If in an Act of Parliament power is conferred to take remedy in divers Courts, as a general rule that remedy will, in each Court, be subject to the *lex fori* of that Court, including the limitation of actions. *Ib.*

Charge on Premises—Enforcement of Charge—Sale of Premises—Owner Unknown—Action against Unnamed "owner of premises"—Vacant Plots—Substituted Service—Defect in Title.—The plaintiff council, who were entitled to a charge under section 257 of the Public Health Act, 1875, on certain premises for certain expenses, were unable to ascertain who was the owner of the premises. With the object of enforcing the charge they commenced an action on the equity side of the County Court expressed to be against "the owner" of the property (describing it), and obtained an order for substituted service of the summons in the action by the publication of a notice of the plaint in certain newspapers, which was done. An order was then made in the action declaring the expenses in question to be a charge on the premises, and giving the council leave to sell the premises for the purpose of enforcing the charge. And by a subsequent order it was declared that upon such sale the owner would be a trustee for the purchaser within the Trustee Act, 1893, and the council were appointed to convey the premises for the estate of the said owner therein. The premises were put up for sale by auction accordingly, and defendant, who was the highest bidder, entered into a written agreement to purchase the premises. The defendant subsequently ascertained the circumstances under which the council had been empowered to sell, and refused to complete the purchase, on the ground that the council could give no title to the premises as against the true owner:—*Held*, that the defendant's objection to the title was well founded, and that specific performance of the contract of sale could not be ordered at the instance of the council, and also, on the particular facts, that there had been no waiver of the defect of title on the part of the defendant. *Wealdstone Urban Council v. Evershed*, 3 L. G. R. 722; 69 J. P. 258—D.

Work Undertaken by Local Authority—Time

when Expenses become a Charge on Premises—Outgoings.]—Where default is made by an owner in complying with a notice under section 150 of the Public Health Act, 1875, to do certain paving works in respect of his property, and the local authority has undertaken the works, the expenses incurred by the local authority for such works first become, within the meaning of section 257 of the Act, a charge on the premises upon the completion of the works. Where, therefore, the owner has agreed to sell the property and to pay the outgoings up to the date of completion, the expenses are payable by the purchaser if the works are not completed till after that date, though at that date an agreement for their execution has been entered into by the local authority and the works are in progress. *Stock v. Meakin* (69 L. J. Ch. 401; [1900] 1 Ch. 688) followed. *Trubbs v. Wynne* (66 L. J. Q.B. 116; [1897] 1 Q.B. 74) distinguished. *Allen and Driscoll's Contract, In re*, 73 L. J. Ch. 614; [1904] 2 Ch. 226; 91 L. T. 676; 52 W. R. 681; 68 J. P. 469; 2 L. G. R. 959; 20 T. L. R. 605—C.A.

Per ROMER, L.J.—Highett and Bird's Contract, In re (72 L. J. Ch. 220; [1903] 1 Ch. 287), was decided on the assumption that the vendor was in the same position as if he had expressly contracted to make a good title. *Ib.*

Highway not Repairable by Inhabitants—Urban Authority—Dedication—Carriage-way—Footway.]—An urban authority making good under section 150 of the Public Health Act, 1875, a street not being a highway repairable by the inhabitants at large has no power to alter the width of the carriage-way or footway forming such street. *Robertson v. Bristol Corporation*, 69 L. J. Q.B. 590; [1900] 2 Q.B. 193; 82 L. T. 516; 48 W. R. 498; 64 J. P. 389—C.A.

Trespass—Arbitration—West Hartlepool Extension and Improvement Act, 1870.]—By a local Act (the material provisions of which were substantially the same as those of the Public Health Act, 1875) commissioners were created, having duties with regard to streets and buildings within a certain area. In 1878 it was proposed to lay out an estate within such area for building, and plans were submitted to and approved by the commissioners. By an agreement between them and the defendant, he was, on completion of certain roads, to throw eighteen feet of his land into those roads, so as to increase the width to thirty-six feet (which was done), but not to make the roads wider. In 1887 the powers of the commissioners passed to the plaintiff corporation. In 1892 the corporation by an order required the defendant to sewer, drain, level, flag, and metal the roads (being the eighteen feet width which was not on his land), so far as his premises fronted, adjoined, or abutted thereon. The defendant had done the necessary work of sewerage and paving on the eighteen feet portion of his land which he had, as agreed, thrown into the roads for the purpose of making them thirty-six feet wide. The order not having been complied with, the corporation executed the work themselves, and on making request for payment the defendant's agent disputed that the property was liable. A summons was accordingly taken out by the corporation to have the sums expended declared a charge on the property:—*Held*, that half of each of the

roads was a "street" within the meaning of the Act, so as to bring it within the power of the corporation to sewer and pave it compulsorily, at the expense of the adjoining owners, in case of their not complying with a proper notice to do so; that the notice was properly made and served on the defendant; that entry on lands in obedience to the order did not constitute a trespass; and that, as the defendant did not rest his defence on a wrong apportionment, there was no question within the jurisdiction of an arbitrator to decide, and his decision was unnecessary. *West Hartlepool Corporation v. Robinson*, 77 L. T. 387; 46 W. R. 218; 62 J. P. 35—C.A.

Work done by Urban Authority on Default of Frontagers—Departure from Work Specified in Notice—Sewer Increased in Size for Purpose of Serving Adjacent Area—Recovery of Expenses.]—An urban authority gave notice, under section 150 of the Public Health Act, 1875, to the frontagers on a street, requiring them to lay two sewers—a surface-water sewer and a soil sewer—in the street. On the default of the frontagers the authority laid the soil sewer in accordance with the requirements of the notice, and a surface-water sewer of larger dimensions than those required by the notice, in order that the latter sewer might serve to carry off water from the adjacent part of the district as well as from the street itself; and they apportioned on the frontagers, as the expenses incurred in sewerage the street, the amount it would have cost to lay both sewers in accordance with the notice:—*Held*, that the authority were entitled to recover the amounts so apportioned. *Acton Urban Council v. Watts*, 1 L. G. R. 594; 67 J. P. 400—Kekewich, J.

Owner Required by Local Authority to do Work which they are Liable to do—Work done as a Volunteer—Right of Owner to Recover Cost.]—The owner of a house, who was enlarging his premises, was required by the local authority's surveyor (amongst other things) to take up and relay the back drain of the house (which was in fact a sewer), and to construct an interception chamber or manhole; and these works the owner, upon being told that they must be done, though no actual steps were taken to enforce their execution, agreed to do under protest, and did do under the direction and by order of the surveyor of the local authority, but without any legal proceedings being taken against him, and without serious threat of such proceedings. The liability in law for carrying out these works rested on the local authority. In an action by the owner to recover the cost of the works from the local authority, on the ground that he was compelled by them to do works which the local authority were compellable by law to do,—*Held*, that the owner in the execution of these works was acting as a volunteer and not under compulsion, and was therefore not entitled to recover, although without legal proceedings, or the threat of such, there may be sufficient compulsion to prevent a person being regarded as a volunteer. *Ellis v. Bromley Rural Council*, 81 L. T. 224; 63 J. P. 711—Ridley, J.

Covenant to Maintain Road until "taken to" by Local Authority.]—The defendant in the course of developing certain building land, in the year 1888, formed a road on the boundary

between his property and land belonging to the plaintiff, and laid a sewer under it. The plaintiff contributed towards the expense, and in consideration of such contribution the defendant covenanted with the plaintiff that the plaintiff should not be under any liability to contribute to the maintenance or repair of the road or sewer, or any works connected therewith, but that the same should be wholly maintained by the defendant until the same should be taken to by the parish or some other local authority. In 1900 the local authority made the road up under section 150 of the Public Health Act, 1875, at the expense of the frontagers, and afterwards declared it a highway repairable by the inhabitants at large:—*Held*, that the plaintiff was entitled under the covenant to recover from the defendant the share of the expense of making up the road apportioned on the plaintiff under the section. *Moore v. Todd*, 67 J. P. 238; 1 L. G. R. 113—Bigham, J.

Apportionment of Expenses—Functions of Surveyor—Remedy of Frontager.]—The sole function of a surveyor or arbitrator appointed in reference to the apportionment of paving expenses is to apportion among the various frontagers the figure which is given to him, and upon which the notice is given, and which the local authority have decided to by the proper amount. Where the local authority have no jurisdiction to direct the works ordered, the Justices can entertain an objection by a frontager, but where the objection goes not to the whole jurisdiction, but only to a part, and the local authority may have come to a wrong decision as to a part, that decision, although it may be wrong, being within their jurisdiction, the Justices have no power to disregard. The frontager's remedy is by appeal to the Local Government Board. *Hanwell Urban Council and Smith, In re*, 68 J. P. 496; 2 L. G. R. 1350—Channell, J.

Proceedings before Magistrates—Injunction—Jurisdiction—Rules of Supreme Court, Order XXV. rule 5.]—Under the Public Health (Buildings in Streets) Act, 1888, s. 3, the Legislature having provided a mode of legal proceeding before magistrates in case of any offence against its enactments, the Court will be very slow to exercise its jurisdiction (if any exists, as to which *quære*) to grant an injunction restraining a local authority from pursuing such statutory remedy, or to make a declaratory order under Order XXV. rule 5, inconsistent with a right to pursue the statutory remedy, in a case where it is not shewn that any trespass on the part of the local authority is either threatened or intended. *Auckland (Lord) v. Westminster Local Board* (41 L. J. Ch. 723; L. R. 7 Ch. 597), *Kerr v. Preston Corporation* (46 L. J. Ch. 409; 6 Ch. D. 463), and *Stannard v. St. Giles', Camberwell, Vestry* (51 L. J. Ch. 629; 20 Ch. D. 190), considered. *Grand Junction Waterworks v. Hampton Urban Council* (No. 1), 67 L. J. Ch. 603; [1898] 2 Ch. 381; 73 L. T. 673; 46 W. R. 644; 62 J. P. 566—Stirling, J.

(5) Frontagers.

Notice to Frontagers—Apportioned Expenses—Arbitration.]—The service of a notice to sewer upon all the frontagers of a street being

a condition precedent under section 150, the omission to serve one of the frontagers is a valid objection to the subsequent proceedings. But where the question of the apportioned expenses of sewerage have been referred to arbitration under the Act, such objection must be taken before the arbitrators, and it is too late to take it in an action to enforce payment of the amount found due by the award. *Handsworth Urban Council v. Derrington, ante*, col. 1372.

Objections by Frontagers.]—The appellant council obtained the sanction of the Conservators of Epping Forest to convert an old path, which was subject to the Epping Forest Act, 1878, into a new street, on the terms that they, the appellants, should make, repair, and maintain such street. Acting under the powers of the Private Street Works Act, 1892, the appellants made the new street and apportioned the expenses on the frontagers, of whom the respondent was one. No objection was made by the respondent under section 7 of the Act of 1892:—*Held*, that the new street was made by the appellants under the statute and not under any agreement with the Epping Forest Conservators, and therefore that the respondent was liable for the apportioned amount of expenses, and further that any objection that the road was not a "street" within the meaning of the Act could only be dealt with by being raised at the proper time under section 7. *Woodford Urban Council v. Henwood*, 64 J. P. 148—D.

Street Repairable by Inhabitants at Large—Completion by Paving, Kerbing, and Flagging—Frontager.]—Section 149 of the Public Health Act, 1875, which imposes upon urban authorities the duty of causing all streets repairable by the inhabitants at large to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require, has not the effect of repealing section 20 of the Ashton-under-Lyne Improvement Act, 1849, which empowers the corporation to call upon the frontagers in any street which is not completed to their satisfaction, to complete it, and, in default of the frontagers doing the work, authorises the corporation to do the work and recover the expense from them. *Ashton-under-Lyne Corporation v. Pugh*, 67 L. J. Q.B. 32; [1898] 1 Q.B. 75; 77 L. T. 583; 46 W. R. 100; 61 J. P. 171—*aff'd*.

Effect of General or previous Special Act.]—Section 340 of the Public Health Act, 1875, expressly reserves the powers given by local Acts, and sub-section 2 of that section, which provides that a local authority shall not be exempt from the performance of any duty under the Act by reason of any local Act, has not the effect of depriving the corporation of their right to call upon the frontagers to do the work under the local Act. *Id.*

Section 11 of the Local Government Act, 1888, which casts the entire maintenance of main roads upon the county council, does not repeal section 53 of the Huddersfield Improvement Act, 1871, which empowers the corporation to call upon frontagers to make and repair footways. *Ashton-under-Lyne Corporation v. Pugh* (67 L. J. Q.B. 32) followed. *Lodge v. Huddersfield Corporation* (No. 1), 67 L. J. Q.B. 568;

[1898] 1 Q.B. 847; 78 L. T. 422; 62 J. P. 387—D. Affirmed on facts: 67 L. J. Q.B. 571; [1898] 1 Q.B. 859; 62 J. P. 515—C.A.

Lands "fronting or adjoining" Streets—Railway—Bridge Carrying Street over Railway.]—

The Greenock Corporation Act, 1893, s. 34, enacts that "the proprietors of all lands and heritages in" an uncompleted street (that is, a street of which, *inter alia*, the causeway had not been made), "or fronting or adjoining both sides of the line of such street," shall pay and relieve the corporation of the expense of the completion of the street in proportion to the length of the frontage of their properties. In 1884 a railway company acquired house property in an old but uncompleted street in Greenock, and demolished the houses on both sides and excavated the ground for the purpose of their line, which ran under the street at right-angles to it. For the portion of the street excavated a bridge with parapets and steps giving access to the railway station underneath was substituted. The bridge with the parapets was the property of the company. In 1903 the corporation decided to complete the formation of the street by causewaying the carriage-way, &c.:—*Held*, that the railway company were liable, as proprietors of adjoining property, under section 34 of the Act, to pay the expense of the formation of the street so far as carried by the bridge. *Great Eastern Railway v. Hackney Board of Works* (52 L. J. M.C. 105; 8 App. Cas. 637) distinguished. *Cameron v. Caledonian Railway*, 6 F. 763—Ct. of Sess.

Agreement as to Making up of Roads—

Whether Ultra Vires.]—By a deed made between an urban authority and the owners and frontagers on certain roads it was agreed that such roads should be accepted by the urban authority as public highways repairable by the inhabitants at large, but the urban authority was to have the same power of requiring the frontagers to sewer, level, and pave those roads when their land was actually occupied for building purposes as if the roads had not been accepted by the urban authority as public highways. Subsequently the urban authority adopted the Private Street Works Act, 1892:—*Held*, first, that if the deed meant that the urban authority undertook not to enforce the Private Street Works Act, 1892, as against the frontagers on those roads it was *ultra vires*; and secondly, that if the deed did not bear this did not preclude the urban authority from recovering the apportioned expenses from the frontagers. *Folkestone Corporation v. Rook*, 71 J. P. 550—D.

Road Taken Over by Local Authority by Agreement—Reservation of Powers—Liability of Frontagers.]—

Under an agreement made in 1879 between a railway company, certain property owners, and the local authority, it was agreed that a road should be dedicated to the public and taken over by the local authority as a highway repairable by the inhabitants at large, but that the local authority should retain the same powers of requiring the respective owners and occupiers for the time being of land fronting, adjoining, or abutting on the road to sewer and make up, &c., all or such parts of the road, carriage-way, or footway as were not already sewered and made up, and

their rights under the Public Health Act, 1875, and a local Act were also reserved to the local authority. At the date of the agreement, the road was properly made up, but the footway was not paved. The local authority having decided, under the powers conferred by the Private Street Works Act, 1892, to pave the footway, they served notices of apportionment on the frontagers:—*Held*, that the frontagers were not liable, as the road was a highway repairable by the inhabitants at large, and the powers which the local authority attempted to enforce did not apply to such a highway, and the local authority could not, under the agreement, make the frontagers liable. *Folkestone Corporation v. Marsh*, 94 L. T. 511; 4 L. G. R. 382; 70 J. P. 113—D.

Recovery of Expenses—Agreement to Widen

Street—No Consideration Amounting to Pur-

chase—No Conveyance to Corporation—Liability

for Expenses.]—A lane forming a highway,

repairable by the inhabitants at large, was widened by throwing into it strips of land in pursuance of an agreement made in 1883, between the urban authority and the then owners of the soil, providing that, for the purpose of amicably settling disputes as to the extent of public rights over the lane, the owners, so soon as they should lay out the land for building, should lay out the lane as a road forty feet wide. The urban authority subsequently made up the whole road as widened under section 150 of the Public Health Act, 1875, and apportioned part of the expenses upon the defendant as a frontager. On a summons asking for a declaration of charge upon the defendant's land for these expenses,—*Held*, that the agreement of 1883 was not a purchase by the corporation under section 154 of the Public Health Act, 1875, and that the defendant was liable under the last paragraph of section 150. *Evans v. Newport Sanitary Authority* (59 L. J. M.C. 8; 24 Q.B. D. 264) applied. *Portsmouth Corporation v. Hall*, 97 L. T. 43; 5 L. G. R. 536; 71 J. P. 299; 23 T. L. R. 449—Joyce, J. Reversed, 71 J. P. 564—C.A.

Indemnity by Local Authority to Frontager—

Whether Effective for all Time.]—Two frontagers

in a street, which was not a highway repairable by the inhabitants at large, having paid a portion of the expenses incurred by the local authority in making part of the causeway, the local authority passed this resolution (a copy of which was delivered to the two frontagers): "Resolved that an indemnity be given to J. I. and E. S. against liability on account of further expenses that may be occasioned in connection with New Street":—*Held*, that this was not evidence of a bargain that there was to be an indemnity for all time, and therefore that the local authority were not precluded when, many years after the date of the resolution, they put in force the Private Street Works Act, 1892, from including the premises of the two frontagers in making the provisional apportionment. *Dodworth Urban Council v. Ibbotson*, 67 J. P. 132—D.

Surveyor's Certificate of Total Cost—Conclu-

siveness of.]—Where an arbitration is held under section 150 of the Public Health Act, 1875, the arbitrator is bound by the certificate

of the urban authority's surveyor as to the total cost of the work to be apportioned among the frontagers, and he can only enquire into the correctness of the apportionment. *Cawston and Bromley Urban Council, In re*, 64 J. P. 760—D. And see col. 1405.

(6) Private Street Works.

Paving Expenses—Liability of Owner of Premises Fronting Street—Recovery of Expenses—Summary Remedy—Owner of the Premises "when the works are completed."—Expenses incurred by a local authority under section 150 of the Public Health Act, 1875, in sewerage and paving a street, not being a highway repairable by the inhabitants at large, may be recovered under section 257 of the Act in a summary manner from the owner of premises fronting the street, notwithstanding that after the works have been completed, but before the date of service of a demand for his proportion of such expenses, he has agreed to sell and has conveyed the premises to a purchaser. *Dictum of Cockburn, C.J.*, in *Reg. v. Swindon Local Board* (4 Q.B. D. 305) disapproved. *Millard v. Balby-with-Hexthorpe Urban Council*, 74 L. J. K.B. 45; [1905] 1 K.B. 60; 91 L. T. 730; 53 W. R. 165; 69 J. P. 13; 2 L. G. R. 1248; 21 T. L. R. 8—C.A.

— **Liability of Owner of Adjoining Premises—Owner in Default—Owner** "when the works are completed."—When expenses have been incurred by a local authority under section 150 of the Public Health Act, 1875, in paving a street not being a highway repairable by the inhabitants at large, an apportioned part of those expenses may be recovered under section 257 of the Act in a summary manner from a person who, when the works are completed, is the owner of premises adjoining the street, although when notice was given to do the work he had not become the owner and had parted with his ownership before demand was made for payment of the apportioned part. *East Ham District Council v. Aylett*, 74 L. J. K.B. 471; [1905] 2 K.B. 22; 92 L. T. 420; 53 W. R. 492; 69 J. P. 205; 3 L. G. R. 541; 21 T. L. R. 406—D.

Premises Fronting on Street but Outside Boundary of District.—Where the boundary-line between the districts of two local authorities runs along the kerb of the footpath on one side of a street, the local authority in whose district the carriage-way is has no power under section 150 of the Public Health Act, 1875, or otherwise, to apportion upon the frontagers whose premises are in the other district a share of the expenses incurred by that local authority under the section in the execution of works to the carriage-way or the footpath within their own district. *Hornsey Corporation v. Birkbeck Freehold Land Society*, 75 L. J. K.B. 348; [1906] 1 K.B. 521; 94 L. T. 700; 54 W. R. 528; 70 J. P. 140; 4 L. G. R. 581; 22 T. L. R. 346—D.

Service of Notice on "Owner."—A local authority, acting under the Private Street Works Act, 1892, paved and sewered a street and apportioned the expenses upon the frontagers. The documents required by sections 6 and 12 to be served upon the owners of the premises charged were served upon the mortgagor of

certain premises, the local authority not being aware that the premises had been mortgaged, and that the mortgagee was in possession. The local authority claimed a charge upon the premises for the expenses, and threatened to sell the same to raise the amount:—*Held*, that the mortgagee of the premises, being in possession, was the "owner" within the meaning of the Act, and that, as he had not been served, the defendants were not entitled to sell. *Maguire v. Leigh-on-Sea Urban Council*, 95 L. T. 319; 70 J. P. 479; 4 L. G. R. 979—Kekewich, J.

Notice of Objection to Provisional Apportionment—Highway Repairable by Inhabitants at Large.—Upon a notice of objection to a provisional apportionment given by an owner of premises to an urban authority under section 7, sub-section (a) of the Private Street Works Act, 1892, evidence may be given by the owner of the premises that the alleged street or part of a street is a highway repairable by the inhabitants at large for the purpose of shewing that the alleged street does not come within the definition of "street" contained in section 5 of the Act. *Carey v. Beahill Corporation*, 73 L. J. K.B. 74; [1904] 1 K.B. 142; 90 L. T. 58; 68 J. P. 78; 2 L. G. R. 367—D.

Objection of Owners that Street is a Highway Repairable by Inhabitants at Large—Objection Allowed by Justices—Second Proposal for same Street—Res Judicata.—The Justices of the city of Wakefield in 1898 disallowed, on the objection of the owners, a scheme of the corporation for private street works in a street in the city, on the ground that the street was a highway repairable by the inhabitants at large, and no appeal was taken from the order. In 1901 a fresh scheme was prepared, and the same objection taken. A Court of summary jurisdiction refused to hear an application on the matter on the ground that it was *res judicata*:—*Held*, that the decision of the Court of summary jurisdiction was correct. *Reg. v. Hutchings* (50 L. J. M.C. 35; 6 Q.B. D. 800) distinguished and explained. *Wakefield Corporation v. Cooke*, 73 L. J. K.B. 88; [1904] A.C. 31; 89 L. T. 707; 52 W. R. 321; 68 J. P. 225; 2 L. G. R. 270; 20 T. L. R. 115—H.L. (E.)

Resolution of Urban Authority—Objection—"Insufficient or unreasonable"—Jurisdiction of Justices.—A Court of summary jurisdiction, upon the hearing of a frontager's objection under section 7 (d) of the Private Streets Works Act, 1892, to the resolution of an urban authority to pave and channel a street, have no power, when determining whether the proposed work as specified in the plans and estimates is "insufficient or unreasonable," to consider the width of the street and the fact that in their view the street should be widened as well as paved. *Mansfield Corporation v. Butterworth*, 87 L. J. Q.B. 709; [1898] 2 Q.B. 274; 78 L. T. 527; 46 W. R. 650; 62 J. P. 500—D.

The word "insufficient" in section 7 (d) means insufficiency of the proposed work to carry out the object specified, and not that the proposed work ought to include something else. "Unreasonable" means an unreasonable scheme of work with reference to the street itself, and not that the scheme is unreasonable because it does not go so far as to provide that the street shall be widened. *Ib.*

Semble, that the street must be taken to have been "severed to the satisfaction of the urban authority," within the meaning of section 6 of the Act. *Ib.*

Memorial to Local Authority by Frontagers—Memorial not Adjudicated on as Objection—Proceedings de novo by Local Authority.]—The plaintiffs resolved to execute private street works under the Private Street Works Act, 1892, and the usual proceedings were taken accordingly. Within the period prescribed for taking objection to the provisional apportionment certain of the frontagers presented a memorial to the plaintiffs stating, *inter alia*, that they would prefer that the street should not be taken over by the plaintiffs and that the proposed works were unreasonable and unnecessary, and praying that the plaintiffs would make further enquiry before carrying out the works. The plaintiffs did not cause the questions raised by the memorial to be brought as objections before a Court of summary jurisdiction, but, after enquiry, modified their scheme as to the works to be done, and caused all the steps prescribed by the Act to be taken afresh with reference to the modified scheme as if it had been an original scheme. The works comprised in the modified scheme were executed, and a final apportionment of the expenses was made:—*Held*, on the ground that the memorial did not contain any effective objection to the provisional apportionment, that the proceedings were validly taken, and that the plaintiffs could recover the sums apportioned by the final apportionment. *Southampton Corporation v. Lord*, 67 J. P. 189; 1 L. G. R. 824—C.A.

Semble (*per* MATHEW, L.J.), that, even had the memorial contained an effective objection, the plaintiffs could have recovered, on the ground that it is competent to the local authority to drop a scheme for private street works under the Act, after objection has been taken to the provisional apportionment, and, without having the objection determined, to proceed *de novo* with reference to the same street. *Ib.*

Recovery of Expenses—Matters that could have been Raised by Objection.]—It is no defence to proceedings for the recovery of the expenses of private street works under the Private Street Works Act, 1892, to shew that the provisional or final apportionment includes a sum representing the cost of a sewer previously laid by one of the frontagers in a portion of the street. If a frontager desires to question the validity of proceedings under the Act on such a ground he must do so by way of objection to the apportionment. *Teddington Urban Council v. Vile*, 4 L. G. R. 782; 70 J. P. 381—D. And see *Portsmouth Corporation v. Hall*, 6 L. G. R. 16; 71 J. P. 664; 24 L. T. R. 76.

Apportionment of Expenses—Summary Proceedings—Improper Execution of Works—Negligence of Surveyor—Jurisdiction of Justices.]—In a summons under section 14 of the Private Street Works Act, 1892, the magistrate has no jurisdiction to enquire whether the works have been properly executed or whether the surveyor to the local authority has been negligent in passing them. *Hayles v. Sandown Urban Council*, 72 L. J. K.B. 48; [1903] 1 K.B. 169;

88 L. T. 61; 51 W. R. 348; 67 J. P. 177; 1 L. G. R. 187—D.

Apportioned Expenses—Action by Local Authority for Declaration of Charge and Power of Sale—Competency of Action.]—The provisions of section 13 of the Private Street Works Act, 1892, do not preclude a local authority from maintaining an action asking for a declaration of charge on premises included in the final apportionment in respect of private street works, an order for enquiries as to incumbrances, and an order enabling the local authority to apply for a sale of the premises for the purpose of enforcing their charge. *West Ham Borough Council v. Sharp*, 76 L. J. K.B. 307; [1907] 1 K.B. 445; 96 L. T. 280; 71 J. P. 100; 5 L. G. R. 634—D.

Service of Copy of Resolution Approving Provisional Apportionment.]—Expenses apportioned upon premises in a street under the Private Street Works Act, 1892, cannot be recovered from the owner of the premises unless a copy of the resolution of the local authority approving the provisional apportionment has been served upon him pursuant to the provisions of the Act. *Wirral Rural Council v. Carter*, 72 L. J. K.B. 332; [1903] 1 K.B. 646; 89 L. T. 171; 51 W. R. 414; 67 J. P. 81; 1 L. G. R. 206—D.

Service on "Owner" not Described by Name.]—Service upon a reputed owner in occupation of the premises is not sufficient. *Semble, per* CHANNELL, J., a copy of the resolution addressed and sent to the "owner" of the premises, without naming him, at the premises, is effectively served upon the owner under the Act. *Ib.*

Final Apportionment Charge—Vendor and Purchaser—"Outgoings"—Liability of Vendor—Covenants for Title.]—The Private Street Works Act, 1892, which has to be read and construed as one with the Public Health Act, 1875, makes no alteration in the time when a charge for street works by an urban authority takes effect under that Act—namely, at the date of the completion of the works. Where, therefore, works have been completed under the Private Street Works Act, 1892, before the date of a contract for the sale of land which is liable for part of the expenses of such works, the vendor will be required to pay the apportioned amount of the expenses, although the final apportionment is not made until after the date of the contract. *Stock v. Meakin*, 69 L. J. Ch. 401; [1900] 1 Ch. 683; 82 L. T. 248; 48 W. R. 420—C.A.

The charge for such works is an "outgoing" which the vendor is liable to discharge under the usual clause in a contract for sale for the payment of "outgoings" by the vendor, and is also an incumbrance which the vendor is liable for under the covenant against incumbrances implied by a conveyance "as beneficial owner." *Ib.*

Railway Company—Exemption of Land of, under Local Act—Land of Railway Company used "solely as a part of their line of railway or sidings."]—Land of a railway company used as a depository for ashes and cinders produced by their engines is not land used by the company "solely as a part of their line of railway or

sidings" within a section of a local Act exempting railway companies from liability to contribute to the expense of private street works in respect of land belonging to them and so used. *Carlisle Corporation v. Saul*, 97 L. T. 514; 71 J. P. 502; 5 L. G. R. 1128—Phillimore, J.

A railway company may be exempt under section 22 of the Private Street Works Act, 1892, from liability to contribute to expenses of private street works under that Act, in respect of land belonging to them and abutting on the street, although, for the moment, the land is not physically used for the purposes of their line of railway, siding, station, or works; but, in order to escape liability in such a case, it is incumbent on the railway company to give evidence that the land will in the future be used solely for those purposes. *Rea v. Jones*, 5 L. G. R. 722—D.

Resolutions—Objections—Amendment—Jurisdiction of Justices.—Under sub-section 1 of section 8 of the Private Street Works Act, 1892, the Justices have power to amend a scheme for street works resolved upon by an urban authority under section 6 of the Act, so as to alter the scheme from one for making up the whole of the road into a scheme for making up that portion of the road only which is a private road, leaving the other portion not made up. *Twickenham Urban Council v. Munton*, 68 L. J. Ch. 601; [1899] 2 Ch. 603; 81 L. T. 136; 47 W. R. 660—C.A.

The Justices have, when acting under the powers of the sub-section, a discretion to say whether or no they will adjourn the hearing of the objections to the proposals of the urban authority, and direct further notices to be given, so as to allow other persons affected an opportunity of objecting. *Id.*

Objection to Proposal of Local Authority—Decision of Justices that Street is Highway Repairable by Inhabitants at Large—Second Proposal as to same Street—Res Judicata.—In 1898 the Corporation of Wakefield acting under section 29 of the Wakefield Corporation Act, 1887 (sections 29, 30, and 31 of which are in all material respects identical with sections 6, 7, and 8 of the Private Street Works Act, 1892), approved a scheme for private street works upon part of a street within their district. Objection was taken under section 30 by the frontagers that the street was a highway repairable by the inhabitants at large. A Court of summary jurisdiction under section 31 determined that the objection was valid. In 1900 the corporation under section 29 approved a fresh scheme for works upon a larger part of the same street. Objection was taken under section 30 by the frontagers upon the same ground as on the previous occasion. A Court of summary jurisdiction under section 31 determined that the matter was *res judicata*, and refused to hear evidence upon the merits of the objection:—*Held*, on Case stated, that the determination of the Court of summary jurisdiction was correct. *Reg. v. Hutchins* (50 L. J. M.C. 85; 6 Q.B. D. 800) distinguished and explained. *Wakefield Corporation v. Cooke*, 72 L. J. K.B. 345; [1903] 1 K.B. 417; 83 L. T. 225; 51 W. R. 305; 67 J. P. 121; 1 L. G. R. 337—C.A.

Appeal to Quarter Sessions.—An appeal will lie to quarter sessions from the decision of Justices under section 8 of the Private Street Works Act, 1892, upon the objections of an owner to the proposals of an urban authority upon any of the grounds set out in section 7. *Pearce v. Maidenhead Corporation*, 76 L. J. K.B. 591; [1907] 2 K.B. 96; 96 L. T. 639; 71 J.P. 230; 5 L. G. R. 622—D.

Charge on Premises—Payment by Tenant for Life—Settled Land—Incumbrance.—The charge provided for by section 17 of the Private Street Works Act, 1892, is intended to enable the limited owners of premises charged with expenses incurred under the Act to raise money for the payment to the local authority of these expenses; it does not affect the right of a tenant for life who has himself paid the local authority to keep alive for his own benefit the charge constituted by section 13 of the Act. *Pizzi, In re*; *Scrivener v. Aldridge*, 76 L. J. Ch. 87; [1907] 1 Ch. 67; 95 L. T. 722; 71 J.P. 58; 5 L. G. R. 86—Neville, J.

(7) Other Matters.

Agreement between County Council and District Council as to Main Roads.—See REVENUE.

Expenses—Liability of Tenant under Covenant in Lease.—See LANDLORD AND TENANT.

Notice to Execute Street Works—Sale of Premises without Disclosure—Compensation.—See VENDOR AND PURCHASER.

—No Notice before Summons—*Res Judicata*.]—See ESTOPPEL.

Paving Expenses—"Outgoing"—Liability of Tenant.—See LANDLORD AND TENANT.

Paving and Sewerage Expenses—Volunteer Headquarters.—See ARMY.

Repair of Bridge.—See WAY.

Repair of Roads.—See WAY.

(gg) Telegraphs and Telephones.

Telegraph Company Laying Wires or Tubes under Street—Jurisdiction of Highway Authority—"Difference"—Former Jurisdiction of Magistrate or County Court Judge to Arbitrate.—By the Telegraph Act, 1892, the statutory power which a stipendiary magistrate or County Court Judge had to hear and determine an appeal from the refusal of a highway authority to permit a telegraph company licensed by the Postmaster-General to break up a street for the purpose of laying wires or tubes has been rescinded; and the increased power given to such local authorities by that Act to veto the laying down of wires or tubes under any street within their district is now final. *National Telephone Co. v. Tunbridge Wells Corporation*, 83 L. T. 525; 48 W. R. 636; 64 J. P. 756—D.

Telephone Company—Delegation of Powers by

Postmaster-General—Consent of Local Authority—Refusal of Consent—Arbitration by County Court Judge—Jurisdiction.]—The Postmaster-General delegated certain powers to the N. T. Company under the Telegraph Acts, and the company made an agreement with the corporation of T. W. to exercise those powers within the borough in respect of certain specified works. It was provided by the agreement that, except in the case of the specified works, the company should not exercise any of the powers conferred on the Postmaster-General by the Acts, in respect of which the consent of the corporation was necessary, without the further written consent of the corporation. The company applied for the consent of the corporation to further works, but the consent was refused. The company then applied to the County Court Judge to arbitrate, under section 4 of the Telegraph Act, 1878, which provides that any difference arising between the Postmaster-General and a local authority shall be referred to the County Court Judge as an arbitrator:—*Held*, that the County Court Judge had no jurisdiction to entertain the application of the company, inasmuch as the corporation had an absolute right to refuse their consent to the proposed work and had not consented thereto. *National Telephone Co. v. Tumbidge Wells Corporation*, 85 L. T. 368—C.A. Affirming, 48 W. R. 686; 64 J. P. 756—D.

Obstruction to Public Place—Statutory Right—Right of Local Authority to Remove Obstruction.]—The appellants, in exercise of an alleged statutory right, placed their wires across the streets of which the respondents were the duly appointed guardians. The appellants failed to prove the existence of the statutory right, and the respondents removed the wires, whereupon the appellants brought an action for damages:—*Held*, that, even apart from evidence of the respondents' power to prohibit the stretching of wires across the streets or to remove them if placed without their consent, the action failed for want of proof of authority so to place the wires. *National Telephone Co. v. St. Peter Port, Guernsey (Constables)*, 69 L. J. P.C. 74; [1900] A.C. 317; 82 L. T. 398—P.C.

(hb) *Tramways.*

Local Authority Created by Statute—Powers—Purchase of Tramways—Running of Omnibuses—Ultra Vires.]—Where a corporation is the creation of statute its powers are confined to such as are expressly, or by necessary implication, conferred by the statute. Thus the London County Council, constituted by the Local Government Act, 1888, and having thereunder and in virtue of other statutes the power of acquiring and working tramways, is not entitled to run a service of omnibuses, such service not being a necessary incident of the business of a tramway company. *London County Council v. Att.-Gen.*, 71 L. J. Ch. 263; [1902] A.C. 165; 86 L. T. 161; 50 W. R. 497; 66 J. P. 340—H.L. (E.)

Section 2 of the Local Government Act, 1888, which provides that the council of a county is to "be in the like position in all respects, as the council of a borough divided into wards," does not confer upon such county the powers

of a corporation created by charter, but merely assimilates the procedure of the one with that of the other. *Ib.* And see *TRAMWAYS.*

(ii) *Water Supply.*

Waterworks—Expenses of Construction and Maintenance—Liability for—Contributory Place—Persons Taking and Using Water Supply.]—Where a district council provides a supply of water to a contributory place under the power conferred by section 51 of the Public Health Act, 1875, it is not incumbent upon the council (although *semble* that it has a discretion) to repay the instalments of principal of, and interest on, a loan contracted for the provision of the supply by means of water rates and water rents charged solely upon the consumers of the water. The cost of construction and maintenance of the necessary works and of the supply generally falls within the category of special expenses mentioned in section 229 of the Act. No distinction is made by that section between capital and current expenditure. In relief of both is to be carried to the account any sum which can practically and reasonably be raised by water rates and water rents; and the balance, so far as it is capable of being estimated by unbroken pence in the pound in a rate upon the contributory place, is to be charged upon and paid by the contributory place. *Horn v. Sleaford Rural Council*, 67 L. J. Q.B. 724; [1898] 2 Q.B. 358; 78 L. T. 722; 46 W. R. 555; 62 J. P. 502—D.

Cost of Providing Supply to House—Limit as to Amount—Remedy of Owner.]—The limitation as to the cost of providing a water supply to a house contained in section 3 of the Public Health (Water) Act, 1878, does not apply to section 62 of the Public Health Act, 1875. Where, under section 62 of the Act of 1875, an owner is required by the local authority to obtain a water supply from an unreasonable distance, the remedy of the owner is by way of appeal to the Local Government Board under section 268 of that Act. *West Lancashire Rural Council v. Ogilvy*, 68 L. J. Q.B. 215; [1899] 1 Q.B. 377; 80 L. T. 162; 47 W. R. 363; 63 J. P. 166—D.

Riparian Proprietor—Water Supply of District—Right to Flow of Water—"Injurious affect."]—A local authority has no right either as riparian proprietor or under section 332 of the Public Health Act, 1875, to interfere with the common-law right of a lower riparian proprietor to the accustomed flow of water to his land, even though such interference causes no actual damage; and an injunction will be granted to restrain such interference. *Roberts v. Gwyrfael Rural Council*, 68 L. J. Ch. 757; [1899] 2 Ch. 603; 81 L. T. 465; 48 W. R. 51; 64 J. P. 52—C.A.

The local authority "injuriously affect" a stream or the supply of water contained in a stream within the meaning of section 332 if their acts amount to such an interference with the common-law right. *Ib.*

"House."]—Justices found that certain premises were not a house within section 62 of the Public Health Act, 1875 (which enables the

local authority in case a house is not supplied with water to give the owner notice to obtain such supply, and, failing compliance with such notice, the local authority is authorised to recover water rates as if the owner had demanded a supply of water):—*Held*, that, the question being one of fact, the Court would not interfere with the Justices' decision. *Wootten v. Bishop*, 96 L. T. 705; 5 L. G. R. 760; 71 J. P. 334—D.

Water-supply to Adjoining District—Contract for Supply—Enlargement of District—Sanction of Local Government Board.—The sanction of the Local Government Board required by section 61 of the Public Health Act, 1875, for the supply of water by a local authority to the local authority of an adjoining district, is a sanction merely to the supply, and not to the terms of the agreement under which such supply is to be furnished. The sanction can be properly limited to particular places in a district. *Soot-hill Upper Urban Council v. Wakefield Rural Council*, 74 L. J. Ch. 703; [1905] 2 Ch. 516; 93 L. T. 711; 3 L. G. R. 1208; 69 J. P. 447; 21 T. L. R. 766—C.A.

Prior to 1895 the plaintiffs made certain contracts with the defendants for the supply of water, the sanction of the Local Government Board under section 61 of the Public Health Act, 1875, being obtained for the supply to particular places within the defendants' district. In 1895 it was contemplated that the plaintiffs should furnish a larger supply for the defendants' whole district, and a new agreement was made whereby the plaintiffs agreed to deliver and the defendants to take for the supply of their district, or such part thereof as they might wish to supply, or any place outside their district which they might contract to supply, the quantities agreed on, the minimum being largely increased beyond the minimum under the previous contracts. Clause 9 provided that unless within six months the sanction of the Board to the agreement should be obtained or found to be unnecessary, the agreement should be void. The Board having refused to give a general sanction to the extended area contemplated by the agreement,—*Held*, that the previous sanctions were limited to the particular places, and that, no sanction having been given to the extended area contemplated by the agreement, clause 9 applied and the agreement was void. *Ib.*

Pollution—User—No Proprietary Title or Licence.—The proprietor of a hydropathic establishment *held* entitled to recover damages from the defendant council in respect of their negligence in polluting the water supply to his establishment, although he had no proprietary title to, or any leave or licence to use, the said water. *Fergusson v. Malvern Urban Council*, 72 J. P. 101—Lawrance, J.

Water Rate—Amount Chargeable—Extension of Borough Boundaries—Right of Corporation to Differentiate the Water Rate.—A corporation, under a Waterworks Act, were entitled to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. on the net rateable value, and they were also empowered, if there were a deficiency in the amount of the water account for any year, to

make up the deficiency out of the general district rate. The corporation, whose boundaries were extended by an extension order, had been charging a uniform water rate of $7\frac{1}{2}$ per cent. over the whole borough, but for certain reasons they reduced it in the old borough to 5 per cent., while retaining it in the added part at $7\frac{1}{2}$ per cent.:—*Held*, that the corporation had no power so to differentiate the water rate, but must charge the same water rate over the whole borough. *Northampton Corporation v. Ellen*, 87 L. T. 335; 66 J. P. 744—Bigham, J.

"Rates" in Added Part not to Exceed a Specified Sum—Whether Water Rates are Included as "Rates."—An article of the extension order provided that the general district rates to be levied in the added part should not in any one year for a number of years exceed such an amount in the pound as, when added to the poor rate and to the borough rate "and any other rate made by the corporation" in the same year would make up a certain specified total on each pound of the rateable value:—*Held*, that the water rate was not a "rate" within the meaning of the words "any other rate" in this article, but was merely the price to be paid for the water supplied, and that the water rate therefore, was not to be included in the computation of such total. *Ib.*

Public Well—Licence to take Water.—A local authority, in whom a public well is vested by section 64 of the Public Health Act, 1875 has no power to grant a licence to abstract water from the well for the purpose of bottling and selling, so as to sensibly diminish the supply of water to riparian proprietors along a stream which is fed by the well. *Mostyn v. Atherton*, 68 L. J. Ch. 629; [1899] 2 Ch. 360 81 L. T. 356; 48 W. R. 163—Byrne, J. See also WATER.

Supply to Local Authority in Bulk.—See WATER.

8. STATUTORY POWERS, ACTS DONE IN EXERCISE OF

Officer of County Council—Act done by Direction of Council in Pursuance of Statutory Duty—Passing over Disputed Right of Way.—An officer of a county council, to which the duties of a district council as to a public right of way within their district under section 26 of the Local Government Act, 1894, had been duly transferred under sub-section 4 of that section by the direction of the council drove along the way in assertion of the public right to use it as a public highway. The owner of the land over which the way ran having brought an action for trespass against the officer, judgment was obtained by the defendant:—*Held*, that the action was commenced for an act done in pursuance or execution, or intended execution, of an Act of Parliament, within the meaning of section 1 of the Public Authorities Protection Act, 1893, and that the judgment carried costs to be taxed as between solicitor and client under that section. *Greenwell v. Howell*, 69 L. J. Q.B. 461; [1900] 1 Q.B. 535; 82 L. T. 183; 4 W. R. 307—C.A.

Damage by "Full compensation"—Legal Proceedings—Party and Party Costs—Solicitor

Client Costs.—Where a person against whom a local authority has instituted legal proceedings under the Public Health Act, 1875, obtains judgment therein with costs, the provision of section 308 of the Act, that "full compensation shall be made to such person by the local authority," does not entitle such person, the costs having been taxed as between party and party and paid to him by the local authority, to recover, in an arbitration under the section to settle the amount of compensation, the difference between party and party costs and all the expenses reasonably and properly incurred by him throughout the proceedings. *Barnett v. Eccles Corporation*, 69 L. J. Q.B. 834; [1900] 2 Q.B. 423; 83 L. T. 66; 64 J. P. 692—C.A. And see PUBLIC AUTHORITIES ACT.

9. RATES AND RATING.

Meeting of Owners and Ratepayers of Borough—Demand for Poll.—A ratepayer who seconds a demand for a poll "demands" a poll within the meaning of rule 6 of Schedule III. of the Public Health Act, 1875. *Re v. Dover (Mayor)*; *Bradley, Ex parte*, 72 L. J. K.B. 210; [1903] 1 K.B. 668; 88 L. T. 296; 67 J. P. 81; 1 L. G. R. 266—D.

"Expenses incurred."—The expression "expenses incurred" in section 232 of the Public Health (Ireland) Act, 1878 (corresponding to section 229 of the Public Health Act, 1875), means actual or estimated expenses. *Re v. Local Government Board*, [1906] 2 Ir. R. 206—C.A.

General District Rate—Valuation List—Reduction of Rate—Time when Cause of Complaint for Non-payment Arises.—Where, in view of a particular assessment of premises to the poor rate, a reduction has been made in the valuation list upon which a general district rate has been based, and the figures of the general district rate have been amended in accordance with the reduction, the rate so amended becomes from that date the instrument rendering the ratepayer liable to pay the reduced amount. If he neglect to pay it, a cause of complaint under section 11 of the Summary Jurisdiction Act, 1848, arises within six months from the date of the amendment, and not within six months of the making of the general district rate. *Keeton v. Sheffield Coal Co.*, 70 L.J. K.B. 374; [1901] 2 K.B. 26; 84 L. T. 387; 49 W. R. 349; 65 J. P. 341—D.

Retrospective Charges included in Estimate—Validity—Right of Appeal.—Where an urban authority in pursuance of section 218 of the Public Health Act, 1875, before proceeding to make a general district rate, causes an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, and the estimate contains items for retrospective charges and expenses incurred more than six months before the making of the rate, contrary to the provisions of section 210 of the Act, an appeal lies against the rate. *Smith v. Southampton Corporation*, 71 L. J. K.B. 639; [1902] 2 K.B. 244; 87 L. T. 171; 50 W. R. 651; 67 J. P. 5—D.

Improvement of Drainage System—Differential Rate.—A drainage board purporting to

exercise powers conferred upon them by a local drainage Act and the Sewers Acts levied within their district drainage rates based upon a differential classification of the rateable properties in accordance with the quantum of supposed benefit derived from the drainage by each property, apart from its contiguity with other properties:—*Held*, that such rates should be equal rates upon all properties benefited, and that the board had no power to make such differential classification. *Metropolitan Board of Works v. Vauxhall Bridge Co.* (26 L. J. Q.B. 253; 7 E. & B. 964) commented on. *Knighit v. Langport Drainage Board*, 67 L. J. Q.B. 432; [1898] 1 Q.B. 588; 78 L. T. 260; 46 W. R. 392; 62 J. P. 245—D.

Annual Sums Raised to Support County Lunatic Asylums Fund—County and County Borough—Proportions in which Contributions to be Divided—"Assessable value"—"Rateable value."—Sums required to be raised annually for the purposes of a county lunatic asylums board constituted by a local Act of Parliament, and to be divided between the county itself and each of its county boroughs, are, during the continuance of the Agricultural Rates Act, 1896, to be raised, in accordance with section 24 of the Lancashire County (Lunatic Asylums) Act, 1891, in proportion to the rateable values of the county and county boroughs as ascertained by section 33 of the Local Government Act, 1888, and not in proportion to the assessable values of the county and county boroughs as ascertained by the Act of 1896 and the regulations of the Local Government Board issued under it. *Lancashire Asylums Board v. Manchester Corporation*, 69 L. J. Q.B. 234; [1900] 1 Q.B. 458; 82 L. T. 1; 48 W. R. 356; 64 J. P. 101—C.A.

Limit Imposed by Local Act—Alteration of Boundaries—Extension of Jurisdiction.—By the Crediton Improvement Act, 1836, after defining the limits of the town of Crediton for the purposes of the Act, the commissioners appointed thereunder were authorised to levy an annual rate on the occupiers of dwelling-houses within the limits of the Act not exceeding 2s. 1d. in the pound, and all persons assessed under the Act were released from liability for the repairs of highways without the limits of the Act. By the Public Health Act, 1875, the district within the local Act became an urban district, and the commissioners became the urban authority. The expenses incurred by them in the execution of the Sanitary Acts were, at the time of the passing of the Public Health Act, 1875, payable out of rates in the nature of general district rates leviable by them throughout the whole of their district. At the time of the passing of the Local Government Act, 1894, the parish of Crediton was partly within and partly without the urban district of Crediton, but by a Confirmation Order of the Local Government Board in 1894 the urban district was extended so as to include the part of the parish outside the former urban district, and it was provided that the district should be deemed to have been extended before the passing of the Act of 1894. The appellant was the occupier of a dwelling-house within the limits of the Improvement Act of 1836. In 1896 the Crediton Urban District Council made a rate for the whole district, including the added area,

headed the "Crediton Improvement Rate for the year ending Midsummer, 1897." The rate exceeded the amount in the pound limited by the Improvement Act. It was made to defray expenses to be incurred by the council under the Public Health Act, 1875, including the purposes for which rates were leviable under the Improvement Act; and was for the repair of highways, both within the limits of the Improvement Act and also in the added area:—*Held*, that the rate was a good one, and was rightly headed. *Hill v. Crediton Urban Council*, 80 L. T. 861—C.A.

Limit and Exemption under Local Act—Limit Removed by Public Act.—By section 40 of the Bingley Improvement Act, 1867, the amount of the improvement rates that may be made by the commissioners without the consent of the ratepayers should not exceed 4s. in the pound, and with their consent 5s., provided that in respect of so much of any rate which might be made without the consent of the ratepayers as exceeded 2s. 6d. in the pound, or with their consent 3s. 6d., the occupier of any land used as a canal or towing path for the same or as a railway should be assessed in the proportion of one-fourth part only of the net amount of the annual value thereof. By section 227 of the Public Health Act, 1875, it is enacted that any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by an urban authority in the execution of this Act:—*Held*, that this did not affect the rights of canal and railway owners to be rated in respect of one-fourth of the annual value only. *Bingley Urban Council v. Midland Railway*, 80 L. T. 725—D.

Exemption—Agricultural Land—Market Garden—Glass-houses—Buildings.—The occupier of a market garden covered with glass-houses is not an occupier of agricultural land within the meaning of the Agricultural Rates Act, 1896, and is not entitled to the exemption conferred by that Act upon the occupiers of agricultural land. *Smith v. Richmond*, 68 L. J. Q.B. 898; [1899] A.C. 448; 81 L. T. 269; 48 W. R. 115; 63 J. P. 804—H.L. (E.)

Non-occupation—House Used in Summer—Furniture Removed during Winter—Fittings Left in House—Intention of Returning to House.—The respondent took a lease of a house and furnished it for the purpose of receiving boarders. She did not reside in the house, and in December, 1900, she removed from the house all her furniture and effects, except certain fixtures, fittings, and things which she had hired from the previous tenant. She intended to return to the house in the following summer, and in May she returned and refurnished the house, but, with the exception of the fittings and things left therein, the house was empty from December, 1900, to May, 1901. The respondent claimed exemption from a general district rate for the period from December, 1900, to May, 1901, on the ground that during that period the house was "unoccupied" within the meaning of section 211, sub-section 2 of the Public Health Act, 1875:—*Held*, that the proper inference of law was that the respondent had the beneficial occupation of the

house during the whole of the period, and was therefore not entitled to the exemption in section 211, sub-section 2 of the Act in favour of unoccupied premises, but was liable to the rate for the whole period. *Gage v. Wren*, 87 L. T. 271; 67 J. P. 32—D.

Building used exclusively for Education of Poor—Institution to Board and Instruct Children.—By the Liverpool Corporation Act, 1893, s. 36, it is provided that no person shall be rated to the general rate in respect of any building used for the education of the poor exclusively:—*Held*, that an institution for the reception of pauper children from the age of two to sixteen years, sent by poor-law guardians and others, where they were received, clothed, maintained, instructed, and provided with medical attendance, was not a building used for the education of the poor exclusively. *Hadfield v. Liverpool Corporation*, 80 L. T. 566—D.

Land Used as a Railway—Goods Station at Distance from Railway—Access by Licence over Tramway.—By section 36 of the Liverpool Corporation Act, 1893, no person occupying land used only as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same to the general rate in any greater proportion than one-fourth part of the net annual value thereof. A railway company purchased land in Liverpool under statutory powers authorising them to acquire it for the purpose of extending the stations, sidings, warehouses, coal wharves, depôts, and other accommodation of the company, for mineral, goods, and cattle traffic, and erected thereon and occupied a covered shed, inside which were a number of railway lines running alongside platforms used for the purpose of loading and unloading railway waggons with goods, all the lines being used for the conveyance of goods sent by the public by rail to or from the premises. The premises were situate half a mile from the company's railway, and the goods conveyed to and from the premises were carried from and to the railway in railway waggons drawn by locomotives over a tramway laid by the company across a public highway under a licence granted by the Liverpool Corporation under the powers of the Liverpool Improvement and Waterworks Act, 1871, and over lines of rail belonging to the Mersey Docks and Harbour Board, which the board, under the powers of their Consolidation Act of 1858, permitted the company to use:—*Held*, that the premises were not "land used only as a railway made under the powers of any Act of Parliament for public conveyance" within the meaning of section 36 of the Liverpool Corporation Act, 1893. *Williams v. London and North-Western Railway*, 69 L. J. Q.B. 531; [1900] 1 Q.B. 760; 82 L. T. 287; 64 J. P. 372—C.A.

Tramroad Constructed under Special Acts to Connect Street Tramways—"Railway."—The appellants constructed under special Acts of Parliament certain street tramways and also a "tramroad" on lands their exclusive property except where it passed over certain roads by level crossings. The tramroad connected the street tramways, and the tramways and tramroad were worked together as one continuous

route. The special Acts provided that for the purpose of certain of the provisions of the Railways Clauses Consolidation Act, 1845, which was incorporated so as to apply to the tramroad only, the tramroad should "be deemed to be a railway," and the Railway and Canal Traffic Acts were applied to the tramroad and tramway "as if the tramroad and tramway were railways": *Held* (BUCKLEY, L.J., *dubitante*), that the appellants were in respect of the tramroad entitled to the partial exemption from general district rates conferred by section 211, sub-section 1 (b) of the Public Health Act, 1875, on "a railway constructed under the powers of any Act of Parliament for public conveyance." *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban Council*, 76 L. J. K.B. 492; [1907] 1 K.B. 568; 96 L. T. 209; 71 J. P. 177; 5 L. G. R. 422; 23 T. L. R. 267—C.A.

— **Light Railway—Reduced Assessment—Land used as Railway Constructed under any Act of Parliament—General Enactment Relating to Railways.**—A light railway authorised by a Light Railway Order (made by the Light Railway Commissioners in pursuance of the powers conferred on them by the Light Railways Act, 1896) is a railway "constructed under the powers of an Act of Parliament" within the meaning of section 211 of the Public Health Act, 1875, and is entitled to the benefit of the reduced assessment thereby conferred, section 211 of the Public Health Act, 1875, falling under the description of "the general enactments relating to railways" contained in section 12, sub-section 2 of the Light Railways Act, 1896. *Wakefield and District Light Railway v. Wakefield Corporation*, 76 L. J. K.B. 634; [1907] 2 K.B. 256; 96 L. T. 622; 71 J. P. 254; 5 L. G. R. 595; 23 T. L. R. 404—C.A.

Lines of rails laid on a public highway in respect of which the light railway company is rated constitute "land used only . . . as a railway" for the purpose of such reduced assessment. *Id.*

— **Shop Closed during Winter—Stock Removed—Fixtures and Articles Left in Shop—Occupation—Liability.**—The respondent held certain premises under a lease or licence for a term of years, and had entered into possession and used the premises as a shop. As the business was remunerative only during the summer, the respondent at the end of the summer locked up and left the shop with the intention of not re-opening the same for business until the beginning of the following summer, and during this interval he had not in fact returned to the shop, and no one lived therein. Before he left he removed all his stock, but left in the premises certain fixtures and other articles. He was entitled under his lease to occupy the premises and carry on his business continuously throughout the year except for certain hours during the night. A general district rate was made for the half-year during the whole of which the shop was so closed in the winter. The respondent having objected to pay the rate made in respect of the shop on the ground that in law the premises were unoccupied by him during the time the shop was closed,—*Held*, that the respondent was in occupation of the premises during the time they were so closed, and was liable to pay the half-year's rate accordingly.

Southend-on-Sea Corporation v. White, 83 L. T. 408; 65 J. P. 7—D.

— **Warehouse—Intermittent User—Interval of Non-user during Period of Rate—Liability of Warehouseman during Interval.**—Local Acts for the making of improvements in a city provided that the corporation should have power to levy and recover rates, but that an occupier who had not been in occupation during the whole period of a rate should be liable to pay a portion of it only proportionate to the time during which he had been in occupation. During the currency of certain yearly rates levied under the Acts, warehousemen, who had been duly rated to the rates in respect of a block of warehouses all under their management and control, on a certain date gave notice to the rating authority that they had on that date gone out of occupation of one of the warehouses, and on a subsequent date during the year gave notice that they had re-opened the warehouse on that date. During the interval between these dates a bill was posted on the warehouse stating that it was to let; the supply of water under pressure for working the hydraulic lift in the warehouse was cut off, the warehousemen thus saving charges which would otherwise have been payable to the hydraulic company, but the supply could have been turned on again at a moment's notice; and the weights, scales, and trucks for weighing and trucking goods were removed to an adjoining warehouse whence they could easily be got; but the warehousemen were at all times throughout the interval prepared to receive applications for the hire of storage room, and ready and willing to re-open the warehouse and receive goods into it, provided that enough goods were offered to fill half its capacity:—*Held*, that the warehousemen were in occupation of the warehouse during the interval, and therefore were not exempt from liability to pay the portion of the rates applicable to the interval, and that a distress warrant should issue to compel them to pay that portion of the rates. *Bootle Overseers v. Liverpool Warehousing Co.* (85 L. T. 45) distinguished. *Rev. v. Melladew*, 76 L. J. K.B. 262; [1907] 1 K.B. 192; 96 L. T. 189; 71 J. P. 125; 5 L. G. R. 177; 23 T. L. R. 207—C.A.

— **Waterworks—Reservoir—"Land covered with water."**—A reservoir of a water company is "land covered with water," within the meaning of these words in section 211, sub-section 1 (b) of the Public Health Act, 1875, and the water company is therefore entitled to be assessed in respect of the same for the purpose of a general district rate in the proportion of one fourth part only of the net annual value thereof. *Hampton Urban Council v. Southwark and Vauxhall Water Co.*, 69 L. J. Q.B. 72; [1900] A.C. 3; 81 L. T. 547; 48 W. R. 209; 64 J. P. 260—H.L. (E.). And see *Smith's Dock Co. v. Tynemouth Corporation*, 77 L. J. K.B. 175; [1908] 1 K.B. 315; 72 J. P. 64; 6 L. G. R. 223—D.

Recovery—Summary Procedure—Demand—Time—"Rate made under this Act."—A person from whom a sum of money is due to a local authority under an agreement for the supply of water made under section 56 of the Public Health Act, 1875, is a person assessed to a "rate made under this Act" within the meaning of section 256, and may therefore, if in

default for fourteen days after demand in writing, be summoned before a Court of summary jurisdiction. *Elliott v. Russell*, 72 L. J. K.B. 15; [1902] 2 K.B. 748; 88 L. T. 204; 51 W. R. 269; 67 J. P. 158—D.

For the purposes of section 11 of the Summary Jurisdiction Act, 1848, the matter of complaint arises at the date of the demand, and the summons may be taken out within six months from that date. *Ib.*

Recovery of Rate—Want of Publication—Rate under Local Act Assimilated to Poor Rate.]

—It is a good defence to proceedings for the recovery of a poor rate to prove that the rate has not been duly published. *Rea v. Newcombe* (4 Term Rep. 368) followed. The Derby Corporation Act, 1901, enables the Corporation of Derby to make an order for the levy of general district rates in like manner as the borough rate, and provides that in such case the general district rate shall be made, assessed, and levied in the same manner and under the same provisions as the poor rate (but subject to the exemptions applicable to general district rates), and either as a separate rate or together with the poor rate, and that if such an order is made the poor rate shall be recoverable in the manner in which general district rates are recoverable under the Public Health Act:—*Held*, that a rate made under these provisions, comprising both poor rate and general district rate, was in the same position as regards publication as a poor rate, and therefore that on proceedings for the enforcement of the rate evidence to prove that it had not been duly published was admissible. *Le Feuvre v. Miller* (26 L. J. M.C. 175; 8 E. & B. 321) distinguished. *Beeson v. Derby Overseers*, 89 L. T. 47; 67 J. P. 282; 1 L. G. R. 624—D.

—Judgment by Consent Two Years after Accrual of Cause of Action—Delay Excused—Renewal of Debt by Judgment—Mandamus.]—In May, 1895, a rural district council incurred a liability to an urban district council for a supply of water to a contributory place within their district, but refused payment on the ground that the urban council had committed a breach of the contract under which the water was supplied. After a long correspondence the urban council, on March 9, 1897, brought an action to recover 93*l.* The rural council counter-claimed for the breach of contract, and in the result judgment was signed on May 15, 1897, by the urban council by consent for 63*l.* The rural council having declined to issue their precept to the overseers of the contributory place to which the water was supplied for the purpose of raising the money to satisfy the judgment, on the ground that a rate for that purpose would be retrospective, the urban council on October 25, 1897, applied for a *mandamus* to compel them to do so:—*Held*, that as there is no prohibition, express or implied, in the Public Health Act, 1875, against making a rate for special expenses under section 230 of that Act to provide for a liability for which judgment is not obtained until after the end of the rating year in which the liability is incurred, and no principle of law that such a rate cannot be made, the Court had power to grant a *mandamus* to the rural council to issue their precept, and that as the circumstances of the case shewed

a sufficient excuse for the delay in bringing the action, and the motion for a *mandamus* was made in due time after the amount of the debt was first ascertained by judgment, the *mandamus* ought to be granted. *Reg. v. Leigh Rural Council*, 67 L. J. Q.B. 562; [1898] 1 Q.B. 836; 78 L. T. 604; 46 W. R. 471; 62 J. P. 355—C.A.

—Rural District Council Extending into Several Petty Sessional Divisions—Right of Council to Take Proceedings for Recovery of Rate in any Division.]—A rural district council can prefer a complaint to the Justices of any petty sessional division in which any portion of their district is situate to recover contributions in respect of a rate levied under the Public Health Act, 1875, from overseers of any parish in the rural district, although such particular parish may not be situate within the petty sessional division in which the application is made, or although the overseers may not be resident therein. *Caistor Rural Council v. Taylor*, 97 L. T. 281; 71 J. P. 310; 5 L. G. R. 767—D.

—Rate Payable in Instalments—Rateable Value of Premises Reduced after Payment of First Two Instalments—Right to Deduct from Subsequent Instalment Amount Overpaid.]—By a local Act it was provided that the corporation might levy any rate they were authorised to make either in one sum or by any number of instalments, and all the powers, rights, and remedies of the corporation for levying and recovering any such rate should extend and apply to each instalment as if the same were a separate rate. After the respondents had paid two instalments of a rate a reduction was made in the gross estimated rental and rateable value of the respondents' premises, and the rates were accordingly altered:—*Held*, that the various instalments were all part of the same rate, and that in paying the third instalment of the rate the respondents were entitled to deduct the difference between what they had actually paid in the first and second instalments, and what they would have paid if those instalments had been calculated on the reduced rateable value. *Hastings Corporation v. Queen's Hotel Co.*, 97 L. T. 310; 5 L. G. R. 1158; 71 J. P. 369—D.

10. ACCOUNTS AND AUDIT.

Right to See Accounts—Delay.]—The Court refused to issue a *mandamus* directing an urban council to grant inspection of its accounts after the lapse of a year from the date when they were audited, where the applicant for such inspection could shew no substantial reason for seeing the accounts and there was no suggestion that he had been surcharged or otherwise injured. *Rea v. Fleetwood Urban Council*, 68 J. P. 314; 2 L. G. R. 1209—D.

Audit of Accounts—Inspection—"Persons interested"—Ex-member of Urban Authority—Adjudication of Bankruptcy.]—An ex-member and ex-chairman of the finance committee of an urban authority, who had become disqualified as a member by being adjudicated bankrupt, claimed under section 247, sub-section 4 of the Public Health Act, 1875, as a "person interested," the right to inspect the

accounts of the authority when deposited prior to the audit, on the ground that if any irregular or illegal payments were disclosed he might be liable to be surcharged. A Court of summary jurisdiction found that, as a former chairman of the finance committee, the applicant would have been a person interested and entitled to see the accounts had he not been a bankrupt, but that the adjudication of bankruptcy deprived him of this right:—*Held*, that, upon this finding, the mere fact of bankruptcy was not a reason for depriving the applicant of a right to which he was otherwise entitled, since the accounts themselves might affect the dividend he had to pay. *Marginson v. Tildesley*, 67 J. P. 226; 1 L. G. R. 333—D.

District Council—Expenses of Conveyance in Performance of Duties—Repairs—Surcharge.—An urban district council, having purchased an omnibus for the purpose of conveying the members of the council about the district when performing their ordinary duties, expended certain moneys in repairing such omnibus. The district auditor having surcharged this amount,—*Held*, that such surcharge was right. *Rex v. Dolby*, 87 L. T. 27; 66 J. P. 521—D.

Surcharge—Local Authority not Accepting Lowest Tender—System of Checking Quantities Delivered—Certiorari—Jurisdiction of Court.—The Court, upon an application for a writ of *certiorari* by a person aggrieved by the disallowance of an auditor under section 247 of the Public Health Act, 1875, has wider powers than in the ordinary case of a *certiorari*, and has jurisdiction to deal with matters of fact as well as of law. *Rex v. Carson Roberts; Lawrence, Ex parte*, 76 L. J. K.B. 1113; [1907] 2 K.B. 878; 96 L. T. 733; 71 J. P. 288; 5 L. G. R. 1017; 23 T. L. R. 491—D.

The district auditor, under section 247 of the Public Health Act, 1875, disallowed and surcharged certain payments made by the finance committee of a local authority, for shingle, and by the highways committee in respect of a contract for the supply of certain goods, upon the grounds that the shingle as delivered by the contractors must have been short in weight, the deliveries not having been, in his opinion, properly checked, and that the tender for the supply of the goods which was accepted was not the lowest tender, and he disallowed the amount which he estimated as the loss to the ratepayers therefrom. The highways committee stated that they had accepted the tender which they considered the most advantageous. Upon an application for a writ of *certiorari* to bring up and quash the disallowance,—*Held*, that with regard to the shingle there was no evidence of short delivery or of anything beyond possibly a lax method of keeping a check upon the amount delivered, and there was no evidence that the payments were illegal; and with regard to the contract for the supply of goods, inasmuch as the highways committee had *bona fide* come to the conclusion that the tender accepted was the most advantageous one, the disallowance was wrong. *Ib.* On appeal, 77 L. J. K.B. 281; [1908] 1 K. B. 407; 98 L. T. 154; 72 J. P. 81; 6 L. G. R. 268.

Time for Recovering Sums Certified by District

Auditor to be Due by Officers or Members of Local Authority—“Determination” of Appeal by Local Government Board.—The nine calendar months within which proceedings to recover sums, certified by a district auditor to be due in the accounts of officers or other persons, have to be taken under the provisions of section 9 of the Poor Law Amendment Act, 1849, commence to run, where there has been an appeal to the Local Government Board, from the date of the final determination of the appeal by that Board. If, therefore, the Board has been asked to reconsider its first determination and has done so, the nine months run from the date of such reconsideration. *Brooks v. Dolby*, 66 J. P. 532—D.

Auditor—Urban Sanitary Authority—Remuneration—Duties.—Where the mayor, aldermen, and burgesses of a borough, acting by the council, are an urban sanitary authority under section 6 of the Public Health Act, 1875, the elective auditors of the borough, being by section 246 of that Act auditors to the urban sanitary authority, are entitled to remuneration under that section for auditing the accounts of the urban sanitary authority. Their duties in this respect are not confined to seeing that there are vouchers in respect of items for which the urban sanitary authority claims credit; but they must make a reasonable examination to see that the payments made are made within the duties of such authority. *Thomas v. Devonport Corporation*, 69 L. J. Q.B. 51; [1900] 1 Q.B. 16; 81 L. T. 427; 48 W. R. 89; 63 J. P. 740—C.A.

11. APPEALS.

Appeal to Local Government Board—Local Act.—Section 31 of the Portsmouth Corporation Act, 1883, which provides that any person aggrieved by any order, determination, or decision of the corporation under the Act may appeal to quarter sessions, or may appeal to the Local Government Board “under the provisions of” section 268 of the Public Health Act, 1875, gives an alternative appeal to the Local Government Board in the case of every order, determination, or decision of the corporation under the Act of 1883, and not merely in cases similar to those in which there is an appeal to that Board under section 269 of the Act of 1875—that is, in cases where the corporation are empowered to recover summarily any expenses incurred by them, or to declare such expenses to be private improvement expenses. *Rex v. Local Government Board; Street, Ex parte*, 96 L. T. 650; 71 J. P. 297; 5 L. G. R. 844—C.A.

12. OTHER MATTERS.

Bakehouses—Necessity of Certificate.—*See SALE OF GOODS.*

Charge on Premises for Sewering and Paving—Discharge.—*See SETTLED LAND.*

Charities—Jurisdiction in Case of.—*See CHARITY.*

District Rate—Preferential Payment in Bankruptcy.—*See Mannesman Tube Co., In re*, 70 L. J. Ch. 565; [1901] 2 Ch. 93.

Documents—Custody of Parish—Tithe Apportionment Map.]—See ECCLESIASTICAL LAW.

Fees—Resolution of Local Authority as to.]—See WEIGHTS AND MEASURES.

Hackney Carriages.]—See HACKNEY CARRIAGE.

Highways—Repair of.]—See WAY.

Information—Amendment of.]—See Batt v. Mattinson, ante, JUSTICE OF THE PEACE, col. 1168.

Markets—As to.]—See MARKETS.

Meat—Unsound—Exposure—Aiding and Abetting Commission of Offence.]—See Callow v. Tillstone, ante, JUSTICE OF THE PEACE.

Procedure Section—Repeal of.]—See Batt v. Mattinson, 82 L. T. 800; post, STATUTE.

River Pollution—Liability for.]—See WATER.

Road—Repair of.]—See WAY.

Stone-throwing—Information.]—See JUSTICE OF THE PEACE.

Street—Altering Gradient of—Injury to Individual—Remedy.]—See STATUTE.

LOCAL LOANS.

Statute.]—7 Edw. 7 c. 36 is the Public Works Loans Act, 1907.

LODGING-HOUSE KEEPER.

Liability for Loss of Boarder's Goods.]—The plaintiffs were guests in the defendant's boarding-house for reward. There was only one key to their bedroom door, and this key, they were told, they were not to take away, as the servants required it for getting into the room; they were also refused a second key, being told that they need be under no apprehension, as every one in the house was known. There were no keys to a chest of drawers in the plaintiffs' bedroom, and, although they asked for a key, this was not supplied. The female plaintiff locked some valuable jewellery in a satchel in one of the unlocked drawers, and during her absence from the room in the daytime the jewellery was stolen by another guest, who, it subsequently appeared, was well known to the police as a thief. The defendant was not aware of the character of this guest, but he had been admitted by the defendant without any reference or introduction or enquiry as to his respectability. At the close of the plaintiffs' case, DARLING, J., held that there was no case to go to the jury, being of opinion that a boarding-house keeper was under no duty to take care of his guests' goods, and was only liable for misfeasance:—*Held*, that the evidence raised a question for the jury whether there was a failure of reasonable care on the part of the defendant to which the loss of the plaintiffs' jewellery was attributable, and that there must be a new trial. *Scarborough v. Cosgrove*, 74 L. J. K.B. 892; [1905] 2 K. B. 805; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754—C.A.

Per COLLINS, M.R., and MATHEW, L.J. A boarding-house or lodging-house keeper undertakes by implication of law, although nothing is expressed, to take due and reasonable care of a guest's baggage brought to the boarding-house or lodgings, and is liable for the negligence of a servant in the course of his employment where by such negligence the guest's baggage is lost. Judgments of LORD CAMPBELL, C.J., and COLERIDGE, J., in *Dunsey v. Richardson* (23 L. J. Q.B. 217; 3 E. & B. 144) approved. *Holder v. Southby* (29 L. J. C.P. 246; 8 Q. B. (N.S.) 254) not followed. *Culpe's Case* (8 Co. Rep. 32a; 1 Sm. L.C. (14th ed.), 119) explained. *Id.*

Per ROMER, L.J.—A person who carries on the business of a boarding-house keeper for reward is bound to carry it on with reasonable care, having regard to the nature and normal conduct of the business as known to the guest or as represented to the guest by him; and if by reason of a breach of that duty the luggage of the guest is lost, the boarding-house keeper is liable for the loss to the guest. *And see* LANDLORD AND TENANT.

Common Lodging-house.]—See LOCAL GOVERNMENT, col. 1329.

LONDON.

See METROPOLIS.

LOTTERY.

See GAMING AND WAGERING.

LUGGAGE.

See CARRIER.

LUNATIC.

1. *Jurisdiction in Lunacy*, 1431.
2. *Petition for Reception Order*, 1432.
3. *Inquisition*, 1432.
4. *Committee*, 1433.
5. *Acts of Lunatic*, 1433.
6. *Property*, 1434.
7. *Maintenance*, 1437.
8. *Allowance to Next-of-Kin*, 1437.
9. *Debts of Lunatic*, 1438.
10. *Bankruptcy of Lunatic*, 1438.
11. *Pauper*, 1438.
12. *Lunatic Trustee*, 1439.
13. *Evidence*, 1440.
14. *Person of Unsound Mind not so Found*, 1441.
 - (a) *Detention*, 1441.
 - (b) *Maintenance*, 1441.
 - (c) *Property*, 1442.
 - (d) *Trustee*, 1444.

1. JURISDICTION IN LUNACY.

Conditional Devise—Election to Take Under or Against Will—Power of Judge to Order Committee to Exercise on Behalf of Lunatic.—The Court in Lunacy has power under its general jurisdiction to direct the committee of a lunatic to elect on behalf of the lunatic to take under a conditional devise in a will, even, if compliance with the condition should involve the alienation of an interest of the lunatic in other real estate, provided that it is, in the opinion of the Court, for the benefit of the lunatic to make such election. *Sefton (Earl), In re*, 67 L. J. Ch. 518; [1898] 2 Ch. 378; 78 L. T. 765; 47 W. R. 49—C.A.

The alienation of the lunatic's interest in real estate under such circumstances is not contrary to the statute *De Prerogativa Regis* (17 Edw. 2, c. 10) according to the true construction of that statute. *Ib.*

The powers conferred on the Judge in Lunacy by Part 4 of the Lunacy Act, 1890, do not include the power to direct the committee to make such an election; but the sections in that part of the Act are enabling sections, and do not prevent the exercise of the general jurisdiction of the Court in such a way. *Ib.*

In considering what is for the benefit of the lunatic in such a case the Court should not look merely at his pecuniary benefit, but act for him as if he were of sound mind, and actuated by such motives as a reasonable man would be. *Ib.*

Jurisdiction of Master—Stock in Joint Names of Lunatic and Another—Lunatic a Retired Trustee—Vesting Order—“Management and administration.”—L. and another person were jointly entitled to certain funds as trustees of a settlement. In 1887 L. retired from the trust, and a new trustee was appointed. The trust property was then transferred to the new trustees, with the exception of a sum of 430l. 11s. 8d. Consols, which was overlooked. L. became a lunatic in 1896. The present trustees of the settlement applied for a vesting order of the 430l. 11s. 8d. Consols:—*Held*, that what was proposed to be done could not properly be described as a matter in the administration or management of the lunatic's estate, and the Master had no jurisdiction to make the order. *Fuller, In re* (69 L. J. Ch. 738; [1900] 2 Ch. 651), distinguished. *Langdale, In re*, 70 L. J. Ch. 38; [1901] 1 Ch. 3; 83 L. T. 451; 49 W. R. 177—C.A.

Alien Domiciled in United States—Temporary Residence in England—Inquisition—Jurisdiction.—There is jurisdiction to direct an inquisition as to the lunacy of an alien domiciled abroad who is temporarily resident in this country, although all the property of the alleged lunatic, except such personal chattels and cash (if any) as he may have brought with him, is situate abroad. *Burbridge, In re*, 71 L. J. Ch. 271; [1902] 1 Ch. 426; 86 L. T. 331—C.A.

Foreign Subject—English Personalty—Declaration of Lunacy—“Tuteur”—Right to Give Valid Discharges.—Where there has been a judicial declaration of the status of lunacy by a foreign Court of competent jurisdiction, and

the *tuteur* appointed by the Court on the lunatic's behalf has the latter's property vested in him, so that he has the right to retain and deal with, without becoming the actual owner of, the lunatic's property, an application on behalf of the lunatic and his *tuteur* for the transfer and payment of his personal property situate in England to the *tuteur* properly may be and generally ought to be granted. The rule equally applies whether the claim is by a creditor against a debtor, or is to a trust fund in Court. *Thiery v. Chalmers, Guthrie & Co.*, 69 L. J. Ch. 122; [1900] 1 Ch. 80; 81 L. T. 511; 48 W. R. 148—Kekewich, J.

Foreign Subject Resident in France—Declaration of Lunacy by French Court—Appointment of Curator by Family Council—Resolution of Council Authorising Curator to get in Lunatic's Personalty in England—Approval of Resolution by French Court—Property not Required for Maintenance—Exercise of Discretion—Transfer to Curator.—Where a person, who was born in Spain, but had acquired an American domicile and had for many years been resident in France, was declared a lunatic by the French Court, and a curator of his person and estate was, according to the law of France, appointed by his family council, and was authorised by resolution (which was subsequently approved by the French Court) to get in the lunatic's personalty in England, the English Court, in the exercise of their discretion and on the application of the curator, made an order under section 134 of the Lunacy Act, 1890, for the transfer to him of stocks and securities in this country of very considerable value belonging to the lunatic, although the same were not required for the maintenance of the lunatic, who was stated to be a millionaire, the bulk of his property being in France. *De Larragoiti, In re*, 76 L. J. Ch. 433; [1907] 2 Ch. 14; 96 L. T. 862—C.A.

2. PETITION FOR RECEPTION ORDER.

Libel—Absolute Privilege.—Proceedings before a Justice of the peace, acting as the judicial authority under the Lunacy Act, 1890, upon a petition under the Act for the reception of an alleged lunatic, are judicial proceedings, so that statements in the statement of particulars accompanying the petition are absolutely privileged. *Hodson v. Pare*, 68 L. J. Q.B. 309; [1899] 1 Q.B. 455; 80 L. T. 13; 47 W. R. 241—C.A.

3. INQUISITION.

Right to Traverse.—A lunatic so found by inquisition is entitled to traverse the inquisition as a matter of right, but the Lords Justices should satisfy themselves that the application is *bona fide*, and that the alleged lunatic is competent to judge of what he is doing in making his application for a traverse, and is capable of exercising a volition in the matter. *Cumming, In re* (21 L. J. Ch. 753; 1 De G.M. & G. 537), followed. *Gilchrist, In re*, 76 L. J. Ch. 63; [1907] 1 Ch. 1; 95 L. T. 739—C.A.

Lunatic so Found by—Limited Finding—Incapacity only to Manage Affairs—Action by Committee—Committee Joined as Plaintiff.—A

person of unsound mind who is found by inquisition, under section 98, sub-section 2 of the Lunacy Act, 1890, to be incapable only of managing his affairs, but not of managing himself, or of being dangerous to himself or to others, has yet been found a lunatic within the meaning of the Lunacy Act, 1890. Should an action be commenced in the name of such a person the committee must, according to the practice of the Court, be joined as co-plaintiff. *Townshend (Marquis) v. Robins*, 77 L. J. Ch. 167; [1908] 1 Ch. 201; 97 L. T. 884—Swinfen Eadler, J.

Examination of Lunatic by Medical Officer—Order by Justices for Payment of Reasonable Remuneration to Medical Officer—Reasonable Expenses.—Under section 14 of the Lunatic Asylums (Ireland) Act, 1875 [cf. section 285 of the Lunacy Act, 1890], Justices cannot make an order for payment to a medical officer of a sum "for loss of time" as well as for professional services in the examination of a lunatic. *Rez v. Delvin Union*, [1903] 2 Ir. R. 15—K.B.D.

The words "other reasonable expenses" in the same section are not confined to expenses of the medical officer, but include expenses of the police incurred in connection with the conveyance of the lunatic prior to his committal (MADDEN, J., *dissentiente*). *Ib.*

4. COMMITTEE.

Appointment by Foreign Court—Payment to Foreign Committee—Discretion of Court.—A committee appointed by a foreign Court of the estate of a lunatic residing within its jurisdiction, but domiciled in England, cannot recover, as of right, personal property of the lunatic situate in England. But the English Court has a discretion, and may exercise the discretion by paying over the property to such a committee without requiring evidence that the whole of such money is needed for the maintenance of the lunatic. *New York Trust and Securities Co. v. Keyser*, 70 L. J. Ch. 330; [1901] 1 Ch. 666; 84 L. T. 43; 49 W. R. 371—Cozens-Hardy, J.

5. ACTS OF LUNATIC.

Contract to Purchase Real Estate—Voidable Contract—Completion of Purchase by Committee—Conversion.—A contract by a person of unsound mind for the purchase of an estate is voidable. If the purchase is completed by the committee by the direction of the Master in Lunacy a conversion is effected, and, on the death of the lunatic intestate, the estate descends to his heir. *Baldwyn v. Smith*, 69 L. J. Ch. 386; [1900] 1 Ch. 588; 82 L. T. 616; 48 W. R. 346—Byrne, J.

Power of Attorney—Execution by Person of Unsound Mind—Validity.—Where a power of attorney is executed by a person of unsound mind, it must be treated as invalid unless it be proved to have been executed in a lucid interval. *"Daily Telegraph" Newspaper Co. v. M'Laughlin*, 73 L. J. P.C. 95; [1904] A.C. 776; 91 L. T. 233; 20 T. L. R. 674—P.C.

Special Power of Appointment—Marriage

Settlement—Committee—Power to Exercise—Fiduciary Character.—Where a special power of appointment in favour of children is by a marriage settlement vested in the husband and wife jointly, and the wife has become lunatic, there is power under section 128 of the Lunacy Act, 1890, to authorise the committee of the lunatic's estate to join on her behalf in exercising the power, for such a power is vested in the lunatic "in the character of trustee" within the words of that section. So held, by the COURT OF APPEAL (COZENS-HARDY, L.J., dissenting). *A., In re*, 73 L. J. Ch. 648; [1904] 2 Ch. 328; 91 L. T. 238; 53 W. R. 172—C.A.

Power of Disposition—Deed made in Lucid Interval—Validity.—A lunatic so found is, until the inquisition has been superseded, absolutely incapable of making a valid deed disposing of his property even in a lucid interval, as such a deed would conflict with the rights and powers of the Crown and of the committee over the lunatic's property. *Sir Benjamin Wright, Ex parte* (1 Vern. 155), considered. *Walker, In re*, 74 L. J. Ch. 86; [1905] 1 Ch. 160; 91 L. T. 713; 53 W. R. 177—C.A.

6. PROPERTY.

Personal Estate Ordered to be Expended in Repairs or Permanent Improvement of Real Estate—Jurisdiction to Order Charge on Realty—Delay—Apportionment of Costs between Realty and Personality.—In exercising jurisdiction under section 118 of the Lunacy Act, 1890 (which enables the Judge to order moneys expended under his order for the permanent improvement of the lunatic's property to be a charge upon the improved property), the Court can take into consideration what is fair between the persons respectively entitled to the real and personal estate as well as what is for the benefit of the lunatic himself. If this jurisdiction is not taken into consideration at the time when the order authorising the expenditure is made, the Court can afterwards exercise it on an independent application; but if the jurisdiction is taken into consideration at the time when the order authorising the expenditure is made, it cannot be afterwards re-exercised. *Gist, In re*, 73 L. J. Ch. 251; [1904] 1 Ch. 398; 90 L. T. 35; 52 W. R. 422—C.A.

An application by the next-of-kin or heir asking the Court to exercise its jurisdiction under section 118 in respect of moneys expended under a former order should be made without undue delay. *Ib.*

Per COZENS-HARDY, L.J.—Speaking generally, it is a good rule that the Master, in making an order for improvements, should either take into consideration section 118 at the time, and express that he has done so, or should state that the order is to be without prejudice as to how the expenditure ought to be ultimately borne. If neither course is adopted, a clear and strong case must be made to induce the Court to exercise its jurisdiction afterwards under section 118. *Ib.*

In the administration in lunacy of a large agricultural estate, having a rental of over 3,000*l.*, the Court considered that moneys ex-

pended under former orders out of the personal estate—first, in converting a malthouse into cottages; secondly, on a new iron pit-wheel; and thirdly, on new roofs to barns—might properly be regarded as ordinary expenses in the due management of the lunatic's property, and were not such as to call for a charge on the real estate under section 118 at the instance of the prospective next-of-kin, especially where the application for the charge was not made till some years after the expenditure. *Ib.*

Where the costs in the lunacy of proceedings relating as well to the real as to the personal estate had for many years been directed to be paid out of the personal estate alone, the Court refused an application by the next-of-kin to charge one moiety of the amount so paid upon the real estate. *Ib.*

Seizure of Goods after Notice of Summons or Appointment of Receiver.]—The property of a person of unsound mind not so found by inquisition does not come under the protection of the Court in Lunacy from the moment when a summons for the appointment of a receiver of his property is taken out under section 116 of the Lunacy Act, 1890, but from the moment when some order is made shewing that the Court has taken the property under its protection. *Clarke, In re*, 67 L. J. Ch. 234; [1898] 1 Ch. 336; 73 L. T. 275; 46 W. R. 337—C.A.

The Court in Lunacy cannot prevent a judgment creditor from issuing execution against the lunatic's property or deprive him of the fruits of such execution, if the creditor can reach it by ordinary writs of execution without interfering with the possession of an officer in the Court in Lunacy. The property in goods seized under a *fi. fa.* remains in the debtor till sale, but subject to the security of the execution creditor. *Ib.*

Lunatic Tenant for Life—Consent to Sale by Trustees of Settlement—Consent Required by Settled Land Act—Person of Unsound Mind not so Found—Quasi-committee—Consent of Quasi-committee on Behalf of Lunatic.]—The consent of a tenant for life required by section 56, subsection 2 of the Settled Land Act, 1882, to the exercise of a power of sale by the trustees of a settlement is not given by him in the character of trustee, nor as a check upon the power of sale within the meaning of section 128 of the Lunacy Act, 1890, and the Judge in lunacy has therefore no jurisdiction under section 128 to authorise the quasi-committee of a lunatic tenant for life to give the consent on behalf of the lunatic. *Baggs, In re* (63 L. J. Ch. 612; [1894] 2 Ch. 416n.), followed. *De Moleyn's and Harris's Contract, In re*, 77 L. J. Ch. 9; [1908] 1 Ch. 110; 97 L. T. 680—Joyce, J.

Property at English Bank—Person of Unsound Mind in Belgium—Right of Foreign Sue.]—In 1856 G., a German, intermarried with M., and went to reside at Brussels, where he died in 1892. M. took out administration to him in this country, and obtained the transfer of G.'s property into her name. In 1897 M. became of unsound mind, and D. was appointed her *administrateur provisoire* by the Belgian Court of First Instance. D. obtained administration *de bonis non* to G., and was

authorised by the Belgian Court of First Instance to bring this action on behalf of M. The bank declined to give up to D. property held by it for M., on the ground that D. could not give it a proper discharge. M. was joined as a co-plaintiff, suing by D. as her next friend:—*Held*, that the bank could not be ordered to deliver the property to D. *Didisheim v. London and Westminster Bank*, 81 L. T. 108—North, J.

Lunatic Resident out of Jurisdiction—Stock Standing in Name of Lunatic—Transfer—Discretion of Court.]—Where stock is standing in the name of a person residing out of the jurisdiction of the Court who has been declared lunatic, the person in whom the property of the lunatic has been vested according to the law of the place where he resides is not entitled as a matter of right to an order under section 134 of the Lunacy Act, 1890, for a transfer of the stock into his name. The section gives the Judge in Lunacy a discretion whether, and under what circumstances, he will make such an order. *Knight, In re*, 67 L. J. Ch. 136; [1898] 1 Ch. 257; 77 L. T. 773; 46 W. R. 289—C.A.

Property in England—Lunatic Domiciled in France—Transfer to French Tuteur.]—Where there has been a judicial declaration of the status of lunacy and the applicant on the lunatic's behalf for the transfer to him of property belonging to the lunatic has the latter's property vested in him in the sense that he has the right to retain and deal with, without becoming the actual owner of, the lunatic's property, the application may properly be and generally ought to be granted. The Court accordingly granted the application of the duly appointed *tuteur* of a person domiciled in France and there declared lunatic, though not so found in England, for the transfer to him of personal property of the lunatic in England. *Thierry v. Chalmers*, [1900] 1 Ch. 80; 81 L. T. 511; 48 W. R. 148—Kekewich, J.

Order to Seize Money in Savings' Bank—Power of Justices to State Case.]—An order under section 299 of the Lunacy Act, 1890, can be made to seize money standing in the lunatic's name in the Post-Office Savings' Bank. Justices under that section are not a Court of summary jurisdiction, and have therefore no power to state a Case. *Beihel, In re*, 80 L. T. 492; 63 J. P. 453; 19 Cox C.C. 262—D.

Judgment Creditor—Charging Order—Fund in Court in Chancery Division.]—Where a person beneficially entitled to a testator's estate has been found a lunatic and a committee of the estate appointed, and an action has been subsequently brought for the administration of the estate of the testator, under which various sums have been paid into Court in the Chancery Division to the credit of the action, the Court will decline to order the transfer of the funds to Lunacy without first providing for the claim of a judgment creditor who has obtained a charging order upon the funds in Court. *Brown, In re; Llewellyn v. Brown*, 69 L. J. Ch. 234; [1900] 1 Ch. 489; 82 L. T. 83; 48 W. R. 461; 64 J. P. 327—Cozens-Hardy, J.

Practice—Transfer of Stock—Title of Order.]—Orders made under section 133 of the Lunacy

Act, 1890, directing the transfer of stock of a lunatic ought to be intituled "In the matter of the Lunacy Acts, 1890 and 1891," as well as in the matter of the particular lunacy; but orders made under section 116, sub-section 1 (d), following form 1 (e) in the schedule to the Rules in Lunacy, 1892, need not be so intituled. *Purvis, In re*, 73 L. J. Ch. 281; [1904] 1 Ch. 373; 90 L. T. 394—Vaughan Williams, L.J.

Payment of Estate Duty—Charge—Realty.
—See *Hole, In re*; *Davies v. Witts*, 74 L. J. Ch. 689; *post*, REVENUE.

7. MAINTENANCE.

Allowance Paid in Advance—Committee of Person—Death of Lunatic—Liability to Account.]
—Where an allowance made under an order in lunacy for the maintenance of the lunatic has as a mere matter of convenience between the committees of the estate and person been paid quarterly in advance to the committees of the person, the lunatic's executors after his death are entitled as against the committees of the person to an enquiry as to what sum out of the moneys last advanced before the death should be allowed for the maintenance of the lunatic up to the date of his death. The committees of the person cannot properly claim to retain the whole sum paid to them without accounting, if the lunatic has died before the expiration of the whole period in respect of which the payment was made. *Strangeways v. Read*, 67 L. J. Ch. 581; [1898] 2 Ch. 419; 79 L. T. 245; 46 W. R. 671—Romer, J.

Maintenance of Lunatic's Children—No Committee Appointed—Sale of Lunatic's Business while Lunatic was under Restraint—Application of Lunatic's Estate, with consent of Wife, by Third Party for Maintenance and Education of Lunatic's Children—Refusal of Lunatic on his Release to Ratify this Expenditure—Right to Recover Proceeds of Sale of Business.]—The plaintiff, who had carried on a draper's business, was confined in a lunatic asylum from 1882 to 1894, but no committee of his estate had been appointed. In 1888 the plaintiff's business was sold by the defendant, and the proceeds of the sale were with the authority and consent of the plaintiff's wife expended by the defendant in the maintenance of the plaintiff's children (not of tender years) while he was in the asylum. The plaintiff upon his release in 1894 refused to ratify what had been done, and brought an action against the defendant to recover the proceeds of sale of the business:—*Held*, that the plaintiff not being legally liable to maintain the children while in the asylum, and no committee having been appointed of his estate who might have sanctioned such expenditure, the plaintiff could recover the proceeds of the sale of his business as money had and received to his use. *Healing v. Healing*, 51 W. R. 221—Ridley, J. *And see* PAUPER, next col. and col. 1441.

S. ALLOWANCE TO NEXT-OF-KIN.

Administration—Lunatic Intestate—Allowances to Presumptive Next-of-kin—Death of one of Presumptive Next-of-kin in Lifetime of Intestate—Liability of Children to bring Allowances to Parent into Hotchpot.]—Under

various orders in lunacy allowances were made to the presumptive next-of-kin of a lunatic. The orders provided that the persons to whom such allowances were made should bring them into account in the event of their surviving the lunatic. The lunatic died a bachelor and intestate. One of the presumptive next-of-kin, to whom allowances had been made, died in the lifetime of the lunatic, leaving children:—*Held*, that the children took *per stirpes* under the Statute of Distributions as representing their parent, but were under no obligation to bring into account the allowances made to her. *Gist, In re*; *Gist v. Timbrill*, 75 L. J. Ch. 657; [1906] 2 Ch. 280; 95 L. T. 41; 22 T. L. R. 637—C.A. Affirming, 54 W. R. 104—Swinfen Eady, J.

9. DEBTS OF LUNATIC.

Statute-barred Debt.]—The Court will not pay debts contracted by a lunatic before he became of unsound mind, when such debts are barred by the Statute of Limitations. So *held* on section 95 of the Lunacy (Ireland) Act, 1871, which corresponds to section 116, sub-section 5 of the Lunacy Act, 1890. *Kenrick, In re*, [1907] 1 Ir. R. 480—L.C.

10. BANKRUPTCY OF LUNATIC.

Death—Undertaking by Solicitor for Payment—Enforcement.]—In the bankruptcy of A., who was a lunatic, a claim of 1,000*l.* was made by K. for services rendered to the bankrupt, which claim had been allowed by the trustee in bankruptcy and paid in full. The estate being realised, the whole of the creditors were paid in full, leaving a surplus over. The official solicitor, having been appointed committee of the estate in lunacy, applied for an order on K. to refund the 1,000*l.*, and K. gave an undertaking that he would refund same. After the undertaking had been given the bankrupt died, and K. thereupon contended that the official solicitor was no longer in a position to enforce the undertaking, as the only person entitled to the 1,000*l.* was the lunatic's executrix, who it was said had acquiesced in the payment:—*Held*, that the official solicitor was entitled to enforce the undertaking and that the money should be paid into the bankruptcy estates account, the Court directing that it should not be paid out to the executrix without notice to K. *Aytoun, In re*; *Official Solicitor, ex parte*, 20 T. L. R. 252—Bucknill, J.

11. PAUPER.

Maintenance—Arrears—Debt—Claim in Administration of Deceased Lunatic's Estate.]—A pauper lunatic who had been maintained by the guardians since November 1, 1889, became entitled on October 14, 1895, to a sum of money as one of the next-of-kin of an uncle. The guardians, in February, 1898, applied in lunacy for the appointment of a receiver of the fund and payment thereof of the cost of the lunatic's maintenance for the then preceding six years. On January 31, 1899, an order was made in lunacy appointing a receiver and directing him to pay to the guardians 95*l.* 14*s.* for the maintenance of the lunatic from October 14,

1895, to February 14, 1899, and to apply the balance for the future maintenance of the lunatic. The lunatic died on June 29, 1899:—*Held*, that the claim of the guardians for the maintenance of the lunatic for the part of the six years prior to October 14, 1895, was a valid legal debt and was not affected by the order in lunacy, and the guardians could enforce their claim against the lunatic's estate now that she was dead. *Taylor, In re; Edmonton Union v. Deeley*, 70 L. J. Ch. 332; [1901] 1 Ch. 480; 84 L. T. 35—C.A.

— **Expenses of—Limit of Charge—Pauper Lunatic Settled in Parish outside Asylum Area.**—

The visiting committee of a lunatic asylum are not entitled under section 283 of the Lunacy Act, 1890, to fix a greater sum than 14s. to be charged for the expenses of the lodging and maintenance of pauper lunatics in the asylum, even in the case of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs. *Fitch v. Bermondsey Guardians*, 73 L. J. K.B. 985; [1904] 2 K.B. 709; 91 L. T. 655; 53 W. R. 153; 68 J. P. 538; 2 L. G. R. 1241—D.

— **Out-union Patient—Amount Chargeable.**—

The visiting committee of a lunatic asylum are not empowered under sub-section 3 of section 283 of the Lunacy Act, 1890, to fix a weekly sum, not exceeding 14s., in respect of the maintenance in the asylum of out-county pauper lunatics, in addition to the weekly sum already fixed by them, under sub-section 1, in respect of the maintenance of each pauper lunatic in the asylum; but where they have, under sub-section 1, fixed a weekly sum of less than 14s. in respect of each pauper lunatic, they have power to differentiate between in-county and out-county pauper lunatics by fixing the maximum weekly sum of 14s. in respect of out-county pauper lunatics. *Fitch v. Bermondsey Guardians*, 74 L. J. K.B. 250; [1905] 1 K.B. 524; 92 L. T. 843; 53 W. R. 303; 3 L. G. R. 300; 69 J. P. 102; 21 T. L. R. 206—C.A.

Summary Reception Order—Jurisdiction of Justice—Place where Pauper Resides.—Where a pauper who is living in a workhouse locally situate outside the union to which he is chargeable becomes a lunatic, a Justice sitting in such union is, by virtue of section 56 of the Poor Law Amendment Act, 1844, a "Justice having jurisdiction in the place where the pauper resides," within the meaning of section 14 of the Lunacy Act, 1890, and has therefore jurisdiction to make a summary reception order with regard to the lunatic. *Reg. v. Bell*, 69 L. J. Q.B. 622; [1900] 2 Q.B. 891; 82 L. T. 711; 64 J. P. 789; 19 Cox C.C. 515—D.

12. LUNATIC TRUSTEE.

Power of High Court to Appoint New Trustee and Make Vesting Order.—On an application for the appointment of a new trustee of a settlement in lieu of a surviving trustee of unsound mind, and for a vesting order as to a sum of Consols standing in his name,—*Held*, that, while there was power under the Trustee Act, 1893, to appoint a new trustee in such case, there was *semble* no power to make a vesting

order, and that application ought therefore to be made to the lunacy jurisdiction. *J. M. In re*, [1899] 1 Ch. 79; 79 L. T. 459—Stirling, J.

Jurisdiction of Master—Stock in Joint Names of Lunatic and Another—Lunatic a Retired Trustee—Vesting Order.—"Management and administration."—L. and another person were jointly entitled to certain funds as trustees of a settlement. In 1887, L. retired from the trust, and a new trustee was appointed. The trust property was then transferred to the new trustees, with the exception of a sum of 430l. 11s. 3d. Consols, which was overlooked. L. became a lunatic in 1896. The present trustees of the settlement applied for a vesting order of the 430l. 11s. 3d. Consols:—*Held*, that what was proposed to be done could not properly be described as a matter in the administration or management of the lunatic's estate, and the Master had no jurisdiction to make the order. *Fuller, In re* (69 L. J. Ch. 738; [1900] 2 Ch. 551), distinguished. *Langdale, In re*, 70 L. J. Ch. 38; [1901] 1 Ch. 3; 83 L. T. 451—C.A.

The powers of administration and management conferred on the Masters by sub-section 1 of section 27 of the Lunacy Act, 1891, are not confined to the powers of management and administration contained in the group of sections (116–130) so headed in the Lunacy Act, 1890, but extend to any powers of management and administration properly so called in the Act of 1890. *Dicta in Browne, In re* (63 L. J. Ch. 729, 732, 733; [1894] 3 Ch. 412, 417, 419), followed. *Id.*

Trustee Criminal Lunatic—Vesting Order—Jurisdiction.—Although by virtue of section 340 of the Lunacy Act, 1890, the Lords Justices have no power to make a vesting order of the trust property under that Act in the case of a criminal lunatic who is a trustee, there is jurisdiction to make such an order under section 5 of the Trustee Act, 1850. The powers of the Lords Justices under the Trustee Act, 1850, are, notwithstanding the repeal of section 5 by section 342 of the Lunacy Act, 1890, preserved, as regards criminal lunatic trustees, by the saving clause in the same section. *R., In re*, 75 L. J. Ch. 421; [1906] 1 Ch. 730; 94 L. T. 494; 54 W. R. 578—C.A.

Trustee of Unsound Mind—Vesting Order—Transfer of Stock—Form of Order—Costs.—An order made under section 136, sub-section 1 of the Lunacy Act, 1890, in the form approved by the Court in *Gregson, In re* (62 L. J. Ch. 764; [1893] 3 Ch. 233), vesting in a person the right to call for a transfer, and to transfer into his own name a sum of Government stock standing in the name of a lunatic trustee and directing him to transfer the same into his own name accordingly, is not an order appointing a person to make a transfer of stock within the meaning of section 137 of the Act of 1890, and it is not necessary to appoint an officer of the bank to make the transfer. *C. M. G., In re*, 67 L. J. Ch. 468; [1898] 2 Ch. 324; 78 L. T. 669—C.A.

13. EVIDENCE.

Order of Master in Lunacy in England.—The order of a Master in Lunacy in England is

prima facie evidence of the facts stated therein, and if uncontradicted ought to be regarded as sufficient evidence, being made by a competent tribunal in a matter within its jurisdiction, not only in this country, but in all his Majesty's dominions. *Harvey v. Regem*, 70 L. J. P.C. 107; [1901] A.C. 601; 84 L. T. 849—P.C.

14. PERSON OF UNSOUND MIND NOT SO FOUND.

(a) *Detention.*

"Lawfully detained"—Appointment of Person to Act as Committee—Jurisdiction.—A person of unsound mind not so found who is detained in an asylum under the Idiots Act, 1886, is "lawfully detained" within the meaning of section 116, sub-section 1 (c) of the Lunacy Act, 1890, and there is therefore jurisdiction to appoint a person under section 116 to exercise the powers of a committee in the case of such a person. *Watkins, In re* (65 L. J. Ch. 636; [1896] 2 Ch. 336), considered and distinguished. *Whalley, In re*, 75 L. J. Ch. 323; [1906] 1 Ch. 565; 94 L. T. 423; 54 W. R. 349—C.A.

—Powers of Administration—Order Appointing Receiver—Determination of Detention.—An order appointing a receiver and manager of the property of a person of unsound mind not so found, made under section 116, sub-section 1 (c) of the Lunacy Act, 1890, on the ground that such person was "lawfully detained as a lunatic though not so found by inquisition," does not come to an end by reason of the person ceasing to be under detention. A further order is required to discharge it, and the Court will not make such an order unless satisfied that the person in question has ceased to suffer from the delusions which caused the detention. *B. A. S., In re*, 67 L. J. Ch. 453; [1898] 2 Ch. 392; 78 L. T. 638—C.A.

(b) *Maintenance.*

Beneficiary of Unsound Mind not so found by Inquisition—Absolute Interest—Jurisdiction of Chancery Division—Payment of Income to Person undertaking to Apply it for Benefit of Beneficiary.—A lady who was absolutely entitled to a fund in the hands of trustees under the trusts of a settlement was of unsound mind, but not so found by inquisition, and she was in confinement in an institution in Germany, having been placed there by her father in accordance with the requirements of the German law. The fund consisted of a sum of India Stock and money invested on mortgage. The lady, by a next friend, applied by an originating summons in the Chancery Division for directions as to her maintenance:—*Held*, that on the stock being transferred into Court, and the deeds of the mortgaged property being deposited in Court, the interest on the stock should, until further order, be paid to the sister of the plaintiff, who was one of the trustees, upon her undertaking to apply it and the interest on the mortgage debt for the maintenance, comfort, and benefit of the plaintiff. *Carr's Trusts, In re*; *Carr v. Carr*, 73 L. J. Ch. 459; [1904] 1 Ch. 792; 90 L. T. 592; 52 W. R. 595—C.A.

Claims of Wife and Family.—A Judge in

Lunacy may, in the exercise of his discretion, apply property belonging to a person of unsound mind not so found in payment for his maintenance in a pauper lunatic asylum in relief of the rates, although the property may not be more than sufficient to maintain the family of the person of unsound mind. *Tye, In re*, 69 L. J. Ch. 153; [1900] 1 Ch. 249; 81 L. T. 743; 48 W. R. 276—C.A.

Section 299 of the Lunacy Act, 1890, enables Justices to make summary orders in certain cases to recover expenses against a lunatic's estate, but does not affect the jurisdiction of the Judges in Lunacy. *Id.*

(c) *Property.*

Direction to Get in Estate—Receiver.—An order made in an *ex parte* application under the Lunacy Act, 1890, s. 116, directing a person in the name and on behalf of a lunatic not so found to receive and give a discharge for his property, does not affect the legal or equitable rights of other parties against that property—as, for instance, a vendor's lien thereon for unpaid purchase-money. *Winkle, In re* (63 L. J. Ch. 541; [1894] 2 Ch. 519), explained. *Davies v. Thomas*, 69 L. J. Ch. 643; [1900] 2 Ch. 462; 83 L. T. 11; 49 W. R. 68—C.A.

Person Incapable of Managing his own Affairs—Person Appointed to Exercise Powers of Committee—Tenant for Life—Power of Sale—Exercise by Quasi-Committee.—Where persons are appointed under section 116 of the Lunacy Act, 1890, to exercise as regards a person of unsound mind not so found by inquisition the powers of the Act exercisable by a committee of the estate under order of the Judge, and the person of unsound mind is tenant for life of land for which notice to treat has been given by a railway company, the Judge in lunacy has no power under the provisions of the Lunacy Act, 1890, ss. 116, 120, and 128, to authorise the quasi-committee to exercise on behalf of the person of unsound mind the power of sale conferred on a tenant for life by section 7 of the Lands Clauses Consolidation Act, 1845, or that conferred by the Settled Land Act, 1882, in respect of the land so required by the railway company. *Baggs, In re* (63 L. J. Ch. 612; [1894] 2 Ch. 416n.), and *Salt, In re* (65 L. J. Ch. 152; [1896] 1 Ch. 117) considered and followed in preference to *X., In re* (63 L. J. Ch. 613; [1894] 2 Ch. 415). *S. S. B., In re*, 75 L. J. Ch. 522; [1906] 1 Ch. 712; 94 L. T. 599; 54 W. R. 429; 22 T. L. R. 461—C.A.

The power of sale given to a tenant for life by the Settled Land Act, 1882, is not a power vested in him "in the character of trustee" within the meaning of section 128 of the Lunacy Act, 1890. *Id.*

—Order for Payment of Debt in Priority—Subsequent Death of Debtor and Administration of his Estate in High Court—Effect of Lunacy Order.—H. was a person not detained as or found lunatic, but found to be incapable of managing his affairs through mental infirmity arising from disease. In 1898 a Master in lunacy made an order, under section 116 of the Lunacy Act, 1890, that H.'s wife should

be authorised to do such things as the Masters should approve of for the purpose of protecting his estate and to exercise the powers of a committee of his estate. In 1902 an order was made in lunacy that H.'s wife should apply certain funds in payment to his creditors of a dividend of 6d. in the pound on their debts. In 1904 an order was made in lunacy that B. & Co., who had not previously claimed, should be admitted as creditors in respect of a certain debt, and should participate in future dividends out of H.'s estate, and should rank in priority to other creditors to the extent of 6d. in the pound upon that debt. Before effect could be given to the order of 1904 H. died, and proceedings for the administration of his estate were taken in the Chancery Division of the High Court:—*Held*, that the jurisdiction in lunacy ended at the death of H.; that the order of 1904 did not bind the High Court when administering his estate; that on the death of H. his creditors were entitled to have his assets collected and distributed according to their rights as creditors on the estate of a deceased person irrespective of the fact that up to his death his estate was subject to the jurisdiction in lunacy; and that the claim of B. & Co. to priority therefore failed. *Hunt, In re; Silicate Paint Co. v. Hunt*, 75 L. J. Ch. 801; [1906] 2 Ch. 295; 95 L. T. 600—Buckley, J.

— **Mental Infirmary—Receiver—Surety Bond—Death of Lunatic—Subsequent Receipts by Committee—Default—Account—Surety's Liability.**—Where a receiver of the estate of a person declared incapable of managing his affairs through mental infirmity entered into a surety bond and received moneys subsequently to the death of the lunatic and made default in payment of the same, the surety is not liable for the moneys so received by the receiver, inasmuch as the latter was not accountable for the same in the lunacy in his character of receiver, his right and duty in that respect having terminated with the death of the lunatic. *Walker, In re*, 76 L. J. Ch. 580; [1907] 2 Ch. 120; 96 L. T. 864—C.A.

Foreign Domicil—Personalty in England—Conflict of Laws—Belgian Law—“Administrateur provisoire”—Right to Recover Property in England—Prerogative of Crown—Costs.—A person of unsound mind, domiciled and resident abroad, suing by his next friend, may recover money and securities belonging to him in England, and if no lunacy proceedings have been taken here his right to recover by such an action will not be affected by the prerogative jurisdiction of the Crown over the property of lunatics. *Didisheim v. London and Westminster Bank*, 69 L. J. Ch. 443; [1900] 2 Ch. 15; 82 L. T. 738; 48 W. R. 501—C.A.

If a curator has been duly appointed by the Courts of the country where the person of unsound mind is residing, with authority to sue for and give a good discharge for his property, the Courts of this country have no discretion, but are bound to recognise that authority, and if the title of the plaintiff is clear to make an order for the recovery of the property. *Ib.*

Persons holding property belonging to the person of unsound mind in this country will be sufficiently protected by the order of the Court

for payment or delivery, but are entitled to require such an order before handing over the property, and, in a proper case, will be allowed their costs of defending an action brought for establishing the plaintiff's title to recover the property. *Barlow's Will, In re* (56 L. J. Ch. 795; 86 Ch. D. 287), considered and distinguished. *Ib.*

(d) *Trustee.*

Jurisdiction of Master—Person Lawfully Detained as a Lunatic, though not so Found by Inquisition—Management and Administration—Exercise of Power of Committee—Appointment of New Trustee—Vesting Order—Real Estate.—Where the last surviving trustee of a settlement who has the power to appoint new trustees is lawfully detained as a lunatic, though not so found by inquisition, and the power of appointing new trustees has been exercised in his name by a person appointed for that purpose under section 128 of the Lunacy Act, 1890, the Masters in Lunacy have, by virtue of subsection 1 of section 27 of the Lunacy Act, 1891, jurisdiction under section 129 of the Act of 1890 to make a vesting order respecting the trust property, whether real or personal, such as could have been made by the High Court under the Trustee Act, 1893, if the appointment of new trustees had been made thereunder. *Fuller, In re*, 69 L. J. Ch. 738; [1900] 2 Ch. 551; 83 L. T. 208; 49 W. R. 90—C.A.

Person of Unsound Mind—Proceedings for Divorce.—*See* HUSBAND AND WIFE.

MACHINERY.

Bill of Sale, in.—*See* BILL OF SALE.

Fixture, as.—*See* FIXTURES.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAINTENANCE.

Infant, of.—*See* INFANT.

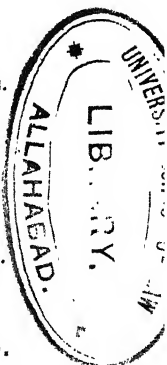
Lunatic, of.—*See* LUNATIC.

Pauper, of.—*See* POOR LAW.

Suits, of.—*See* CHAMPERTY.

MALICE.

Lawful Act Done with Bad Motive.—An act which does not amount to legal injury is not actionable because it is done with a bad motive. *Brown v. Edinburgh Magistrates*, [1907] S. C. 256—Ct. of Sess. *And see infra.*



MALICIOUS PROCEEDING AND FALSE IMPRISONMENT.

Action, Cause of—Legal Injury—Day by Day Hiring—Representation Inducing Master to Dismiss Servant.]—Boiler-makers in common employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on iron-work. The appellant, an official of the Boiler-makers' Union, in response to a telegram from one of the boiler-makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union, and also fined; they must wait till the matter was settled. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out. The respondents were thereupon dismissed:—*Held*, by six of their Lordships as against three, that no actionable wrong had been committed by the appellant. *Allen v. Flood*, 67 L. J. Q.B. 119; [1898] A.C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595—H.L. (E.)

By LORD WATSON.—Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. *Ib.*

Dicta in this regard of LORD ESHER (then BRETT, L.J.) in *Bowen v. Hall* (50 L. J. Q.B. 305; 6 Q.B. D. 333) and in *Temperton v. Russell* (62 L. J. Q.B. 412; [1898] 1 Q.B. 715) disapproved. *Ib.*

Dicta of LORD ESHER, M.R., and LOPES, L.J., in *Temperton v. Russell*, that it is actionable maliciously to induce a person not to enter into a contract, disapproved. *Ib.*

Actionable Wrong—Combination to Prevent Person being Employed—Trade Union.]—A combination between two or more persons to induce others not to employ a particular person nor to permit him to be employed, even if the acts are maliciously done and with an intention to injure such person, is not actionable if no civil injury results to him in consequence, for a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been done without preconcert, have involved a civil injury to the person against whom they were directed. *Allen v. Flood* (*supra*) discussed. *Huttly v. Simmons*, 67 L. J. Q.B. 213; [1898] 1 Q.B. 181.—Darling, J.

Maliciously Inducing Servant to Break Contract of Service—Maliciously Preventing Persons from Entering into Contracts.]—An action is maintainable by an employer against persons who, to his damage, maliciously conspire to in-

duce his servants to break their contract of service, and also for conspiring together to injure him by preventing persons from entering into contracts with him. *Allen v. Flood* (67 L. J. Q.B. 119; [1898] A.C. 1) distinguished. *Temperton v. Russell* (62 L. J. Q.B. 412; [1898] 1 Q.B. 715) followed. *Leatham v. Craig*, [1899] 2 Ir. R. 667—C.A.

Adjudication of Insolvency—Reasonable and Probable Cause—Functions of Judge and Jury.]—In an action for malicious prosecution it is for the plaintiff to prove the absence of reasonable and probable cause; and it is for the Judge, and not for the jury, to decide, as matter of inference from facts found by the jury, whether or not there was such cause. *Cox v. English, Scottish, and Australian Bank*, 74 L. J. P.C. 62; [1905] A.C. 168; 92 L. T. 483—P.C.

The appellant was largely indebted to the respondents, who gave him notice that a writ would be issued against him. The respondents, sending from place to place, failed in their efforts to serve the writ or obtain definite information of the appellant's movements. The appellant's solicitor told the respondents they would have to issue the writ, of which he declined to accept service, that a distraint would be put in for the appellant's rent, and that the latter would file his petition. Then, on the respondents' application and an affidavit of belief that the appellant had left his dwelling-house with a view to delay his creditors, the appellant was adjudged insolvent:—*Held*, that the appellant had failed to prove the absence of reasonable and probable cause for making the application. *Ib.*

Presentation of Bankruptcy Petition.]—Whether an action will lie for maliciously and without reasonable cause presenting a petition in bankruptcy against an individual without the averment of special damage, *quære*. *Wyatt v. Palmer*, 68 L. J. Q.B. 709; [1899] 2 Q.B. 106; 80 L. T. 689; 47 W. R. 549—C.A.

Corporation—Limited Company—Liability to be Sued.]—An action for malicious prosecution will lie against a limited company or corporation. *Edwards v. Midland Railway* (50 L. J. Ex. 281; 6 Q.B. D. 287) followed. *Stevens v. Midland Counties Railway* (23 L. J. Ex. 328; 10 Ex. 352) not followed. Judgment of LORD BRAMWELL in *Abrath v. North-Eastern Railway* (55 L. J. Q.B. 457; 11 App. Cas. 247) commented on. *Cornford v. Carlton Bank*, 68 L. J. Q.B. 196; [1899] 1 Q.B. 392; 80 L. T. 121.—Darling, J. Affirmed on other grounds, 68 L. J. Q.B. 1020; [1900] 1 Q.B. 22; 81 L. T. 415—C.A.

False Imprisonment—Public-house Manager—Implied Authority to Arrest—Liability of Master.]—The implied authority of a public-house manager to give into custody a person whom he suspects of stealing the property of the proprietor is not unlimited. The implication only arises where the arrest is reasonably necessary for the protection of the employer's property, or for its recovery if it is being wrongfully taken away. *Hanson v. Waller*, 70 L. J. K.B. 231; [1901] 1 K.B. 390; 84 L. T. 91; 49 W. R. 445—D.

Evidence—Signing Charge Sheet.]—The act of

signing a charge sheet is *prima facie* referable to the prosecution and not to the imprisonment of the person charged. *Sewell v. National Telephone Co.*, 76 L. J. K.B. 196; [1907] 1 K.B. 557; 96 L. T. 483; 23 T. L. R. 226—C.A.

In an action for false imprisonment the only evidence tendered on behalf of the plaintiff was that after the plaintiff had been taken into custody by a police officer on a charge of felony, and while he was still in such custody, the defendants by their authorised agent signed the charge sheet:—*Held*, that the Judge at the trial had rightly withdrawn the case from the jury and entered judgment for the defendants. *Austin v. Dowling* (39 L. J. C.P. 260; L. R. 5 C.P. 534) followed and applied. *Ib.*

Conspiracy to Injure Master.]—*See* CONSPIRACY.

MANDAMUS.

When granted—Alternative Remedy—Neglect of Guardians to Appoint Vaccination Officer—Power of Local Government Board to Appoint.]—The court will not refuse a *mandamus* on the application of the Local Government Board commanding the guardians of a parish to perform the duty of appointing a vaccination officer, imposed upon them by section 5 of the Vaccination Act, 1871, on the ground that, owing to the guardians having failed for twenty-eight days after receipt of a requisition of the Local Government Board in that behalf to appoint the officer, the Local Government Board (assuming that by statute they have then power to do so) may themselves make the appointment. *Reg. v. Leicester Guardians*, 68 L. J. Q.B. 945; [1899] 2 Q.B. 632; 81 L. T. 559—D.

Alternative Remedy Inadequate.]—Where a right of appeal given by a statute is not so adequate a remedy as *mandamus*, a *mandamus* ought to issue to compel the performance of a duty. *Reg. v. Stepney Borough Council*, 71 L. J. K.B. 238; [1902] 1 K.B. 317; 86 L. T. 21; 50 W. R. 412; 66 J. P. 183—D.

Refusal to Produce Minutes of Burial Board to Ratepayer—Application not *Bona fide*—Ultior Motive.]—A ratepayer named Hatton made an application to the District Council of Wimbledon, being the burial board, for his solicitors to inspect and take copies of these minutes. Those solicitors were acting for a company, who for another matter wished to obtain inspection of those books. The board refused to allow the solicitors to inspect, on the ground that the ratepayer alone was the person to whom they were bound to produce the books, and that the present application was not made *bona fide*, but for another purpose, that was indirectly obtaining inspection on behalf of the company for whom the solicitors were also acting:—*Held*, that the Court would not in the exercise of their discretion make absolute this rule for a writ of *mandamus*, as the application was not made *bona fide* for the purpose of the ratepayer, but for another purpose. *Reg. v. Wimbledon Urban Council; Hatton, ex parte*, 77 L. T. 599; 62 J. P. 84—D.

Valuation List in Metropolis—Hereditaments Exempt from Poor Rate, but Liable to other Rates—Insertion of Rateable Value in List—Duty of Assessment Committee—Right of Rating Authority to Mandamus—Alternative Remedy.]—Certain hereditaments in the City of London were by statute exempt from poor rate, but not from the consolidated rate. In the valuation list for the parish in which the hereditaments were situated they were duly described, and in the column for gross value their gross value was entered, but in the column for rateable value their rateable value was not entered, the word “exempt” being there entered in place thereof. The Corporation of the City, as the rating authority for levying the consolidated rate, having applied for a *mandamus* to compel the assessment committee to enter the rateable value of the hereditaments in the list,—*Held*, that a *mandamus* ought not to issue, inasmuch as there was another legal and effective remedy in the right of appeal given by section 32 of the Valuation (Metropolis) Act, 1869; or, if the corporation was not entitled to avail itself of that right of appeal, in the means provided by the Act as a whole for safeguarding the rights of all parties interested in the correctness of the list. *Rea v. City of London Union; London Corporation, Ex parte*, 76 L. J. K.B. 1087; [1907] 2 K.B. 764; 97 L. T. 346; 71 J. P. 377; 5 L. G. R. 819; 23 T. L. R. 502—C.A.

Semble, that in such a case the overseers and the assessment committee had a duty to insert the rateable value of the hereditaments in the list. *Ib.*

Disobedience—Attachment—Delay in Commencing and Carrying out Sewerage Scheme.]—The Corporation of Worcester having disobeyed a peremptory writ of *mandamus* issued on the application of the Local Government Board, and requiring the corporation to execute certain works, the Courts ordered writs of attachment against certain members of the council to issue, but to lie in the office for a limited period, which had been extended from time to time. The Court now, on an application of the corporation, which the Local Government Board did not oppose, being satisfied that the works were being proceeded with with due diligence, ordered the writs to remain in the office, and the matter to stand over generally, with liberty to apply. *Reg. v. Worcester Corporation*, 3 L. G. R. 468; 69 J. P. 296—D.

Service of Writ on Members of Corporation—Delay in Commencing and Carrying out the Works Ordered.]—In July, 1897, a peremptory writ of *mandamus*, ordering a municipal corporation to carry out a sewage scheme, was duly served upon ten members of the city council, which numbered forty-eight members, and the original writ was handed to one of the ten members so served, but was afterwards lost. The corporation being in default, an order of the Court to return the writ, with an authenticated copy of the original writ attached, was, in March, 1903, served upon each of the then members of the council:—*Held*, that there had been such service of the peremptory writ of *mandamus* upon the whole of the members of the council, as constituted in March, 1903, as to render them individually liable to attachment for disobedience to it. *Held* also, on the facts,

that there had been such delay in carrying out the works as amounted to disobedience to the writ. *Reaz v. Worcester Corporation*, 2 L. G. R. 51; 68 J. P. 180—D.

Costs — Rule for Mandamus — Cause Shewn against Rule by Crown — Discharge of Rule — Right of Crown to Costs.—The doctrine of the common law that the Crown neither pays nor receives costs remains unaltered in relation to the prerogative writ of *mandamus*. *Reaz v. Canterbury (Archbishop)* (No. 2), 71 L. J. K.B. 932; [1902] 2 K.B. 503; 86 L. T. 450; 50 W. R. 476; 66 J. P. 455—D.

Costs of Opposing Rule.—Upon the argument of a rule *nisi* for a *mandamus* to licensing Justices, the Court has jurisdiction to grant costs to a person who successfully opposes the rule being made absolute notwithstanding the decision of the House of Lords in *Boulter v. Kent Justices* (66 L. J. Q.B. 787; [1897] A.C. 556), that licensing Justices are not a Court of summary jurisdiction. *Reg. v. Yorkshire (W.R.) Justices; Shaw, ex parte*, 67 L. J. Q.B. 279; [1898] 1 Q.B. 503; 78 L. T. 47; 46 W. R. 334; 62 J. P. 197—D.

Grant of Game-dealer's Licence.—See *GAME*, col. 890.

Issue is a Matter of Judicial Discretion.—See *Croydon Corporation v. Croydon Rural Council*, 77 L. J. Ch. 138; [1908] 1 Ch. 222; 98 L. T. 182; 72 J. P. 13—Neville, J.

Justices, to.—See *INTOXICATING LIQUORS*.

MANOR.

See *COMMONS*; *COPYHOLD*.

MANSLAUGHTER.

See *CRIMINAL LAW*.

MARINE INSURANCE.

See *INSURANCE (MARINE)*.

MARKET.

1. *Fairs and Markets*, 1449.
2. *Title to Hold*, 1450.
3. *Disturbance*, 1452.
4. *Tolls*, 1452.
5. *Local Authority*, 1454.
6. *Penalties*, 1454.

1. FAIRS AND MARKETS.

Fair and Market on Same Day.—The two franchises of fair and market are separate and

distinct, and of equal dignity. There is no question between them of a greater and less estate, such as is essential to merger; and it is therefore possible for the two franchises to co-exist on the same day. *Newcastle (Duke) v. Workson Urban Council*, 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86 L. T. 405—Farwell, J.

Unlicensed Change of Fair Days—Neglect to Levy Fair Tolls—Forfeiture or Surrender of Fair Tolls.—Although it may be true that an unlicensed change of fair days does not *ipso facto* work a forfeiture of the fair franchise, but only constitutes a ground of forfeiture of which the Crown may, or may not, take advantage, yet an unlicensed change of fair days precludes a lord who is entitled by his subordinate franchise of toll to levy fair toll on the original fair days from levying such toll on the altered days. *Middleton (Lord) v. Power* (19 Ir. R. Ch. 1) distinguished. *Ib.*

Fair Toll—Stallage.—A fair toll is payable to the owner of a franchise of fair toll in respect of goods sold in his fair, or brought into his fair for sale, whether he be owner of the soil or not, and has nothing to do with the ownership of the soil. Stallage, on the contrary, is paid in respect of some usage of the soil, and can be exacted only by the owner of the soil. *Ib.*

2. TITLE TO HOLD.

Immemorial User within Manor — Presumption of Market without Metes or Bounds—New Streets—Dedication Subject to Market Rights.—The Whitechapel hay and straw market was an ancient market held within the parish of Whitechapel and belonging to the lord of the manor of Stepney. No grant of any franchise could be produced, so that the title of the lord of the manor was by prescription. Of old, the market had always been held in the High Street, but the evidence shewed that in more modern times the market, having increased in size, had extended into certain adjoining streets. When statutes were passed authorising the construction of tramways in those streets, provisions were inserted preserving to the salesmen, as against the tramway company, their right to place market carts in these streets during market hours. The borough council claimed the right to exclude the market carts from these streets, and in 1904 they issued orders directing that whenever the High Street was full the market carts should be deflected into certain back streets:—*Held*, that the market must be presumed to be a market without metes or bounds which might extend within the limits of the parish as the exigencies of the market might require. *Gingell v. Stepney Borough Council*, 75 L. J. K.B. 777; [1906] 2 K.B. 463; 95 L. T. 146; 70 J. P. 503; 4 L. G. R. 1092; 22 T. L. R. 688—Swinfen Eady, J.

The fact that the adjoining streets in which the salesmen claimed the right to place their carts were of recent construction, having been made under statutory powers at dates subsequent to 1840, did not prevent their being liable to be used for the purpose of the market. They must be taken to have been dedicated to

the public subject to the exercise of the market franchise. *Ib.*

Manor Market without Metes and Bounds—New Streets—Dedication Subject to Market Rights.]—The Whitechapel hay and straw market was an ancient market belonging to the lord of the manor of Stepney, in which manor the parish of Whitechapel was comprised. No grant of any franchise could be produced, so that the title of the lord of the manor was by prescription. Of old the market had always been held in the High Street, but the evidence shewed that in more modern times the market, having increased in size, had extended into certain adjoining streets. Pursuant to Acts passed in 1840 and 1865 respectively, two existing streets within the parish adjoining the High Street were widened and altered so as to include additional land, and an entirely new street was constructed within the parish, adjoining the High Street, on land that had previously been built upon. On these previously existing and new streets the market had in fact been held for years. The Stepney Borough Council claimed the right to exclude the market carts from these new streets, and in 1904 they issued orders that whenever the High Street was full the market carts should be deflected into certain back streets:—*Held* (FLETCHER MOULTON, L.J., dissenting), that the fact that the three streets last mentioned were of recent construction did not prevent their being liable to be used for the purpose of the market, inasmuch as they must be presumed to have been dedicated to the public subject to the exercise of the market franchise. *Gingell v. Stepney Borough Council*, 77 L. J. K.B. 847; [1908] 1 K.B. 115; 97 L. T. 598; 71 J. P. 486; 6 L. G. R. 180; 23 T. L. R. 759; 24 T. L. R. 148—C.A.

Limits—New Streets Made under Statutory Authority—Dedication—Market Rights.]—An ancient manor market for hay and straw, which was without metes and bounds, was held in the parish of Whitechapel. The market was held in High Street, and for many years the market carts had stood in some of the adjoining streets when High Street was overcrowded. In 1840 and 1865 two statutes were passed authorising a public body to make three new streets running into High Street, and both those statutes provided that all the land which should be laid open into the streets should form part of the streets, and should be used by the public accordingly. One of the new streets was a widening and extension of an old street which adjoined High Street, and the others were either in whole or in part new streets constructed on land which had before then been private property. Since the new streets were made carts attending the market were placed therein. In an action by hay and straw salesmen for a declaration of their right to use the new streets adjoining High Street for the purpose of the market,—*Held*, by VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J. (FLETCHER MOULTON, L.J., dissenting), that the market extended into High Street and the adjoining streets; and that, upon the evidence of user, the new streets must be taken as having been dedicated to the public subject to the market rights over them. *Gingell v. Stepney Borough Council*, [1908] 1 K.B. 115; 97 L. T. 598; 71 J. P. 486; 23 T. L. R. 759; 24 T. L. R. 148—C.A.

3. DISTURBANCE.

Infringement of Market Rights—Injunction.]—A person to whom horses were consigned for sale sold them in a field within a short distance of a market. The consignor objected to the horses being sold within the market, and it appeared that no sale would have taken place elsewhere than where it did take place:—*Held*, that in the circumstances no case had been made out for an injunction to prevent the salesman interfering with the market rights. *Wilcox v. Steel*, 67 J. P. 261—Kekewich, J.

Rival Market—Accommodation—Motives of Seller.]—In the case of a mere sale outside a market, the question whether it was the motive of the seller to evade the market tolls is of importance in determining whether there has been a disturbance of the market or not, but where the sale really amounts to the establishment of a new rival market on the market day, taking advantage of the concourse of people at the lawful market, the motive of the seller is irrelevant. *Wilcox v. Steel*, 73 L. J. Ch. 217; [1904] 1 Ch. 212; 89 L. T. 640; 2 L. G. R. 105; 68 J. P. 146; 20 T. L. R. 78—C.A.

The plaintiff was the lessee of the right to hold a market once a week to buy and sell horses and all sorts of cattle, tolls being taken from those selling there. The defendant, an auctioneer, who had held sales of cattle and horses in the market, paying tolls to previous lessees of the market, held a sale on a market day in the neighbourhood of the plaintiff's market of a number of horses which had been consigned to him for sale, which sale he invited people in the market to attend. There was evidence that the defendant's object in holding this sale was not to evade payment of the market tolls, but that the horses would not have been consigned to him for sale at all if they were to be sold in the plaintiff's market:—*Held*, that the acts of the defendant amounted to a disturbance of the plaintiff's market. *Ib.*

Disturbance of.]—See *Stevens v. Chown*, 70 L. J. Ch. 571; *post*, STATUTE.

4. TOLLS.

Right to.]—Toll is not incident to a fair or market, but owes its origin to a separate grant, and exists as a subordinate franchise appurtenant to the fair or market, differing in this respect from the Court of Piepowder, which is incident to a market. Statement to the contrary in *Viner's Abridgment*, tit. "Market," F. 7 and 8, considered and dissented from. *Newcastle (Duke of) v. Workson Urban Council*, 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86 L. T. 405—Farwell, J.

Preferential Tolls—Power to Remit.]—There is no rule of law against preferential market tolls. So long as the lord of the market toll does not exceed the maximum sum that he is entitled to demand—that is, a reasonable amount, where no sum is specified by his charter—he is entitled to remit the whole or any part of the toll to whomsoever he pleases. Reasoning in *Hungerford Market Co. v. City Steamboat Co.* (30 L. J. Q.B. 25; 3 E. & E. 365) applied. *Ib.*

Infringement—Injunction.—By letters patent in the sixteenth year of his reign James I. granted a right to a Friday market for the town of W. By an Act of 48 Geo. 3, after reciting the letters patent, it was enacted that it should be lawful for the person entitled to keep the market to take tollage of markets holden on Wednesday and Saturday. On June 13, 1887, the market rights were conveyed and assigned to the W. Local Board. In 1888 by-laws were made regulating the use of the market-place. By-law 15 provided that a market for the sale of goods, meat, fish, poultry, provisions, fruit, vegetables, plants, flowers, hardware, furniture, apparel, and all other goods, merchandise, and marketable commodities should be held on every day except Sunday, Christmas Day, and Good Friday. By a charter in the fifty-fourth year of Henry 3, a Tuesday market in P. was granted, which became vested in Queen's College, Oxford, who conveyed to the plaintiff. Under section 19 of the Local Government Act, 1899, a scheme was made for W. and an Order in Council was made extending the boundaries of W. so as to include P. No provision was made for charging tolls, but power to do so was given by the Woolwich Borough Council Act, 1903, s. 4. The plaintiffs asked for an injunction to restrain the defendants from hawking, selling, or offering or exposing for sale within the borough of W. (except in their own dwelling-houses or shops) any articles or commodities usually sold in public markets except in a market-place of the borough of W., and after payment of the tolls payable to the plaintiffs. Some of the defendants claimed a right to sell in the market without paying toll, and proved that they had sold without paying toll for a number of years:—*Held*, that as the right to take tolls was not given by the charter, but by the Act of 1903, no right was acquired by non-payment of tolls for a considerable period. No trace of the defendants acquiring a right adverse to the rest of the world could be discovered, and an injunction must be granted. *Woolwich Corporation v. Gibson*, 92 L. T. 538; 69 J. P. 361; 3 L. G. R. 961; 21 T. L. R. 421—Swinfen Eady, J.

Carts Used for Delivery of Mineral Waters to Customers—Exposure to Sale of Commodities in Public Street.—A mineral-water cart used for delivery of goods from a distant manufactory to customers in an urban district, in which a local Act is in force, is not liable to a toll imposed by such local Act upon every cart "used for exposing or in which shall be exposed to sale any article commodity or thing" brought into any public market-place or public street. *Newton-in-Makerfield Urban Council v. Lyon*, 69 L. J. Q.B. 230; 81 L. T. 756; 48 W. R. 222—D.

Selling Fruit and Vegetables in Public Streets—Hawker's Licence.—An itinerant vendor of fruit and vegetables in the public streets of an urban district possessing a market, who holds a hawker's licence, is entitled to the exemption from market tolls afforded by section 13 of the Markets and Fairs Clauses Act, 1847, although no hawker's licence be needed for the sale of such articles, for in so vending his wares he does not act in breach of his licence. *Llan-dudno Urban Council v. Hughes*, 69 L. J. Q.B. 303; [1900] 1 Q.B. 472; 82 L. T. 147; 48 W. R. 366; 64 J. P. 357; 19 Cox C.C. 456—D.

Manufacturer of Mineral Waters Calling on Customers.—By a by-law of the borough of D., "every person or persons who shall hawk or expose about the town for sale" certain articles shall pay a toll. The respondent, who was in the employ of a manufacturer of mineral waters at R., brought into the borough of D. a van laden with mineral waters. He called at the houses and shops of regular customers to sell and deliver to them any mineral waters they might require. The goods were not cried in the streets, and no effort was made to attract casual customers:—*Held* (*dissentiente DARLING, J.*), that the respondent had not hawked or exposed about the town for sale the mineral waters, within the meaning of the by-law. *Philpott v. Allright*, 94 L. T. 540; 70 J. P. 287; 4 L. G. R. 1013; 21 Cox C.C. 123—D.

Person Travelling with Horse and Cart—Selling Oil to Customers—Absence of Previous Orders.—A person who travels with a horse and cart carrying a cask of oil, and calls at the houses of customers in compliance with their request, and delivers oil there without having received previous orders for any specified quantities, is a "hawker" within the definition of that term in section 2 of the Hawkers Act, 1838, and is required to take out a licence under section 3. *O'Dea v. Crowhurst*, 68 L. J. Q.B. 655; 80 L. T. 491; 63 J. P. 424; 19 Cox C.C. 260—D.

Agreement to Sell Goods then Outside Market Limits, followed by Delivery Within Limits.—G. was charged on summons with having sold, or exposed for sale, on June 13, 1904, within the limits of a market, a quantity of potatoes, which were tollable articles. It appeared that on June 9 G. had agreed with M., within the limits of the market, to supply him with 1 cwt. of potatoes, no price being agreed on. The potatoes were not at the time within the limits of the markets, but were delivered within such limits on June 13:—*Held*, that G. was not guilty of an offence within section 13 of the Markets and Fairs Clauses Act, 1847. *Gracey v. Banbridge Urban Council*, [1905] 2 Ir. R. 209—K.B. D.

5. LOCAL AUTHORITY.

By-laws—Competency to Enact.—A by-law, enacted by a local authority under statutory powers, that sale rings established by the local authority shall be used only for public sales by auction on conditions equally applicable to all bidders and buyers, and not for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying, *held* (LORD SHAND dissenting) to be valid and *intra vires*. *Scott v. Glasgow Corporation*, 68 L. J. P.C. 98; [1899] A.C. 470; 81 L. T. 302; 64 J. P. 132—H.L. (Sc.)

6. PENALTIES.

Recovery of Penalties—Party Aggrieved.—The servant of a retail dealers' association may take proceedings to recover penalties for a contravention of section 13 of the Markets and Fairs Clauses Act, 1847. He is "a party

aggrieved" within the meaning of section 253 of the Public Health Act, 1875. *Ross v. Taylerson*, 62 J. P. 181—D.

MASTER AND SERVANT.

1. *Statutes*, 1456.
2. *Contract of Service*, 1456.
3. *Breach of Contract*, 1458.
4. *Scope of Employment*, 1458.
5. *Factories and Workshops*, 1464.
 - (a) *What are*, 1464.
 - (b) *Fencing Machinery*, 1467.
 - (c) *Fire Escapes*, 1468.
 - (d) *Employment of Young Persons and Children*, 1469.
 - (e) *Hours of Employment*, 1470.
6. *Shops*, 1471.
7. *Domestic Service*, 1473.
8. *Wages*, 1473.
9. *Dismissal of Servant*, 1477.
10. *Pension*, 1479.
11. *Injuries to Servants*, 1479.
 - (a) *Negligence of Master*, 1479.
 - (b) *Common Employment*, 1484.
 - (c) *Employers' Liability Act*, 1880, 1485.
 - (d) *Workmen's Compensation Act*, 1897, 1900, 1489.
 - (1) "*Workman*," who is, 1489.
 - (2) *Accidents in Course of Employment*, 1492.
 - (3) *Buildings and Scaffolding*, 1506.
 - (4) "*Engineering Work*," 1513.
 - (5) "*Factory*," 1513.
 - (6) "*Forestry*," 1523.
 - (7) *Mines*, 1523.
 - (8) *Railways*, 1530.
 - (9) *Ships*, 1532.
 - (10) *Warehouses*, 1537.
 - (11) "*Undertakers*," 1538.
 - (12) "*Serious and Wilful Misconduct*," 1546.
 - (13) *Bars to Compensation*, 1552.
 - (14) *Claim for Compensation*, 1555.
 - (15) *Medical Examination*, 1558.
 - (16) *Scale of Compensation*, 1564.
 - (17) *Agreement to Pay Compensation*, 1576.
 - (18) *Arbitration*, 1580.
 - (i.) *Powers of Arbitrator*, 1580.
 - (ii.) *Award*, 1585.
 - (19) *Agreement to Scheme Certified by Registrar of Friendly Societies*, 1586.
 - (20) *Dependants*, 1587.
 - (21) *Costs*, 1594.
 - (22) *Appeal*, 1595.
 12. *Seduction*, 1597.
 13. *Other Matters*, 1598.

1. STATUTES.

Children—Employment of.—3 Edw. 7 c. 45 is the *Employment of Children Act*, 1903.

Early Closing.—4 Edw. 7 c. 31 is the *Shop Hours Act*, 1904.

Employers' Liability Insurance.—7 Edw. 7 c. 46 is the *Employers' Liability Insurance Companies Act*, 1907.

Factories and Workshops.—1 Edw. 7 c. 22 is the *Factory and Workshop Act*, 1901.

— 7 Edw. 7 c. 10 is the *Employment of Women Act*, 1907, and 7 Edw. 7 c. 39 is the *Factory and Workshop Act*, 1907.

Seats for Shop Assistants.—62 & 63 Vict. c. 21 is the *Seats for Shop Assistants Act*, 1899.

Shop Clubs.—2 Edw. 7 c. 21 is the *Shop Clubs Act*, 1902.

Unemployed.—5 Edw. 7 c. 18 is the *Unemployed Workmen Act*, 1905.

2. CONTRACT OF SERVICE.

Agreement to "engage and employ"—Duty to Find Employment—Representative Salesman.—In an agreement by a firm of cotton-yarn merchants to engage and employ a servant as representative salesman for a fixed period, whereby the firm agreed to pay a fixed yearly salary and the servant agreed to devote his whole time to the business of the firm,—*Held* (STIRLING, L.J., doubting), that there was no obligation on the firm to find employment for the servant as representative salesman. *Turner v. Goldsmith* (60 L. J. Q.B. 247; [1891] 1 Q.B. 544) distinguished. *Turner v. Sawdon*, 70 L. J. K.B. 897; [1901] 2 K.B. 653; 85 L. T. 222; 49 W. R. 712—C.A.

Commercial Traveller—Refusal by Employer to Send on Journey—Travelling Expenses.—A commercial traveller was engaged for a term. By the contract he was to travel in certain countries, and was to receive a salary of 500*l.* and a fixed allowance per day as travelling expenses. During the continuance of the engagement his employers found that owing to a fall in prices, it was no longer profitable to take orders in the countries travelled by him. They thereupon refused to send him on further journeys, and refused to pay him the allowance for travelling expenses or any part thereof, but continued to pay him his salary. He sued them for damages for the injury done to the goodwill of his trade connection by their refusal to send him on journeys, and for the loss of the proportion of his allowance for travelling expenses which by economy he was able to save when travelling:—*Held*, that the action would not lie. *Lagerwall v. Wilkinson*, 80 L. T. 55—Bigham, J.

Shipping Agent—Engagement "for one year certain"—Termination of Contract.—By letter dated December 29, 1891, the manager of the N. B. Railway appointed S., a coal exporter, to be "agent for this Company as from 1st ulto

(for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg at Bo'ness, Burntisland, and Methil), at a salary of 450*l.* per annum, for one year certain." S.'s duty as agent was to endeavour to get coal taken by the railway company's lines to the ports named, and shipped thence to Hamburg. On December 7, 1892, the contract was renewed "for another year." Thereafter S. continued to discharge the duties of agent until 1900 without formal reappointment. He always received his salary in one sum*for each year ending October 31. On January 2, 1901, the railway company gave S. notice that his services would not be required after three months from that date. In an action by S. against the company for payment of the balance of his salary to October 31, 1901,—*Held*, that the contract between the pursuer and the defenders was a yearly contract, and therefore that the defenders were not entitled to terminate it, after a year had begun, on three months' notice. *Stevenson v. North British Railway*, 7 F. 1106—Ct. of Sess.

Agreement for Five Years—Illness of Servant—Right of Employer to Terminate Agreement—Substantial Period of Agreement Unexpired.]—By an agreement, made in August, 1903, the defendants agreed to employ the plaintiff for a period of five years as their works manager. The agreement contained no provision enabling the defendants to terminate the agreement before the end of the five years. Towards the end of 1905 the plaintiff became ill and was absent from work from time to time. In January, 1906, his illness became more serious, and shortly afterwards he was medically examined and was told that he must have complete rest for a considerable time and undergo special treatment. It did not appear from the certificate of the doctor given at the time that the plaintiff would never be able to resume his work. As, by reason of his ill-health, the plaintiff continued to be absent from work, the defendants gave him notice in April, 1906, terminating the agreement, and they appointed one of their staff to act as works manager. By the middle of May, 1906, the plaintiff recovered and was fit for work. In an action by him for damages for breach of contract,—*Held*, that he was entitled to recover, inasmuch as the circumstances were not such as to justify the defendants in thinking that the plaintiff would never be able to perform a substantial part of the unexpired period of the agreement. *Storey v. Fulham Steel Works*, 23 T. L. R. 306—Channell, J. Affirmed, 24 T. L. R. 89—C.A.

Confidentiality—Use by Servant after Leaving Service of Information Obtained during Service.]—A person who had been agent of a friendly society was held not entitled, after he had left the society's service, to give written lists of the members of the society to the officials of a rival society. *Liverpool Victoria Legal Friendly Society v. Houston*, 3 F. 42—Ct. of Sess.

—Right of Property in Lists of Customers—Procuring Breach of Contract—Injunction—Damages.]—By an agreement in writing dated April 1, 1902, B. entered into the service of W. S. & Co., and agreed not at any time without the consent in writing of

W. S. & Co. to "divulge or make known any of the trusts, secrets, accounts, or dealings of or relating to the business of the company." On September 21, 1905, B. wrote to K. & Co., asking if they had a vacancy for a traveller, and stated he could introduce some excellent accounts. On September 30 B. left W. S. & Co. and entered into the service of K. & Co., and communicated to them lists of the customers of W. S. & Co., and called on these customers and induced many of them to transfer their custom from W. S. & Co. to K. & Co. K. & Co. had notice of the agreement:—*Held*, that an injunction must be granted against both defendants, restraining them from acting in breach of the agreement, and that the lists of customers made by B. must be given up to W. S. & Co., and that W. S. & Co. were entitled to damages against both B. and K. & Co. *Summers v. Boyce*, 97 L. T. 505—Swinfen Eady, J.

3. BREACH OF CONTRACT.

Continuance of Employment—Damages—Waiver.]—On the hearing of a complaint under the Employers and Workmen Act, 1875, for damages for breach of contract by the appellants against the respondent, a miner, it was admitted that the appellants had continued, since the date of such breach, to employ the respondent upon the terms of such contract:—*Held*, that that amounted to no waiver or release with regard to the claim for damages. *Wynnstay Collieries v. Edwards*, 79 L. T. 378; 62 J. P. 823—D. And see CONTRACT, col. 537, and MALICIOUS PROCEEDING, col. 1445.

4. SCOPE OF EMPLOYMENT.

Negligence of Servant—Evidence of Existence of Relationship—Admission—Offer to Pay Money after Accident.]—The plaintiff was knocked down and injured by a runaway pony attached to a trap which had been driven by M. The pony and trap were the property of B. The plaintiff sued M. and B. for damages. At the trial a witness for the plaintiff gave evidence of a statement made by M. after the accident to the effect that he had been driving the pony and trap and had left them standing in the street when the pony was startled and ran away. He also proved that after the accident, and after the plaintiff had been brought to the hospital, M. claimed the pony and trap and took them away. The plaintiff's daughter proved that B. called on her after the accident and said he was very sorry that they were his pony and trap, and that if she took her father home he would pay all expenses. In cross-examination it appeared that this offer to pay the expenses was made after the plaintiff's daughter had said to B. that she believed he had lent M. the pony and trap, to which B. merely replied "Humph." Neither B. nor M. was produced at the trial. Counsel for B. asked the Judge for a direction in his favour, which was refused, and the Judge asked the jury to find whether M. was acting as the servant of B. within the scope of his authority. The jury answered this question in the affirmative, and found 250*l.* damages against the defendants:—*Held*, that there was no evidence to support the finding; that no presumption of

the relationship of master and servant arose from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which B. would not be liable, he was entitled to a non-suit or a direction in his favour, and that the verdict and judgment entered thereon against him should be set aside. *Powell v. M'Glynn and Bradlaw*, [1902] 2 Ir. R. 154—C.A.

Bailment—Locatio Operis Faciendi—Theft by Servant of Bailee—Liability of Bailee.—A jobmaster let to a silversmith a brougham, in order that the traveller of the silversmith might be driven about London in search of orders by a driver supplied by the jobmaster. It was in the contemplation of the parties to the contract that the brougham would contain valuable samples, and that it would be a part of the duty of the driver to take care of its contents during the necessary absences of the traveller from it. The jobmaster supplied a driver whom he reasonably supposed to be trustworthy, but during a necessary absence of the traveller the driver stole the contents of the brougham:—*Held*, in an action by the silversmith to recover from the jobmaster the value of the stolen goods, that, as the jobmaster had taken reasonable care to perform his duty of supplying a trustworthy servant, he was not liable for the loss caused by the crime of his servant, which was outside the scope of his employment. *Abraham v. Bullock* (86 L. T. 796) distinguished. *Cheshire v. Bailey*, 74 L. J. K.B. 176; [1905] 1 K.B. 237; 92 L. T. 142; 53 W. R. 322; 21 T. L. R. 180—C.A.

Hire of Chattel—Liability of Bailee to Bailor for Tortious Act of Servant.—The bailee of a chattel for hire is not, in the absence of want of due care on his part, liable to the bailor for damage caused to the chattel by the tortious act of the bailee's servant whilst acting outside the scope of his employment. *Coupe Co. v. Maddick* (60 L. J. Q.B. 676; [1891] 2 Q.B. 413) considered and distinguished. *Sanderson v. Collins*, 73 L. J. K.B. 358; [1904] 1 K.B. 628; 90 L. T. 243; 52 W. R. 354; 20 T. L. R. 249—C.A.

Driver—Coachman Hired from Livery Yard.—The owner of a brougham and horse, with its harness, kept them at a livery stable. He had no coachman, but hired a driver from the livery-stable keeper at a certain weekly sum. The livery-stable keeper paid the driver's wages. The owner of the equipage supplied the driver with a full suit of livery clothes, and there was evidence that the driver had been approved of by the owner. The horse was new to London life, and had only been driven a few times in the brougham by the driver; its peculiarities and characteristics were unknown both to the livery-stable keeper and also to the driver:—*Held*, that the inference to be drawn from the circumstances was that the driver was the servant, not of the livery-stable keeper, but of the owner of the equipage, who was liable for injuries caused to a third person through the negligence of the driver whilst driving the equipage. *Jones v. Scullard*, 67 L. J. Q.B. 895;

[1898] 2 Q.B. 565; 79 L. T. 386; 47 W. R. 303—Lord Russell of Killowen, C.J.

Passenger Standing on Driver's Platform—Consent of Driver—Violation of Rules.—The plaintiff got on to a tramcar belonging to the defendants. The car being crowded both inside and on the back platform, the plaintiff travelled on the driver's platform, the driver making no objection to his doing so. During the journey the car ran off the line owing to the points being set wrong, and the plaintiff was thrown off and sustained injuries in respect of which he sued the defendants. No one else in the car was hurt. In his evidence the plaintiff stated that he had travelled on the driver's platform some six times previously, without objection, and had always paid his fare, but this was controverted. The servants of the defendants had orders not to allow any one on the front or back platform, and notices were placed inside the cars that it was forbidden to stand there. The jury found that the servants of the company had no authority from the company to allow the plaintiff to stand on the driver's platform; that the plaintiff stood on that platform with the permission of the defendant's servants; that such permission was not with the consent of the company and was in violation of their rules; that the plaintiff was travelling on the platform as a passenger intending to pay his fare; that the notice alleged to be posted in the car was not brought to the plaintiff's attention or seen by him; and that reasonable notice was not given to the public of the company's rule that passengers should not occupy the platform. They further found that the accident was caused by the company's negligence in the driving of the tramcar, and awarded damages to the plaintiff:—*Held*, that the findings of the jury negatived any authority in the driver to permit the plaintiff to stand on the front platform, whether derived from course of service, or scope of employment; that such permission was not an act of agency, but was a personal indulgence outside course of service or scope of employment; and that the company were not liable. *Byrne v. Londonderry Tramway Co.*, [1902] 2 Ir. R. 457—C.A.

Purchase of Motor Car—Car being Driven for Delivery to Purchaser.—The defendant purchased and paid for a motor car in London, and the vendor agreed to provide a driver to drive the car to a certain place outside London and deliver it there, as the defendant's driver did not know the locality and had no experience of the class of car purchased. While the car was being driven by the driver supplied by the vendor from London to the place named for delivery it collided with and damaged a motor bicycle, owing to the negligence of the driver. At the time the defendant, his driver, and his son were in the car. In an action in the County Court by the owner of the bicycle against the defendant to recover for the damage to the bicycle, the Judge held that the driver of the car, though he was the general servant of the vendor, was at the time under the control of the defendant, who had the property in and possession of the car, and that therefore the defendant was liable to the plaintiff for the negligence of the driver:—*Held*, that the decision was right. *Jones v. Scullard* (67 L. J.

Q.B. 895; [1898] 2 Q.B. 565) followed. *Perkins v. Stead*, 23 T. L. R. 433—D.

— **Delegation of Duty—Negligence.**—A motor car, after having been repaired by the defendants, was sent back to the owner under the charge of a driver who was in the employment of the defendants. The driver received instructions from the defendants not to give up the driving to any one. At one stage of the journey a man not in the employment of the defendants accompanied the driver, who, hearing a noise at the back of the car, entrusted the driving to his companion while he himself went to the back of the car to see the cause of the noise. His companion, while driving, negligently drove the car against the plaintiff's van. In an action to recover damages in the County Court the jury found a verdict for the plaintiff. The Divisional Court held that, as there was no necessity for keeping the car going while the driver examined the machinery, and therefore for entrusting the driving to the driver's companion, the defendants were not liable for the negligence of the latter. Upon appeal, *Held*, that, as the question of the necessity to entrust the driving of the car to a third person was not raised in the County Court nor by the notice of appeal to the Divisional Court, it could not be raised afterwards, and the verdict and judgment for the plaintiff must stand. *Harris v. Fiat Motors*, 23 T. L. R. 504—C.A.

— **Omnibus driven by Conductor.**—On the trial of an action for negligence against an omnibus company it was proved by the plaintiff's witnesses that the omnibus by which the plaintiff was run down and injured had just finished one of its journeys, and was coming down an incline at the rate of eight miles an hour while making a slight *détour* for the purpose of coming to the starting-place facing the right way for commencing a fresh journey, and that it was being driven by the conductor, who was not the regular driver:—*Held*, that the Judge was right in withdrawing the case from the jury at the close of the plaintiff's case, on the ground that there was no evidence that the person who was driving the omnibus was acting within the scope of his authority. *Beard v. London General Omnibus Co.*, 69 L. J. Q.B. 895; [1900] 2 Q.B. 530; 83 L. T. 362; 48 W. R. 658—C.A.*

— **Master Letting out Engine, Trolley, and Driver—Hirer to have Control of Driver—Negligence of Driver while Engaged in Work of Hirer.**—The defendants let out on hire at a certain sum per week a traction engine, trolley, and driver for the engine, and they paid the driver, who took his orders from the hirers and went with the engine wherever they told him to go. Under the terms of the hiring agreement, which had been continued from week to week for several months, the defendants were to supply the hirers with motors, trolleys, and drivers, and to provide oil and do the necessary repairs, and the hirers were to have control over the engines, trolleys, and drivers, and were to provide coal. The driver got his orders from the hirers, and did whatever they told him to do. While the driver was proceeding in charge of the engine along the road with a trolley of coals a collision occurred through his negligence,

causing personal injuries to the plaintiff:—*Held*, that, although the engine driver was paid by and was in the general service of the defendants, he was at the time of the accident in the particular service of the hirers, and was under their control with reference to the work which was then being done, and therefore the defendants were not liable for the consequences of his negligence. *Dewar v. Tasker*, 95 L. T. 87; 22 T. L. R. 303—D.

— **Servant Lent to Another—Control over Servant—Negligence—Hire of Engine and Driver.**—The defendants hired out an engine to another person, and they supplied a driver for the engine. They paid the driver, supplied the oil for the engine, and kept it in repair. The evidence shewed that the person to whom the engine was hired could direct where the engine should go and what loads it should haul, and that the defendants never knew where the engine was sent to or what it carried. While so hired, the engine, by the negligence of the driver, injured the plaintiff:—*Held*, that, on the facts, the defendants, who appointed and paid, and who could dismiss the driver, had control over him at the time of the injury, and were therefore liable to the plaintiff. *Dewar v. Tasker*, 23 T. L. R. 259—C.A.

Servant Working for Another Person—Use of Master's Plant by Servant.—The Harvey Engineering Co. contracted to remove and repair an iron shaft belonging to the defendants. In the course of the work of removal the pursuer, one of the servants of the Harvey Engineering Co., was injured through the breaking of the chain attached to a winch belonging to the defendants, which was being used to raise the shaft on to a barrow. The pursuer sued the defendants for damages, alleging that Hill, a sawyer in their employment, was instructed by the defendants to assist the Harvey Engineering Co.'s workmen in the removal of the shaft; that in so doing Hill "remained in the service of the defendants and continued to be subject to their control"; that Hill made use of a steam winch and chain belonging to the defendants for the purpose of raising the shaft on to a barrow; that while the shaft was being so raised the chain broke and the shaft fell on the pursuer and injured him; that the chain was obviously unsound and unfit for the work; and that "the accident was accordingly due to the fault of the defendants. The plant in question was supplied by them or by their employee for whom they were responsible, and it was their duty to inspect it and to see that it was sufficient for the purpose. It is a general and well recognised custom of trade that when machinery is being removed from premises for repair the occupiers of the premises give the use of their plant for the purpose, and that any employee deputed by them to assist in the operation has authority to use their plant":—*Held*, that the action was not maintainable in respect that at the time of the accident Hill was in the employment of the Harvey Engineering Co. in the sense that he was under their control, and not under that of the defendants; and that the pursuer did not aver that the Harvey Engineering Co. had contracted with the defendants for the use of the winch and chain. *Donovan v. Laing* (63 L. J. Q.B. 25; [1893] 1 Q.B. 629)

followed. *M'Fall v. Adams*, [1907] S.C. 367—Ct. of Sess.

Libel by Servant—Liability of Master—Voluntary Association.]—A master is liable for a libel written by his servant while acting within the scope of his employment, although without special instructions. So *held*, where the master was a voluntary association? *Ellis v. National Free Labour Association*, 7 F. 629—Ct. of Sess.

False Imprisonment—Public-house Manager—Implied Authority to Arrest—Liability of Master.]—The implied authority of a public-house manager to give into custody a person whom he suspects of stealing the property of the proprietor is not unlimited. The implication only arises where the arrest is reasonably necessary for the protection of the employer's property, or for its recovery if it is being wrongfully taken away. *Hanson v. Waller*, 70 L. J. K.B. 281; [1901] 1 K.B. 390; 84 L. T. 91; 49 W. R. 445—D.

Station-master—Detention of Passenger.]—The plaintiff, a passenger on the defendants' line, alighted at the station next before that for which his ticket was issued. He refused to give up his ticket, alleging that he was breaking his journey, but offered his name and address. The station-master thereupon locked the only door leading out of the station and detained the plaintiff a considerable time until his ticket was given up. On new trial motion in an action against the company for false imprisonment:—*Held*, that the locking of the door being an act of a class ordinarily within the scope of the station-master's authority, and having been done under circumstances that rendered it unjustifiable in the course of the servant's employment, and for the purposes of the railway company, his employers, the company, were responsible. *Farry v. Great Northern Railway*, [1898] 2 Ir. R. 352—Q.B. D.

Tramway Conductor—Alleged Counterfeit Coin—Giving into Custody.]—The plaintiff Knight was travelling in one of the defendant company's trams and tendered 6d. in payment of the fare, and received 4d. change. Shortly after the conductor alleged it was counterfeit, and, on the plaintiff refusing to give another, the conductor gave him in charge. An inspector of the company, who happened to be passing, sent the conductor down to charge the plaintiff, and went on with the tram. The next morning the magistrate dismissed the charge, the sixpence turning out to be a good one. Another inspector of the company was present in Court during the proceedings. In an action against the tramway company for malicious prosecution and false imprisonment,—*Held*, that there was no evidence to shew that the conductor acted within the scope of his authority express or implied, or that the defendant company ratified his proceedings. *Knight v. Metropolitan Tramways Co.*, 78 L. T. 227—Bruce, J.

Boy Cleaning Machine—Person in Charge Starting Machine—"Allowing" Boy to be in Machine—Injury—Liability.]—A young person employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part

of the machine, and for this purpose the boy was obliged to go into the space between the fixed and traversing portions of the machine. When the order was given the machine was properly stopped; but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries from which he died:—*Held*, that, as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not "allowed" by him to be in the prohibited space at the time of the accident, within the meaning of sub-sections 2 and 3 of section 9 of the Factory and Workshop Act, 1895, and that the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under section 83 of the Factory and Workshop Act, 1878, though such occupiers would have been liable for an "allowance" by their servant. *Crabtree v. Fern Spinning Co.*, 85 L. T. 549; 50 W. R. 167; 66 J. P. 181; 20 Cox C.C. 82—D.

And see *infra*, WORKMEN'S COMPENSATION ACT, col. 1489, and PRINCIPAL AND AGENT.

5. FACTORIES AND WORKSHOPS.

(a) What are.

Gangway of Ship—Regulations—Breach of.]—Part II. section 4 of the Regulations of October 24, 1904 (made by the Secretary of State under section 79 of the Factory and Workshop Act, 1901), contains a regulation as to the use of a gangway when a ship is lying at a quay:—*Held*, that this regulation applied only in the case of persons employed in loading or unloading or coaling the vessel, and did not affect the liability at common law of the shipowner to third parties. *O'Brien v. Arbib*, [1907] S.C. 975—Ct. of Sess.

"Factory"—Beer-bottling Works—Washing and Filling Bottles—"Adapting for sale"—Mechanical Power—"in aid of" Manufacturing Process.]—Premises used solely for the purpose of washing beer-bottles by manual labour with the aid of mechanical power, and filling them with beer by manual labour only, are not a factory within the meaning of section 93 of the Factory and Workshop Act, 1878. *Law v. Graham*, 70 L. J. K.B. 608; [1901] 2 K.B. 327; 84 L. T. 599; 49 W. R. 622; 65 J. P. 501; 19 Cox C.C. 709—D.

—Beer-bottling Stores—Mechanical Power—Manufacturing Process—Adapting for Sale—Non-textile Factory.]—Bottling stores used for aerating and bottling beer, where carbonic-acid gas and beer are mixed together by mechanical power and then put into bottles by a tap, the nozzle of which is pulled down by hand into the neck of the bottle, the beer flowing from the tap and filling the bottle by the pressure of the gas, come within the definition of a non-textile factory in section 93 of the Factory and Workshop Act, 1878, and it is an offence to employ a young person in such beer-bottling stores beyond the period permitted by section 13 of that Act or section 36 of the Factory and Workshop Act, 1895. *Law v. Graham* (70 L. J. K.B. 608; [1901] 2 K.B. 327) distinguished. *Hoare*

v. Truman, Hanbury, Buxton & Co., 71 L. J. K.B. 380; 86 L. T. 417; 50 W.R. 396; 66 J. P. 342—D.

— **Making and Finishing of Bricks**—Girl under Age of Sixteen.]—Bricks after being baked were taken to dipping-sheds, and after being placed in a preparing solution were dipped in glaze and scraped and knifed. They were then stacked, and ultimately baked with a view to setting the glaze. They were then polished, and stacked until wanted for sale:—*Held*, that this constituted the “finishing of bricks” within the Act. *Squire v. Stanley*, 84 L. T. 535; 65 J. P. 467; 19 Cox C.C. 695—D.

— **“Tenement factory”**—Supply of Mechanical Power from Several Sources—Buildings “situate within the same close or curtilage” — **Fire-escapes**.]—A building is not a “tenement factory” within the meaning of section 149, sub-section 1 of the Factory and Workshop Act, 1901, in which the mechanical power employed in the different parts of the building occupied by different persons is derived from separate sources situated upon these parts respectively, inasmuch as mechanical power is not “supplied to” different parts of such a building within the meaning of the sub-section. *Brass and London County Council, In re*, 73 L. J. K.B. 841; [1904] 2 K.B. 336; 91 L. T. 344; 53 W.R. 27; 68 J. P. 365; 2 L. G.R. 809; 20 T. L. R. 464—D.

Semble, that adjoining premises consisting of two factories, the one in part superimposed upon the other, and a builder's store, approached by separate entrances, cannot properly be described as “buildings situate within the same close or curtilage” within the definition of “tenement factory” in section 149, sub-section 1 of the Factory and Workshop Act, 1901. *Ib.*

— **“Workshop”**—Room for Repairing Articles used by a Person in his Business—Fishing-boat Owner—Room for Repairing Fishing Nets—Manual Labour Exercised “by way of trade or for purposes of gain.”]—A fishing-boat owner occupied a warehouse with a chamber over it, in which persons in his employ repaired fishing nets belonging to his fishing boats and used by him in his fishing business, and no nets were repaired in this room except those which belonged to him and were used by him in his own fishing business. Upon an inspector of factories visiting the premises he found four persons engaged in manual labour in mending or repairing these nets:—*Held*, on the authority of *Nash v. Hollinshead* (70 L. J. K.B. 571; [1901] 1 K. B. 700), that, as the labour employed in the room was employed in the repairing of nets belonging to the employer and solely used by him in his own business, there was no manual labour exercised “by way of trade or for purposes of gain” within the meaning of the definition of “workshop” in section 149 of the Factory and Workshop Act, 1901, and that therefore the room was not a “workshop” within the meaning of the Act. *Curtis v. Shinner*, 95 L. T. 31; 70 J. P. 272; 22 T. L. R. 448—D.

— **Underground Bakehouse in Use before 1901 Continued after January 1, 1904**—Necessity for Certificate of District Council.]—Section

101 of the Factory and Workshop Act, 1901, absolutely prohibits the use of underground bakehouses after January 1, 1904, unless certified as structurally suitable for the purpose by the local authority. *Evans v. Gallon*, 2 L. G. R. 1004; 68 J. P. 537—D.

— **“Workshop”**—Omission to Affix Abstract of Act—“Manual labour” —“Article.”]—Premises belonging to retail florists consisted of a shop in front and a room at the back. In this room crosses, wreaths, and bouquets were made by employees, and floral decorations arranged. In doing this work wire was used, and rubber tubing, made to resemble the bark of trees, attached to frames. This work was not merely incidental to the business done in the shop:—*Held*, that the production of these crosses &c. was the exercise of “manual labour” by way of trade in the making or adapting for sale of articles within the meaning of section 149, sub-section 1 of the Factory and Workshop Act, 1901, and that consequently the room in which it took place was a “workshop” within the Act, and the notice mentioned in section 128, sub-section 1 (a) must be affixed therein. *Hoare v. Green*, 76 L. J. K.B. 730; [1907] 2 K.B. 315; 96 L. T. 724; 71 J. P. 341; 23 T. L. R. 483—D.

— **Underground Bakehouse**—Place Underground “used” as a Bakehouse on January 1, 1896.]—A place underground had been used as a bakehouse for about fifteen years down to October, 1895, when the premises of which it formed part became vacant. The landlord then had the premises, including the bakehouse, put into repair, and while the work of repair was in progress a notice was exhibited upon the premises to the effect that they were to let as baker's premises. The repairs were completed by Christmas, 1895, but the premises remained unoccupied until February, 1896, when they were let to a baker, who entered into possession and used the bakehouse for the purposes of his business. By sub-section 3 of section 27 of the Factory and Workshop Act, 1895, “a place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act”—that is, January 1, 1896:—*Held*, that the place in question was “used” as a bakehouse within the meaning of the above exception, and was therefore not a place underground the use of which as a bakehouse was prohibited by the Act. *Schwerzerhof v. Wilkins*, 67 L. J. Q.B. 476; [1893] 1 Q.B. 640; 78 L. T. 229; 62 J. P. 247; 19 Cox C.C. 22—D.

— **Certificate of Suitability**—Alterations—Apportionment of Expenses.]—By a lease made in 1903 premises were let for a term of twenty-one years at a yearly rent of 50*l.* as an underground bakehouse. The lease contained a covenant that the lessee would during the term “pay all existing and future taxes, rates, duties, assessments, impositions and outgoings of every description for the time being payable either by landlord or tenant in respect of the premises respectively (except landlord's property tax).” The certificate of suitability required by section 101 of the Factory and Workshop Act, 1901, could not be obtained unless structural alterations were made in the premises:—*Held*, that the expenses of the alterations were “impositions and outgoings” within the meaning of the covenant, and therefore that they

must be borne by the lessee. *Monk v. Arnold* (71 L. J. K.B. 441; [1902] 1 K.B. 761) considered. *Goldstein v. Hollingsworth*, 73 L. J. K.B. 826; [1904] 2 K.B. 578—D. *And see* LANDLORD AND TENANT—OUTGOINGS, cols. 1232–3.

— **Structural Alterations—Covenant to Pay Outgoings—Recovery of Expenses—Jurisdiction of High Court.**—A lease of an underground bakehouse contained a covenant by the lessee to pay all outgoings which might be imposed upon the demised premises or upon the landlord or tenant in respect thereof. During the lease the district council refused to certify under section 101, sub-section 8 of the Factory and Workshop Act, 1901, that the premises were suitable for the purpose of being used as an underground bakehouse, on the ground that structural alterations were necessary. The defendant, who was assignee of the lease, applied under the same sub-section to a Court of summary jurisdiction to apportion, and that Court apportioned, the expenses between the lessors and lessee. The plaintiffs, assignees of the reversion, having made the necessary structural alterations, claimed to recover the expense of so doing from the defendant:—*Held*, that the expenses were not recoverable by means of an action in the High Court, the only remedy of the plaintiffs being under section 101, sub-section 8 of the Act. *Horner v. Franklin* (74 L. J. K.B. 291; [1905] 1 K.B. 479) applied. *Goldstein v. Hollingsworth* (73 L. J. K.B. 826; [1904] 2 K.B. 578) and *Morris v. Beal* (73 L. J. K.B. 880; [1904] 2 K.B. 585) considered. *Stuckey v. Hooke*, 75 L. J. K.B. 504; [1906] 2 K.B. 20; 94 L. T. 723; 54 W. R. 509; 70 J. P. 393; 4 L. G. R. 815; 22 T. L. R. 508—C.A.

— **Room for Repairing Articles Used by a Person in his Business—Fishing-boat Owner—Room for Repairing Fishing Nets—Manual Labour Exercised “by way of trade or for purposes of gain.”**—A fishing-boat owner occupied a warehouse with a chamber over it in which persons in his employ repaired fishing nets belonging to his fishing boats and used by him in his fishing business, and no nets were repaired in this room except those which belonged to him and were used by him in his own fishing business. Upon an inspector of factories visiting the premises he found four persons engaged in manual labour in mending or repairing these nets:—*Held*, on the authority of *Nash v. Hollinshead* (70 L. J. K.B. 571; [1901] 1 K.B. 700), that, as the labour employed in the room was employed in the repairing of nets belonging to the employer and solely used by him in his own business, there was no manual labour exercised “by way of trade or for purposes of gain” within the meaning of the definition of “workshop” in section 149 of the Factory and Workshop Act, 1901, and that therefore the room was not a “workshop” within the meaning of the Act. *Curtis v. Shinner*, 95 L. T. 31; 70 J. P. 272; 21 Cox C.C. 210; 22 T. L. R. 448—D.

(b) *Fencing Machinery.*

Machinery outside Factory Precincts.—Machinery used for crushing mortar was erected on a piece of ground where the respondents

were erecting a new sheet mill. It was within the close, curtilage, and precincts of the respondents' factory, but was used solely by the respondents for a purpose other than the manufacturing process or handicraft carried on in their factory. An accident having occurred owing to the machinery in question being unfenced, the respondents were summoned for not having same securely fenced. The Justices being of opinion that the piece of ground did not form part of the respondents' factory, and was not otherwise a “factory,” dismissed the summons:—*Held*, that on the facts the Justices were right. *Lewis v. Gilbertson*, 91 L. T. 377; 68 J. P. 323; 20 Cox C.C. 677—D.

Engine-house in Workhouse for Generating Electrical Energy—Public Building.—Upon the premises of a workhouse under the control of the appellants were an engine-house and machinery used for the purpose of generating electrical energy for the lighting of the workhouse and for other purposes. The machinery included an engine, which was not securely fenced:—*Held*, that the engine-house was a “factory” within the meaning of section 149, sub-section 1 (a) of the Factory and Workshop Act, 1901, the workhouse being a “public building” within Part I. (20) of the Sixth Schedule, and that the appellants were therefore properly convicted of not having securely fenced the engine. *Mile End Old Town Guardians v. Hoare*, 72 L. J. K.B. 651; [1903] 2 K.B. 483; 89 L. T. 276; 67 J. P. 395; 1 L. G. R. 732; 20 Cox C.C. 536—D. *And see* cols. 1486, 1479.

(c) *Fire Escapes.*

“Factory”—Adjoining Houses Connected by External Gangway.—Adjoining houses were let upon separate leases by the same owner to the same tenant, who occupied them for the purposes of a manufacturing business. Regarded separately, one of the houses would have been a “factory” and the other a “workshop” within the Factory and Workshop Act, 1901. In the former house more than forty persons and in the latter less than forty persons were employed. The buildings were connected by an external iron gangway joining the first-floors; certain processes commenced in the one house were finished in the other, and the two were used by the tenant as one set of manufacturing premises:—*Held*, that, under these circumstances, an arbitrator, to whom a dispute between the owner and the local authority as to the provision of means of escape from fire under section 14 of the Act had been referred, was amply justified in holding that the two buildings constituted a single “factory” within the meaning of the Act. *London County Council and Tubbs, In re*, 1 L. G. R. 746; 68 J. P. 29—D.

— **Covenant to Pay “Outgoings”—Recovery of Expenses—County Court.**—The owner of a factory within the meaning of section 7, sub-section 2 of the Factory and Workshop Act, 1891 (which is re-enacted by section 14 of the Factory and Workshop Act, 1901), who, in compliance with the requirements of a sanitary authority, incurs expenses in providing means of escape in case of fire, must apply to the County Court under the same sub-section in order to recover the expenses or any part thereof

from the occupier. His only remedy against the occupier is in that Court, and he cannot sue in the High Court even when the occupier has expressly covenanted with him to pay all outgoings in respect of the premises constituting the factory. *Horner v. Franklin*, 74 L. J. K.B. 291; [1905] 1 K.B. 479; 92 L. T. 178; 69 J. P. 117; 3 L. G. R. 423; 21 T. L. R. 225—C.A.

The County Court Judge, when the matter comes before him, is entitled to consider the terms of the tenancy, but he is also bound to consider what may be just and equitable under all the circumstances of the case. *Ib.*

Observations of CHANNELL, J., in *Monk v. Arnold* (71 L. J. K.B. 441; [1902] 1 K.B. 761), on this point approved. *Goldstein v. Hollingsworth* (73 L. J. K.B. 826; [1904] 2 K.B. 578) and *Morris v. Beal* (73 L. J. K.B. 830; [1904] 2 K.B. 585) doubted by ROMER, L.J. *Ib.*

— **Expense of Works—Liability as between Owner and Occupier—Jurisdiction of County Court.**—Where the lessor of a factory to which section 7, sub-section (2) of the Factory and Workshop Act, 1891, applies has, pursuant to that sub-section, provided the means of escape in case of fire for the persons employed in the factory, the County Court has jurisdiction under the last clause of the sub-section, on the application of the lessor, to apportion the expense between the lessor and the lessee in such manner as appears to the Court just and reasonable in all the circumstances, notwithstanding that the lease contains a general covenant to pay outgoings. *Monk v. Arnold*, 71 L. J. K.B. 441; [1902] 1 K.B. 761; 86 L. T. 580; 50 W. R. 667—D.

(d) *Employment of Young Persons and Children.*

Working during Prohibited Hours—Work done for Amusement—Liability of Occupier.—Where a young person does any work in a factory during meal-times, the occupier of the factory is liable to be convicted under section 83 of the Factory and Workshop Act, 1873, although he may not in fact have employed the young person to do the work. *Prior v. Slaithewaite Spinning Co.*, 67 L. J. Q.B. 615; [1898] 1 Q.B. 881; 78 L. T. 532; 46 W. R. 488; 62 J. P. 358; 19 Cox C.C. 54—D.

The fact that a young person who is found oiling machinery during meal times is doing so merely for his own amusement, and not under orders, does not prevent it from being "work" within the meaning of the Act. *Ib.*

Boy Cleaning Machine—Person in Charge Starting Machine—"Allowing" Boy to be in Machine—Injury—Liability.—A young person employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part of the machine, and for this purpose the boy was obliged to go into the space between the fixed and traversing portions of the machine. When the order was given the machine was properly stopped; but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries

from which he died:—*Held*, that, as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not "allowed" by him to be in the prohibited space at the time of the accident, within the meaning of sub-sections 2 and 3 of section 9 of the Factory and Workshop Act, 1895, and that the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under section 83 of the Factory and Workshop Act, 1873, though such occupiers would have been liable for an "allowance" by their servant. *Crabtree v. Fern Spinning Co.*, 85 L. T. 549; 50 W. R. 167; 66 J. P. 181—D.

Child employed in Meal-times—Dismissal of Information.—A child was employed in a factory where the meal-time was from 5.30 to 6 p.m. Work was stopped for the day at 5.30, and the child was employed after that time in wiping the spindles of a machine in a room where the under-manager and several overlookers were present. Notices were exhibited calling attention to the provisions of the Factory Acts against working in meal-times. The Justices dismissed an information against the masters for employing a child in meal-time, on the ground that they had used every possible means to carry out the provisions of the Factory and Workshop Act, 1901:—*Held*, that it could not be said that the masters had used due diligence to enforce the Act within section 141. *Quære*, whether the information could have been dismissed within section 16 of the Summary Jurisdiction Act, 1849. *Rogers v. Barlow*, 94 L. T. 519; 70 J. P. 214—D.

Full Time—Half Time—By-laws as to School Attendance—Total Exemption—Partial Exemption—Effect of Certificate of Previous Due Attendance.—Where the by-laws made by the school authority of a district apply to children between thirteen and fourteen years of age and make no provision for total exemption from the obligation to attend school upon a child obtaining a certificate of previous due attendance of a certified efficient school, a child of the age of thirteen who has obtained such a certificate cannot lawfully be employed full time in a factory or workshop, notwithstanding the provisions of section 71 of the Factory and Workshop Act, 1901. *Stevenson v. Goldstraw*; *Same v. Craig*, 75 L. J. K.B. 565; [1906] 2 K.B. 298; 95 L. T. 111; 4 L. G. R. 868; 70 J. P. 340—D.

A child of the age of twelve who has obtained a certificate of previous due attendance at a certified efficient school, may by virtue of the provisions of section 68 of the Factory and Workshop Act, 1901, lawfully be employed as a half-timer in a factory or workshop, although the by-laws of the school authority make no provision for the partial exemption of children from the obligation to attend school. *Ib.*

(e) *Hours of Employment.*

Young Persons—Exhibition of Notice—Newspaper Stall at Country Railway Station—"Shop."—A newspaper stall, consisting of a board laid on trestles, at a country railway station, at which a boy is employed for a few hours daily, his principal place of employment being at the bookstall of the railway junction

two miles distant, is not a "shop" within the Shop Hours Act, 1892, and the notice required by section 4 of that Act need not be exhibited upon it. *Smith v. Kyle*, 71 L. J. K.B. 16; [1902] 1 K.B. 286; 85 L. T. 428; 50 W. R. 319; 66 J. P. 101; 20 Cox C.C. 54—D.

Employment before Statutory Hour.—Two women, weavers in a linen factory, twenty minutes before 6 A.M. (the statutory hour for beginning work), voluntarily dusted and otherwise regulated their spinning looms for their own satisfaction and comfort in accordance with a practice known to the occupiers of the factory. Adequate provision for the cleaning and regulation of the looms by other persons had been made by the occupiers of the factory. The occupiers being charged with a contravention of sections 23 and 24 of the Factory and Workshop Act, 1901.—*Held*, that the women had not been employed before the statutory hour. *Paterson v. Duke*, 6 F. (Just. Cas.) 53—Ct. of Justy.

Employment after Legal Period—"Workshop"—Shop Used for Operation of Adapting for Sale.]—A shop in which, during several hours after the ordinary shop hours have ceased, an operation is carried on which is not incidental to the shop business, but is for the purpose of adapting an article for sale, is capable of being a "workshop" within the meaning of section 93 of the Factory and Workshop Act, 1878. *Fullers, Lim. v. Squire*, 70 L. J. K.B. 689; [1901] 2 K.B. 209; 85 L. T. 249; 49 W. R. 683; 65 J. P. 660—D.

Overtime—Polishing, Cleaning, Wrapping, and Packing up—Part of Factory in which Work "Overtime" is Allowable.—The overtime work of "polishing, cleaning, wrapping, or packing up goods" allowed in textile and non-textile factories by clause (4) of the Second Schedule of the Factory and Workshop Act, 1901, must be performed in a warehouse or room adapted to that purpose, and cannot be performed in any part of the factory in which any manufacturing process or handicraft has previously been carried on during ordinary working hours. *Smith v. Sibray Hall & Co.*, 72 L. J. K.B. 822; [1903] 2 K.B. 707; 89 L. T. 353; 52 W. R. 218; 67 J. P. 390; 1 L. G. R. 874; 20 Cox C.C. 542—D. *And see SHOPS, infra.*

6. SHOPS.

Early Closing.—4 Edw. 7 c. 31 is the *Shop Hours Act*, 1904.

Seats for Assistants.—62 & 63 Vict. c. 21 is the *Seats for Shop Assistants Act*, 1899.

Shop Clubs.—2 Edw. 7 c. 21 is the *Shop Clubs Act*, 1902.

Early Closing—Order Fixing Hour for Closing on One Day of the Week—Ultra Vires—Reasonableness.—A local authority will not be restrained from proceeding with an order made under the Shop Hours Act, 1904, after it has been sent to the Home Office for confirmation. *Att.-Gen. v. Brighton Corporation*, 77 L. J. Ch. 6; 71 J. P. 535; 6 L. G. R. 51; 24 T. L. R. 33—Joyce, J.

Semble, such an order need not fix the hours for closing on every day of the week, but may fix the hour for closing on one day only. *Ib.*

Semble, the order need not provide for the different requirements of different shopkeepers in the same trade. *Ib.*

Offence against Shop Hours Act—Effect of Duly Confirmed Order under the Act.—At the hearing of a complaint charging an offence against the Shop Hours Act, 1904, and a duly confirmed order purporting to have been made thereunder, evidence is not admissible to prove that certain steps preliminary to the making of the order have not been taken as required by the Act, inasmuch as the Act provides that a closing order made by a local authority and confirmed by the central authority is to have "the effect of an Act of Parliament." *Hamilton v. Fyfe*, [1907] S.C. (J.) 79—Ct. of Justy.

Hours of Employment—"Licensed public-houses of any kind"—"Person wholly employed as a domestic servant."—A licensed hotel and restaurant, although of a very high class, is a "shop" within the meaning of the definition contained in section 9 of the Shop Hours Act, 1892, inasmuch as it is a licensed public-house of a very superior kind. A page-boy employed at such an hotel is not within the exception contained in the Act as a "person wholly employed as a domestic servant." Therefore a master who employs a page-boy under the age of eighteen years in or about such an hotel for a longer period than seventy-four hours, including meal-times, in any one week, or fails to keep exhibited the notice required by the Act, is liable to the penalty imposed by section 5 of the Act. *Savoy Hotel Co. v. London County Council*, 69 L. J. Q.B. 274; [1900] 1 Q.B. 665; 82 L. T. 56; 48 W. R. 351; 64 J. P. 262; 19 Cox C.C. 437—D.

Rules of Club Existing before Commencement of Shop Clubs Act—No Person Leaving to have Claim on Fund—Existing Rules Continued after Commencement of Act—Rules not Registered.—The plaintiff when he entered the defendants' service agreed to contribute to a provident fund controlled by the defendants, to which they required all their employes to contribute rateably. One of the rules provided that no person dismissed from or leaving the defendants' service should have any claim on the provident fund. In 1902, subsequent to the passing of the Shop Clubs Act, 1902, the defendants issued a new form of servants' agreement, declaring that such servant was to be a voluntary subscriber to the provident fund, and they passed a resolution cancelling the rule by which all employes were required to contribute to the provident fund. The plaintiff, who left the defendants' service in 1903, claimed a declaration that the defendants could not discharge the members of the compulsory provident fund without their assent, and deprive them of their rights thereunder, and that the transfer of such funds for the benefit of the new provident fund to be supported by voluntary contributions was illegal; and alternatively, on his own behalf, he asked that his share of the funds of the compulsory provident fund might be ascertained and paid to him.—*Held*, that although the rules of the provident society were not registered under the Shop Clubs Act, 1902,

there was nothing in that Act to abrogate the existing rules of the society, and that, as by one of the rules no member leaving or being dismissed should have any claim upon the funds, the action failed. *Balchin v. Ebury (Lord)*, 20 T. L. R. 60—Kekewich, J.

7. DOMESTIC SERVICE.

First Month's Service—Custom to Determine by Fortnight's Notice.]—A custom that either master or servant may determine domestic service at the end of the first month by notice given at or before the expiration of the first fortnight, is not in itself unreasonable; but inasmuch as such a custom has not yet been so fully established that judicial notice can be taken of it, it must be proved in each case as a question of fact. *Moult v. Halliday*, 67 L. J. Q.B. 451; [1898] 1 Q.B. 125; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8—D.

8. WAGES.

Deductions—Waiver by not Claiming at End of Each Week.]—By an agreement made between the respondents and the appellant the wages were to be at the rate of 24s. per week, and so in proportion for any less period than a week. The wages were to be at the rate of 24s. per week at the least. During the employment, owing to various causes the appellant was not employed for certain periods, and no wages were paid to him in respect of those periods, but the wages were settled up at the end of each week, when the deductions were made:—*Held*, that the appellant could not recover the amount of these deductions at the end of the employment, as it was a claim that could be waived, being a claim for damages and not a liquidated debt. *Stoddart v. Mitchell*, 85 L. T. 686; 66 J. P. 103—D.

Superannuation Fund—Railway Company—Dismissal of Servant for "dishonesty"—Dishonesty outside Company's Service.]—The defendant company's servants were obliged to contribute a certain percentage of their wages to the company's superannuation fund, and the company contributed to the fund a sum equal to the amount subscribed by the contributors. By rule 5 of the rules of the superannuation fund, "any contributing member dismissed the service for dishonesty or retiring to avoid such dismissal shall forfeit all his contributions":—*Held*, that "dishonesty" included dishonesty outside the service of the company as well as dishonesty towards the company. *Thayre v. London, Brighton, and South Coast Railway*, 22 T. L. R. 240—Jelf, J.

Claim for, by Niece in Position of Adopted Daughter.]—A niece who would otherwise have had to earn her own living, at the request of her aunt came to live with her in the position of an adopted daughter. During the last three years of her life the aunt suffered from senile dementia, and required constant attendance and nursing. She was efficiently nursed by the niece, and but for her services two nurses would have had to be employed. After her aunt's death the niece claimed remuneration:—*Held*,

that in the absence of an express agreement the niece was not entitled to remuneration for the services rendered by her. *Russel v. McClymont*, 8 F. 821—Ct. of Sess.

Becoming Due Daily—Fortnightly Payment—Refusal to Work—Forfeiture—Breach of Contract.]—The plaintiff was engaged as a putter by a colliery company, and his work consisted in drawing coal in tubs underground. The amount earned by him depended upon the number of tubs drawn by him, and his wages were paid fortnightly upon the Friday following the end of the fortnight, the total amount of work done each day by him being ascertained daily. On the day preceding pay day a pay note was handed to each workman. On a certain occasion upon receipt of the pay notes a dispute arose between one of the putters and the company, and as a consequence upon the following day the putters, including the plaintiff, declined to work, and laid the pit idle. They were then informed by the masters that they had broken their contract, and that all wages earned since the conclusion of the previous fortnight would be forfeited. On the Monday following the putters presented themselves prepared to work, but were told that they would not be allowed to resume unless they signed on afresh. Subsequently, by arrangement, they resumed work without prejudice on the following day. The plaintiff sued the defendants to recover the amount of the wages forfeited by the defendants for the four days' work done by him after the conclusion of the fortnight in respect of which the disputed pay note was given, and also claimed damages for breach of contract on the ground that the refusal to allow him to work on the Monday was a breach by the defendants of their contract with him, it being common knowledge that laying the pit idle for a day or two was a common practice, and did not amount to a repudiation of their contract by the putters:—*Held*, that the plaintiff was not entitled to recover damages for breach of contract, as the masters were justified in dismissing him in consequence of his refusal to work; but that as each day's wages became due daily, although they were not paid over to him until the expiration of a fortnight, he was entitled to recover the wages for the four days upon which he had worked before his dismissal. *Parkin v. South Hetton Coal Co.*, 97 L. T. 98; 23 T. L. R. 408—D.

Sick Pay—Right to Wages during Time of Illness.]—The plaintiff, a railway employee, upon entering the company's service, signed an undertaking to abide by the rules of the company. One of these rules required him to join the railway company's friendly society, which was independent of the company, but to the funds of which the company contributed. By the rules of the society a member was entitled to sick pay during illness, but not if he was receiving wages from the company. The plaintiff became ill in February, 1905, and received sick pay until September, when he received notice terminating his employment. In an action by the plaintiff claiming wages from the company from February to September,—*Held*, that he was not entitled to wages during that period. *Niblett v. Midland Railway*, 96 L. T. 462; 23 T. L. R. 240—D.

Truck Act—Jurisdiction of Justices.—The jurisdiction of Justices under the Employers and Workmen Act, 1875, is not ousted by the provisions of section 1 of the Truck Act, 1896, and proceedings may be taken before Justices to recover a penalty under a contract between an employer and a workman, although particulars under section 1, sub-section 2 (b) of the Truck Act, 1896, have not been supplied to the workman. *Buxton Lime Firms Co. v. Howe*, 69 L. J. Q.B. 498; [1900] 2 Q.B. 282; 82 L. T. 422; 48 W. R. 472; 64 J. P. 503—D.

— **Payment of Wages Otherwise than in Current Coin—Agreement by Workman to Accept Portion of Wages in Scrip of Employing Company.**—The plaintiff was employed by the defendants as a machinist at 22s. per week. In October, 1894, he (along with his fellow-workmen) signed an agreement by which his wages continued to be 22s., of which, however, 2s. per week was to be satisfied by shares of the defendant company, his employers. The plaintiff was paid 20s. down to April 24, 1897, when he served notice on the defendants that he would not accept the reduced cash wages, and from that date until February, 1899, he was paid 22s. a week in cash. In February, 1899, he left the defendants' employment, and sued them for 12l., the difference between the 20s. and 22s. a week from the date of the agreement in October, 1894, to April 24, 1897:—*Held*, that the agreement was void under the Truck Acts, and that the defendants were liable to pay so much of the plaintiff's wages as had not been paid in current coin of the realm; and that there was nothing in the concurrence of the other workmen or in the plaintiff's own conduct to prevent him from recovering. *Glasgow v. Independent Printing Co.*, [1901] 2 Ir. R. 278—C.A.

— **Payment in Full—Part to be Handed Back.**—The respondent, a manufacturer employing several workmen, had since the Workmen's Compensation Act, 1897, adopted the practice of paying his workpeople their wages fortnightly in full, but at the time of such payment a slip of paper was handed to each workman on which was written a sum equal to twopence in the pound on the amount of the wages handed to the workman, and the sum so indicated on the paper was then handed back by the workman to the respondent's cashier. This system was explained and was understood by the workmen as being intended to provide for the insurance premiums which the employer himself paid to cover his own liability in respect of accidents under the Workmen's Compensation Act. In accordance with this system the respondent paid a workman his wages (2l. 5s.) in full, and at the same time handed him a slip of paper on which was written 4½d., which the workman then paid back to the respondent:—*Held*, that there was not a payment of a part of the wages otherwise than in current coin, and that the respondent had committed no offence against section 3 of the Truck Act, 1891. *Owner v. Hooper*, 89 L. T. 130; 67 J. P. 406; 20 Cox C.C. 518—D.

— **Deductions—"Workman."**—The respondents, lace manufacturers, were the occupiers of a factory. After lace had been removed from the machines it had to go through a pro-

cess called clipping, which was performed by women clippers. The general course of business was for the clippers to apply to the manufacturers for lace, and to take it home to be clipped. The clippers were not employed exclusively by any one firm, but might take lace from different firms. They might execute the work themselves or give it to other persons to execute, or might return it unexecuted. The clippers were responsible in case of non-return of the lace. They were paid weekly, and if any damage had been done to the lace a deduction was made in respect thereof. In accordance with this practice, two women clippers applied to and obtained lace from the respondents, took it home, and subsequently returned it clipped but damaged, and a reasonable sum was deducted in respect of the damage from the amount due to them from the respondents:—*Held*, that the clippers did not come within the definition of "workman" in section 10 of the Employers and Workmen Act, 1875, inasmuch as they were not bound by contract to execute any part of the work personally, and that therefore the provisions of section 2 of the Truck Act, 1896, had no application. *Squire v. Midland Lace Co.*, 74 L. J. K.B. 614; [1905] 2 K.B. 448; 93 L. T. 29; 53 W. R. 653; 69 J. P. 257; 21 T. L. R. 466—D.

— **Fines on Breach of Rules—Good Order and Decorum—Acts Causing or Likely to Cause Damage to Employer.**—A rule posted in a factory workroom that all workers shall observe "good order and decorum" is sufficiently specific to cover the case of female workers dancing during their dinner hour in a workroom in which they are privileged to dine, where such dancing raised dust likely to cause damage to the machines at which they worked and to the materials upon which they had to work. *Squire v. Bayer*, 70 L. J. K.B. 705; [1901] 2 K.B. 299; 85 L. T. 247; 49 W. R. 557; 65 J. P. 629—D.

A fine imposed upon the breach of such a rule, and under such circumstances, is in respect of "an act or omission" causing or likely to cause damage to the employer within the meaning of section 1, sub-section 1 (c) of the Truck Act, 1896. *Id.*

— **Damages Awarded by Court for Breach of Contract—Deduction of Damages by Master.**—The deduction by an employer from the wages of a workman of damages awarded by a Court of competent jurisdiction to be paid to the employer for breach of contract is a violation of section 3 of the Truck Act, 1891, which requires payment of the entire amount of wages in coin. *Williams v. North's Navigation Collieries*, 75 L. J. K.B. 384; [1906] A.C. 136; 94 L. T. 447; 54 W. R. 485; 70 J. P. 217; 22 T. L. R. 372—H.L. (E.)

— **Weekly Wage for Specified Hours—Bonus for Full-time Work—Failure to Put in Full Time—Deduction of Bonus.**—A workwoman was employed at 8s. per week of 55½ hours, with a bonus of 2s. per week for full attendance, and that alone. Printed rules posted in the factory, admittedly read by the workwoman, provided, *inter alia*, that "any person absent without reason, and not assigning satisfactory reason, shall lose bonus." The workwoman being absent for a quarter of a day without

sufficient reason, 2s. 4d. was deducted from the weekly sum of 10s. which would otherwise have been payable to her. No question being raised as to the 4d. (representing the quarter of a day's wages),—*Held*, that the deduction of the 2s. bonus was not an offence under the Truck Acts. *Deane v. Wilson*, [1906] 2 Ir. R. 405—K.B. D.

9. DISMISSAL OF SERVANT.

Without Notice—Negligence of Workman—Forgetfulness.—The forgetfulness of a servant in the performance of an important part of his duty need not be habitual in order to amount to negligence justifying his dismissal without notice. A single act of forgetfulness may, under certain circumstances, be sufficient. *Baster v. London and County Printing Works*, 68 L. J. Q.B. 622; [1899] 1 Q.B. 901; 80 L. T. 757; 47 W. R. 639; 63 J. P. 439—D.

Power of Master to Dismiss Servant on Two Months' Notice or Two Months' Salary—Wrongful Dismissal without Notice—Right to General Damages beyond Two Months' Salary.—By an agreement the defendants were entitled to terminate the plaintiff's employment with them at any time by giving him two months' notice in writing or two months' salary in lieu of notice. The plaintiff having been wrongfully dismissed,—*Held*, that the defendants were not liable for more damages than two months' salary merely because they had not a good reason for dismissing him. *Baker v. Denkera Ashanti Mining Corporation*, 20 T. L. R. 37—Grantham, J.

Misconduct—Secret Commission—Dismissal without Notice.—The plaintiff entered into an agreement with the defendants, a tannery company, to serve them as manager, and undertook to give his whole time and attention to the business. As part of his duty he was consulted by the defendants, and advised them as to the insurance of their premises. Without the defendants' knowledge he accepted an agency from an insurance company and received commissions from it in respect of insurances effected by the defendants through the plaintiff upon their premises with the insurance company. The agreement having expired, he subsequently entered into a fresh agreement with the defendants upon the same terms as to giving his whole time and attention to the business and advising the defendants as to the insurances upon their premises. At the expiration of this agreement he remained in the defendants' service without any fresh agreement being entered into. He continued during the whole time he acted as the defendants' manager, without the knowledge of the defendants, to act as agent for the insurance company and to receive commissions from it upon insurances effected through him upon the defendants' premises:—*Held*, that the acceptance by the plaintiff of the agency and the receipt by him of the secret commissions was misconduct which entitled the defendants to dismiss the plaintiff without notice, although under his contract of service he would otherwise have been entitled to six months' notice of the determination of his employment. *Swale v. Ipswich Tannery*, 11 Com. Cas. 88—Kennedy, J.

Wrongful Dismissal—Plea of Justification—

Functions of Judge and Jury.—There is no fixed rule of law defining the degree of misconduct which will justify the dismissal of a servant. The question is one of fact for the jury. But it is for the Judge to decide whether there is any evidence to justify dismissal, and if there be no such evidence he should not submit to the jury any issue of fact. He may also direct, guide, and assist the jury by informing them of the nature of the acts which in law would justify dismissal, and of the materiality of facts to the issues raised. *Clouston v. Corry*, 75 L. J. P.C. 20; [1906] A.C. 122; 93 L. T. 706; 54 W. R. 382; 22 T. L. R. 107—P.C.

Servant Occupying House as Part of Remuneration—Ejection from House.—When a servant has the occupation of a house as part of the remuneration for his services, he has on his dismissal (whether wrongful or not) no longer a title to possession, and is therefore not entitled to recover damages from his former master for having removed the servant's furniture from the house, the master having allowed the servant a reasonable time for removing it. *Sinclair v. Tod*, [1907] S.C. 1038—Ct. of Sess.

Procuring—Representation Inducing Master to Dismiss Servant.—Boiler-makers in common employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on ironwork. The appellant, an official of the Boiler-makers' Union, in response to a telegram from one of the boiler-makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union, and also fined; they must wait till the matter was settled. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out. The respondents were thereupon dismissed:—*Held*, that no actionable wrong had been committed by the appellant. *Allen v. Flood*, 67 L. J. Q.B. 119; [1898] A.C. 1; 77 L. T. 717; 46 W. R. 253; 62 J. P. 595—H.L. (E.)

By LORD WATSON.—Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. *Id.*

Dicta in this regard of LORD ESHER (then BRETT, L.J.) in *Bowen v. Hall* (50 L. J. Q.B. 305; 6 Q.B. D. 333) and in *Temperton v. Russell* (62 L. J. Q.B. 412; [1893] 1 Q.B. 715) disapproved. *Dicta* of LORD ESHER, M.R., and LOPES, L.J., in *Temperton v. Russell*, that it is actionable maliciously to induce a person not to enter into a contract, disapproved. *Id.*

Servant of Local Authority—No Special Contract.—See LOCAL GOVERNMENT, col. 1307.

Voluntary Winding-up.—See *Midland Counties District Bank v. Atwood*, 74 L. J. Ch. 286; *ante*, COMPANY, col. 475.

10. PENSION.

"Retiring with consent of the directors"—Clerk Required to Resign.]—The plaintiff, when he entered the service of the defendant bank, signed a form of rules dealing with retiring allowances to the officers of the bank. The second rule provided that each officer retiring with the consent of the directors should receive an allowance of one-third of the annual amount of his salary at the time he so retired. Rule 5 provided that no retiring allowance whatever was to be granted to any officer who was dismissed from the service of the bank. In consequence of his having indorsed a certain promissory note the plaintiff was called upon for an explanation, and eventually the secretary of the bank wrote a letter to the plaintiff which contained these words, "You are required to resign your appointment in the bank forthwith," whereupon the plaintiff sent in his resignation:—*Held*, that the plaintiff had not retired "with the consent of the directors" so as to entitle him to claim a retiring allowance under the rules. *Stephenson v. London Joint-Stock Bank*, 20 T. L. R. 8—C.A.

11. INJURIES TO SERVANTS.

(a) *Negligence of Master.*

Neglect of Statutory Duty—Penalty—Right of Action—Common Employment.]—Where a person is injured in consequence of the occupier of a factory having failed to fence or to maintain the fencing of machinery, as required by the Factory and Workshop Act, 1878, an action for damages will lie against the occupier notwithstanding that a penalty is imposed for breach of the statutory duty. *Groves v. Wimborne* (Lord), 67 L. J. Q.B. 862; [1898] 2 Q.B. 402; 79 L. T. 284; 47 W. R. 87—C.A.

To such an action founded upon the breach of the statutory duty the defence of common employment—namely, that the failure to fence was due to the negligence of a fellow servant of the plaintiff in the employment of the occupier of the factory—is not applicable. *Ib.*

Fencing Machinery—Dangerous Portion Unfenced—Carelessness and Wilful Disobedience to Orders—Accident to Employé.]—The carelessness and wilful disobedience to the foreman's orders of a factory hand, who has been injured by an unfenced machine, afford no answer to summary proceedings, under section 82 of the Factory and Workshop Act, 1878, against the occupier of the factory for having neglected to fence the machine. *Blenkinsopp v. Ogden*, 67 L. J. Q.B. 537; [1898] 1 Q.B. 783; 78 L. T. 554; 46 W. R. 542—D.

Claim under Workmen's Compensation Act—Workmen's Option as to Remedy—Estoppel—Infant.]—An infant apprentice sustained personal injuries in consequence of the negligence of his employers in not fencing machinery. A claim under the Workmen's Compensation Act, 1897, was sent in to the employers on behalf of the infant, and they paid him compensation in accordance with the Act during his incapacity for work.

Subsequently he commenced a common-law action of negligence against them:—*Held*, that the infant was not precluded from maintaining the action by the fact that he had exercised the option given to him by section 1, sub-section 2 (b) of the Workmen's Compensation Act, 1897, by claiming compensation under the Act, there being nothing in the Act forming an exception to the general rule that an infant is not bound by a contract made by him which is not for his benefit. *Stephens v. Dudbridge Ironworks Co.*, 73 L. J. K.B. 739; [1904] 2 K.B. 225; 90 L. T. 838; 52 W. R. 644; 68 J. P. 437; 20 T. L. R. 492—C.A.

Negligence of Servant—Implied Duty of Jobmaster—Driver's Duty to Take Care of Carriage.]

—A manufacturing jeweller hired from a jobmaster a carriage with a horse and driver at an agreed weekly sum for the express purpose of sending his traveller with a stock of jewels to go round to his customers. One day, while making his rounds, the traveller went into an hotel and left the carriage, with a stock of jewels inside it, in the charge of the driver. Before leaving the carriage the traveller locked the door. The driver then went into a coffee-house, leaving the carriage unattended in the street. A thief drove the carriage away and stole the jewels. The jeweller brought an action against the jobmaster to recover the value of the stolen jewels:—*Held*, that it was the duty of the defendant to provide a driver who should take ordinary care of the carriage during the temporary absence of the traveller, and that the theft of the jewels was the natural and ordinary result of a breach of such duty, so as to make the defendant liable for the loss suffered by the plaintiff. *Abraham v. Bullock*, 86 L. T. 796; 50 W. R. 626—C.A.

Contract to Supply Carriage and Driver to Commercial Traveller—Goods Left in Carriage—Obligation to Take Care of Carriage during Temporary Absence of Traveller—Larceny by Coachman—Liability of Jobmaster for Loss.]

The plaintiff, a wholesale jeweller, entered into a contract with the defendant, a jobmaster, for the hire of a brougham and driver for the use of the plaintiff's traveller, and the brougham was fitted up for the purpose of such use. The traveller left the brougham in the street for the purpose of getting his lunch, and while he was away the contents of the carriage were stolen, with the connivance of the coachman:—*Held*, that the defendant was liable because there was an obligation on him, by virtue of the contract, to provide a careful and trustworthy driver who would safeguard the contents of the brougham during intervals when the traveller would be necessarily absent, and that the defendant was not the less liable because the breach of contract was occasioned by a criminal act on the part of the defendant's servant. *Abrahams v. Bullock* (50 W. R. 626) followed. *Cheshire v. Bailey*, 52 W. R. 631; 20 T. L. R. 561—Walton, J. Reversed, 21 T. L. R. 130—C.A.

Lift Accident—Servant Injured—Lack of Knowledge of Danger by both Master and Servant—Defect in Lift.]—Where a lift, defective through the absence of an inner gate, has become dangerous owing to cleaning with oil by the order of a fellow-servant given with the sanction of the master, and there is a

neglect to give the servant working the lift proper directions as to its working, the master will be liable if such servant working the lift is injured, even although the danger is not known to the master or his superintendent, and is not known to the servant so injured. *Lloyd v. Woolland*, 87 L. T. 73—Bruce, J.

Where a plan of a lift is put in, but no evidence as to defective construction is given, the jury are entitled to form their own opinion as to the construction of such lift. *Id.*

Nursing Association—Negligence of Nurse Supplied.—A voluntary association for the supply of trained nurses supplied a nurse to attend at a surgical operation performed by a medical man, making a charge for the services of the nurse which was payable to the association. In the course of the operation the nurse negligently applied to the patient a hot-water bottle so hot that it caused injury to the patient by burning. By the rules of the association the nurses, who were paid a fixed salary, were appointed and discharged by the house committee in consultation with the superintendent. Any nurse infringing the rules was liable to dismissal without notice. Each nurse was responsible to the superintendent, and was to conform to her instructions in all matters pertaining to work and conduct. Only such cases were to be undertaken as were attended by a medical man, whose instructions the nurse was to follow implicitly:—*Held*, in an action against the members of the house committee to recover damages for the injury done to the patient, that, upon the true construction of the contract between the association and the patient, the association did not undertake to nurse the patient, but merely to supply the patient with a competent qualified nurse, and that the nurse when engaged in nursing the patient passed under the control of the medical man, and the relation of master and servant did not exist between the association and the nurse for the purpose of the nursing of the patient so as to make the association liable for the negligence of the nurse. *Hall v. Lees*, 73 L. J. K.B. 819; [1904] 2 K.B. 602; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678—C.A.

Defect in Ship Existing before Voyage Started—Defect not Self-evidently Capable of Remedy by Crew.—In an action for damages by an engineer on board a cargo-boat against the owners, the pursuer averred that about four o'clock on a morning in February—it being very dark at the time—he was requested by the mate, who was at the wheel, to go forward and call a sailor to relieve him; that, in going forward, he fell into the hold through the middle hatches, which were uncovered, and was injured; that the reason of these hatches being uncovered was that (as the pursuer had since learned, though he was unaware of it at the time) the forward thwartship beam at the mouth of the hold was bent and twisted, with the result that the centre fore-aft beam between the two thwartship beams was too short and would not catch in the socket in the forward thwartship beam, so that the middle hatches, which should have rested on the centre beam, could not be put on; that it was the duty of the defenders to see that the equipment of the boat was safe and seaworthy, and in particular

that the beams on which the hatches rested were in good order; that the defenders failed in their duty, with the result that a trap existed on the boat which formed a danger to their employees; and that the defenders knew, or should have known, the defective state of their boat, as it had been in the same condition for a considerable time previously and a similar accident had in consequence occurred on a previous voyage:—*Held*, that, as the pursuer had averred that the vessel was not properly equipped when the voyage commenced, and as the defect alleged was not an obvious defect which could be easily remedied by those on board, the pursuer had stated a relevant case. *Tyrrrell v. Paton*, 8 F. 112—Ct. of Sess.

Ship's Hold Unventilated—Gang Employed by Agent of Defendants.—The defendants, Stephenson, Clarke & Co., were coal contractors, and contracted to supply coal to the London, Brighton, and South Coast Railway. They ship coal at Cardiff in vessels belonging to the London, Antwerp, and Continental Steam Navigation Company to be carried to Newhaven. The defendants have to unload the coal there, and engage agents to employ a gang to carry out the work. One of their agents, Weeks, had a gang unloading the *Bluebell*, amongst whom was the plaintiff Carter. Owing to the hold of the *Bluebell* not being properly ventilated there was an accumulation of gas, and when the hatch was removed a violent explosion took place, and the plaintiff was injured:—*Held*, that the injury was caused by the defective "plant" of the defendants Stephenson, Clarke & Co. *Carter v. Clarke*, 78 L. T. 76—D.

Failure to Provide Proper Appliances—Danger Known to Servant—Risk Voluntarily Incurred.—In an action under the Fatal Accidents Act, 1846, to recover damages at common law for the death of a workman who had been killed while descending from an elevated tramway on which he had been working for the defendants, his employers, the jury found that the defendants did not exercise due care to have the tramway in a proper condition so as to protect their servants working upon it against unnecessary risk; that it was dangerous to descend from the tramway without the means of a ladder; that the deceased had the same means of knowing that it was dangerous as the defendants had; that he knew that it was dangerous; and that he had not been guilty of contributory negligence:—*Held*, that the defendants were liable, for the mere knowledge on the part of the deceased of the risk of the defect—the want of the ladder—did not necessarily involve his consent to undertake it. *Williams v. Birmingham Battery and Metal Co.*, 68 L. J. Q.B. 918; [1899] 2 Q.B. 338; 81 L. T. 62; 47 W. R. 680—C.A.

Option to Workman to Proceed against Third Party—Exercise of Option—Subsequent Claim against Employers—"Proceed at law."—An injured workman claimed damages at common law against a person other than his employers, and without having taken legal proceedings received a payment in settlement of his claim:—*Held*, in a claim for compensation under the Workmen's Compensation Act, 1897, by the workman against his employers, that he had "proceeded" against a third party within the

meaning of section 6 of the Act, and that therefore he had exercised his option and was barred from claiming compensation against his employers. *Held*, also, that a claim in the receipt granted by him reserving a right to claim compensation from his employers did not prevent this result. *Oliver v. Nautilus Steam Shipping Co.* (72 L. J. K.B. 857; [1903] 2 K.B. 639) distinguished. *Mulligan v. Dick*, 6 F. 126—Ct. of Sess.

Common-law Action for—Whether or not Barred by Receipt of Compensation—“Proceeding.”—The plaintiff met with an accident through the negligence of the defendants, on whose ship he was working under the orders of his employers. The plaintiff gave notice of his accident to his employers and signed receipts for money received from them “on account of compensation which may be or become due to me under the Workmen’s Compensation Act, 1897”; but after giving the first receipt, in pursuance of advice given to him by the delegate of his trade union, the plaintiff said he could only accept payments “without prejudice.” The plaintiff subsequently refused to accept any further payments from his employers, and brought this action against the defendants, in which negligence was admitted and the damages agreed subject to the question of the defendants’ liability under section 6 of the Act:—*Held*, that the plaintiff had not so exercised his option under section 6, of proceeding against his employers for compensation under the Act, as to be debarred from maintaining his common-law action against the defendants. *Randall v. Hill’s Dry Dock &c. Co.* (69 L. J. Q.B. 554; [1900] 2 Q.B. 245) discussed. *Oliver v. Nautilus Steam Shipping Co.*, 72 L. J. K.B. 857; [1903] 2 K.B. 639; 89 L. T. 318; 52 W. R. 200; 9 Asp. M.C. 436—C.A.

Per VAUGHAN WILLIAMS, L.J.—If there is a payment and a receipt of money under the Act of 1897, and that receipt is in no way qualified, that is sufficient to bring the case within the operation of section 6 and to put the workman in the position of having proceeded against his employer for compensation and recovered it. *Ib.*

Per ROMER, L.J.—Proceedings by a workman against his employer should not be held to irrevocably bind the workman in the exercise of his option under section 6, unless they have resulted in some compensation, as such, being paid to and received by the workman in such a manner as to bind both parties. *Ib.*

Instruction of Infant in Use of Machine by Foreman.—Where an employer employs a competent foreman, whose duty it is, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instructions to an infant workman in the working of a machine, the employer is not liable to the infant workman at common law for the negligence of the foreman in omitting to give proper instructions. There is no difference between an adult workman and an infant workman in respect of the nature of the employer’s implied contractual liability under the doctrine of common employment, but the method and extent of instruction required may vary according to the age and known disabilities of the workman.

Cribb v. Kynoch (76 L. J. K.B. 948) approved. *Young v. Hoffman Manufacturing Co.*, 76 L. J. K.B. 993; [1907] 2 K.B. 646; 97 L. T. 230; 23 T. L. R. 671—C.A.

(b) Common Employment.

Injury to Servant—Negligence of Fellow-servant—Theatrical Employees—Chorus-singer and Scene-shifter—Agreement for Service—Clause Excluding Employers’ Liability Act, 1880.—The plaintiff was engaged as a chorus-singer by the defendants, who were the proprietors of a theatre, on the terms of a written agreement which excluded the operation of the Employers’ Liability Act, 1880. As the plaintiff was leaving the stage at the close of a performance, some object, the nature of which could not be ascertained, fell upon and injured her. At the time of the accident the scene-shifters were engaged in removing the scenery in her immediate neighbourhood. There was some evidence to show that the object which fell was an old piece of scenery which had been in the theatre for years; but it did not appear that the accident had been caused by the negligence of the defendants or of any person for whom they were responsible. The plaintiff having brought an action for damages against the defendants,—*Held*, that the doctrine of common employment applied and that she could not recover. *Burr v. Theatre Royal, Drury Lane*, 76 L. J. K.B. 459; [1907] 1 K.B. 544; 96 L. T. 447; 23 T. L. R. 299—C.A.

Though the doctrine of common employment depends upon an implied undertaking by the servant to take the risk of injuries caused by the negligence of his fellow-servants, which implied undertaking may be excluded by the express terms of the agreement for service, yet the mere fact that the agreement for service contains an express term excluding the operation of the Employers’ Liability Act, 1880 (which does away with the doctrine of common employment in the cases to which the Act applies), does not exclude the implied undertaking in a case to which the Act does not apply. *Ib.*

—Negligence of Forewoman—Infant—Dangerous Employment—Defence of Common Employment—Liability of Master at Common Law.—A servant takes upon himself the risk of negligence on the part of his fellow-servants, whatever position they hold, so long as they are fellow-servants. To this rule there is no exception to the effect that the master has a personal duty to perform, which, in dangerous employments and in the case of an infant, he cannot delegate to others. *Cribb v. Kynoch*, 76 L. J. K.B. 948; [1907] 2 K.B. 548; 97 L. T. 181; 23 T. L. R. 550—D.

Injury to Person Voluntarily Assisting Servant.—A carter employed by a railway company left his lorry at his employers’ goods station in charge of a boy ten years of age. The boy was not in the employment of the railway company, but was assisting the carter at his request. While the boy was in charge of the lorry he was injured, owing to the negligence of another carter, also employed by the railway company. In an action by the boy against the railway company,—*Held*, that the boy having

voluntarily assisted one of the railway company's servants was, as regards claims of damages against the company, in no better position than a servant employed by the company, and that the defence of common employment applied. *Potter v. Faulkner* (31 L. J. Q.B. 30; 1 B. & S. 800) followed. *Lunnie v. Glasgow and South-Western Railway*, 8 F. 546—Ct. of Sess. And see cols. 1496-1497.

Statutory Duty to Secure Roof of Mine.]—A miner, who had been injured by a fall of shale from the roof of a roadway in a mine, sued his employers, the mine owners, at common law for damages. It was proved that about eight days before the accident there had been an extensive fall of shale from the roof at the place of the accident, and that nothing had been done prior to the accident to support the roof at this place. The jury found for the pursuer, and awarded damages. The defenders sought to set aside the verdict on the ground—first, that there was no fault on the part of the defenders, as they were proved to have appointed a competent manager; and secondly, that if there was fault on the part of the manager, it was the fault of a person in common employment with the pursuer:—*Held*, that there was fault on the part of the defenders in not having the roof made secure as required by section 49, rule 21 of the Coal Mines Regulation Act, 1887; and secondly, that, there being a duty imposed by statute on the mine owners to have the roof made secure, the defence of common employment was not available to them. *Bett v. Dalmeny Oil Co.*, 7 F. 787—Ct. of Sess.

(c) *Employers' Liability Act, 1880.*

"Workman"—Hairdresser.]—A hairdresser is not a "workman" "engaged in manual labour" within section 10 of the Employers and Workmen Act, 1875. *Reg. v. Louth Justices*, [1900] 2 Ir. R. 714—Q.B. D.

—Sempstress.]—A sempstress who works at a sewing machine and heats irons on a stove and irons materials is a person "engaged in manual labour" within the definition of "workman" in section 10 of the Employers and Workmen Act, 1875, and therefore entitled to the benefit of the Employers' Liability Act, 1880. *Maynard v. Peter Robinson, Lim.*, 89 L. T. 136—D.

—Bargeman—"Workman" or "Seaman".]—The plaintiff was employed to assist in loading and unloading and in navigating a sprit-sail barge plying only on the Thames, though capable of going coasting voyages, and registered as a British ship, the captain of the barge and the plaintiff being the only hands employed on the barge. In the course of his employment the plaintiff sustained personal injury:—*Held*, that the plaintiff was a "seaman" within section 13 of the Employers and Workmen Act, 1875, and not a "workman" within section 10 of that Act, and section 8 of the Employers' Liability Act, 1880, and therefore that he had not a right to compensation under the latter Act. *Corbett v. Pearce*, 73 L. J. K.B. 885; [1904] 2 K.B. 422; 90 L. T. 781; 68 J. P. 387; 20 T. L. R. 473—D.

— **Workman Employed in Coal Mine by In-**

dependent Contractor—Liability of Mine Owner.]

—The plaintiff's husband was employed to work for him as a sinker by an independent contractor, who had contracted with the defendants, the owners of a coal mine, to sink a shaft for them in their mine. The plaintiff's husband was killed while working in the mine. In an action by the plaintiff under the Employers' Liability Act, 1880, to recover damages in respect of the death of her husband,—*Held*, that the statutory control given to the mine owner by the Coal Mines Regulation Act, 1887, and the rules thereunder, over persons working in the mine, for the purpose of enforcing the prescribed regulations for carrying on the mining operations without danger, did not alter the relationship between the contracting parties *inter se*, and consequently the plaintiff's husband was not a workman in the defendants' employment within the meaning of the Employers' Liability Act, 1880, and the plaintiff was not entitled to recover. *Marrow v. Flimby and Broughton Moor Coal and Fire-Brick Co.*, 67 L. J. Q.B. 976; [1898] 2 Q.B. 588; 79 L. T. 397—C.A.

Injury to Servant—Compensation—Employment in Coal Mine by Independent Contractor—Contract with Owners of Colliery by Signing Conditions of Employment—Liability of Owners—"Workman".]

—A workman employed by an independent contractor, who had contracted with the owners of a colliery to sink a shaft therein, signed the record book of the colliery containing the conditions of employment for all persons employed at the colliery directly or indirectly. The conditions provided that every workman employed by a contractor at the colliery should, in consideration of being employed at the colliery, be bound as between himself and the owners by the terms of the conditions. During the work of sinking an escape of gas occurred, which ignited and so burned the workman that he died. In an action by the legal personal representative of the workman under the Employers' Liability Act, 1880, to recover compensation for his death, the contractor gave evidence that if the manager of the mine had given him an order relating to the work he would have obeyed and would have expected his workman to obey it:—*Held*, that there was no evidence to go to the jury that the deceased man was a "workman" in the service of the owners of the colliery within the meaning of section 8 of the Employers' Liability Act, 1880, and section 10 of the Employers and Workmen Act, 1875. *Marrow v. Flimby and Broughton Moor Coal and Firebrick Co.* (67 L. J. Q.B. 976; [1898] 2 Q.B. 588) followed. *Fitzpatrick v. Evans*, 71 L. J. K.B. 302; [1902] 1 K.B. 505; 86 L. T. 141; 50 W. R. 290—C.A.

Defect in Plant—Movable Machine—Breakage during Use—Order not to Use Again—Injury to Workman Moving it.]

—A movable machine in a glass-bottle factory was usually kept in a corner of the factory, and when required for use was brought forward to the furnaces. While being used near the furnaces a breakage of the machine occurred, which rendered it unsafe to move it in its broken condition. A foreman examined the machine and gave orders that it was not to be used again, as a new one had been ordered. On the next day the foreman allowed the machine

to be moved to its position in the corner of the factory, and in the course of its removal a lever fell from it and injured the foot of one of the workmen engaged in the work:—*Held*, in an action by the workman for compensation under the Employers' Liability Act, 1880, that there was evidence on which the County Court Judge was justified in finding that the machine was plant connected with or used in the business of the employer within the meaning of section 1, sub-section 1 of the Act. *Thompson v. City Glass Bottle Co.*, 71 L. J. K.B. 145; [1902] 1 K.B. 233; 85 L. T. 661—C.A. And see *Greenwood v. Greenwood*, 97 L. T. 971—D., and NEGLIGENCE OF MASTER, *supra*.

— **Plant Used by but not Belonging to Employer—Defect in—Duty of Employer—Stevordore and Shipowner.**—Under the Employers' Liability Act, 1880, s. 1, sub-s. 1, the employer is liable for injury to a workman caused by any defect in the condition of the plant used in his business, as well where the plant so used is the property of a third person for whom the employer is working, and who supplies it for the purpose, as where it is the property of the employer, or is hired by him. If, therefore, the employer uses plant so supplied without enquiry or inspection, there is *prima facie* evidence to go to the jury of negligence within section 2, sub-section 1 of the Act. *Biddle v. Hart*, 76 L. J. K.B. 418; [1907] 1 K.B. 649; 97 L. T. 66; 28 T. L. R. 262; 10 Asp. M.C. 469—C.A.

Defect in Condition of "Ways"—Open Joists in Floor of House in Course of Construction.—The open joists of a floor of a house in course of construction across which a labourer has to pass in carrying out an order by his foreman, do not constitute a "way" in the sense of section 1, sub-section 1 of the Employers' Liability Act, 1880. *M'Gowan v. Smith*, [1907] S.C. 548—Ct. of Sess.

Person Intrusted with Superintendence.—A firm of stevedores employed two squads of dock labourers in loading a steamer at the same hatch, one squad being under the superintendence of M'Neilly, its foreman, who acted as hatch-mouth man for the lowering of goods from a shore crane, and the other under the superintendence of its foreman Murray, who acted as hatch-mouth man for the conveying of goods from the ship's winch. Falconer, one of M'Neilly's squad, who was injured by the fall of a piece of wood from the ship's winch, raised an action under the Employers' Liability Act, 1880, against the stevedores as responsible for Murray, through whose fault he alleged the accident happened. It was proved that Murray was generally employed by the defenders as a labourer, but that he was occasionally selected to act as a hatch-mouth man; that at the time of the accident his duties were to superintend the lowering of goods into the hold, and to take the chain of the winch ashore, and to attach the hook to the goods; that he had complete control over his squad, and could dismiss any members of it; and that he was paid by the hour, but received higher wages than the men under him:—*Held* (LORD YOUNG *dissentiente*), that Murray was a person ordinarily engaged in manual labour, and could not be regarded as a person having superintendence entrusted to

him in the sense of the Act. *Falconer v. M'Cabe*, 8 F. 210—Ct. of Sess.

Notice of Injury.—In an action for damages under the Employers' Liability Act, 1880, against a limited company at the instance of a workman in its employment,—*Held*, that a notice of the injury addressed to the company, inclosed in an envelope directed to A. B., who was the company's cashier, and was in charge at one of the offices of the company, and delivered at that office, was duly served on the company in accordance with the requirements of section 7 of the Act. *Duncan v. Fife Coal Co.*, 7 F. 958—Ct. of Sess.

Orders or Directions to which Workman is Bound to Conform.—For sub-section 3 of section 1 of the Employers' Liability Act, 1880, to be applicable it is necessary that the order from conforming to which the injury to the workman resulted should be particular to the effect of superseding the exercise of the workman's own private judgment and discrimination, and substituting therefor the behest of the person to whose directions he is bound to conform. *Canavan v. Green*, 8 F. 275—Ct. of Sess.

Semble, the orders or directions from conforming to which the injury resulted need not be the *causa causans* of the accident, but may be only the *causa sine qua non*, and they may be express or implied, and need not be given at the precise time of the accident. *Ib.*

Withdrawal of Claim for Compensation—Subsequent Action under Employers' Liability Act, 1880.—A workman who withdraws notice of injury and request for arbitration under the Workmen's Compensation Act, 1897, upon the employer objecting that the workman's claim is not within that Act, is not debarred from bringing an action in respect of the same injury under the Employers' Liability Act, 1880, inasmuch as the workman has not exercised his "option" within the meaning of section 1, sub-section 2 (b) of the Act of 1897. There is no real option where there is no liability under the Act of 1897. *Rouse v. Dixon*, 73 L. J. K.B. 662; [1904] 2 K.B. 628; 91 L. T. 436; 68 J. P. 406; 20 T. L. R. 553—D.

Edwards v. Godfrey (68 L. J. Q.B. 66; [1899] 2 Q.B. 333) is a decision upon section 1, sub-section 4 of the Workmen's Compensation Act, 1897, only, and no expressions in the judgments in that case ought to be adopted as laying down any general principle. *Ib.* And see NEGLIGENCE.

Driver of a Motor Omnibus—"Artificer"—"Handicraftsman"—Person Engaged in Manual Labour—Workman.—The plaintiff was in the employ of an omnibus company as the driver of a motor omnibus. According to the evidence his duty was not only to drive the omnibus, but also to start it by means of the starting handle after working the pump to get pressure up. Spanners and wrenches were supplied to him, and he was expected, if anything occurred on the road, to put it right if he could:—*Held*, that on the evidence he was a workman within the definition of section 10 of the Employers and Workmen Act, 1875, and therefore entitled

to the benefit of the Employers' Liability Act, 1880. *Cook v. North Metropolitan Tramways Co.* (56 L. J. Q.B. 309; 18 Q.B. D. 683) distinguished. *Smith v. Associated Omnibus Co.*, 76 L. J. K.B. 574; [1907] 1 K.B. 916; 96 L. T. 675; 71 J. P. 239; 23 T. L. R. 381—D.

(d) *Workmen's Compensation Acts, 1897, 1900.*

Statute.—63 & 64 Vict. c. 22 is the *Workmen's Compensation Act, 1900.*

(1) "*Workman*," who is.

Certificated Manager under Mines Regulation Acts—Receipt of Fixed Yearly Salary.—A certificated manager of a mine, appointed under the Mines Regulation Act, 1887, who is paid a fixed yearly salary, but does not do any manual labour, is not a "workman" within the meaning of that term as defined in section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Simpson v. Ebbw Vale Steel, Iron, and Coal Co.*, 74 L. J. K.B. 847; [1905] 1 K.B. 453; 92 L. T. 282; 53 W. R. 390; 21 T. L. R. 209—C.A.

Contractor—Piecework—Member of Squad.—A firm of shipbuilders entered into an arrangement with a squad of skilled workmen called "platers," under which the latter did certain work in connection with "frames," for which they were paid weekly by the hands of their leader a fixed sum per frame. This sum the squad, after paying the wages of certain helpers or unskilled workmen employed by them, divided among themselves. The squad were bound to work continuously all the working hours recognised in the yard, and when these were exceeded they were paid a certain sum per hour extra. Their work was done in the yard, and was supervised generally by the foreman of the shipbuilders. The necessary plant and materials were supplied by the shipbuilders. The squad were subject to printed rules and regulations "to be observed by the workmen in the employment of" the shipbuilders. One of the squad was accidentally killed while at work in the yard:—*Held*, that the deceased was a workman in the employment of the shipbuilders as employers in the sense of the Act. *M'Cready v. Dunlop*, 2 F. 1027—Ct. of Sess.

Independent Contractor.—In an arbitration under the Workmen's Compensation Act, 1897, upon a claim by the dependants of a man who was killed by an accident while at work upon the premises of the respondents, the evidence was that the deceased man worked for the respondents at breaking steel and clearing cinders, that he was paid by tonnage, and that he had five or six men working under him whom he employed and paid on his own account:—*Held*, that the County Court Judge was justified in finding that the deceased man was not a "workman" in the employment of the respondents within the meaning of the Act. *Vamplew v. Parkgate Iron and Steel Co.*, 72 L. J. K.B. 575; [1903] 1 K.B. 851; 88 L. T. 756; 51 W. R. 691; 67 J. P. 417—C.A.

H. and P., two labourers, agreed in writing with a quarrymaster to excavate the "tirr"

or surface earth from a new part of the quarry at the rate of 7½d. per cubic yard. P. was then working at the quarry, but H. had not previously worked there. They were joined by a third man, on the footing that he should get an equal share of what they received for the work. The three did the work by their own manual labour, with the assistance of a man whom they engaged at fixed wages. The quarrymaster supplied the tools and plant, but exercised no control over the method of working, and the men were not tied down to hours. Payments on account were made by the quarrymaster to H. and P. (the receipts being signed by H.) practically weekly, the amount of the payment being calculated on a rough estimate of the work done. H. was killed while engaged in the work:—*Held* (dissentiente LORD YOUNG), that he was not a "workman" within the meaning of the Act, but an independent contractor. *Hayden v. Dick*, 5 F. 150—Ct. of Sess.

Sub-contractor.—The applicant tendered to the respondent for the supply of labour and tools to carry out the bricklaying work upon the respondent's building for a certain sum. He worked on the job as a foreman bricklayer, but he received no wages:—*Held*, that he was not a "workman," but a sub-contractor, and therefore not entitled to claim compensation in respect of injuries sustained by him while engaged on the work. *Simmons v. Faulds*, 65 J. P. 371—C.A.

Contractor — "Undertaker."—An estate owner, through his factor, engaged a man to quarry from a quarry on the estate stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct. He was to be paid five shillings a day, though in fact he was not paid daily, and might employ assistants, to be paid through him, at the same rate. The estate forester visited the quarry and kept a note of the days on which the quarryman worked. The tools were supplied partly by the quarryman and partly by the estate. The quarryman was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made. The quarryman, having been injured by an explosion while engaged in his work, claimed compensation under the Act from the estate owner. The sheriff disallowed the claim on the ground that the claimant was a contractor and not a workman:—*Held*, on a Case stated, in which the only question was whether the claimant was a servant or workman within the meaning of the Act, that the claimant was a servant or workman. *Paterson v. Lockhart*, 7 F. 954—Ct. of Sess.

Whether a workman can at the same time be a contractor and a workman within the meaning of the Act, *quære. Ib.*

Quære (per LORD M'LAREN), whether a landed proprietor who works a quarry on his estate for estate purposes is an "undertaker" in the sense of the Act. *Ib.*

Practical Chemist—University Graduate.—By an agreement in writing between a company of chemical and dye manufacturers and one B., who held the degree of master of science, the duration of which agreement was to be five

years, B. agreed to give his whole time to serve the company and endeavour to promote its success, to obey all orders in such work as might be allotted to him, to put at the disposal of the company the results of his work, whether they might lead to the improvement of existing methods of manufacture or concern the production of new bodies, the company being entitled to make use of the work or research and their results as they might think fit; and the company agreed to pay B. a yearly salary of 200*l.* for the first year, rising by annual increases to 260*l.* for the fifth year payable by monthly instalments, and a commission on net profits of inventions, improvements, or discoveries which should justify a patent being taken out. B. did no research work. His work, in fact, consisted of manual labour involving scientific knowledge. He was employed on sulphur colours, his duties being to see that the daily manufacture was carried out, to turn on steam, to place the taps for blowing over liquor in boxes, to take samples to the laboratory to test, and, where the colours were important, to charge the pan himself. He was dressed like the ordinary workmen, and worked amongst the chemicals like them, but his name was not in the wages book like theirs, and his hours were somewhat later than theirs:—*Held* (FARWELL, L.J., dissenting), that B. was not a "workman" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Bagnall v. Levinstein*, 76 L.J. K.B. 234; [1907] 1 K.B. 531; 96 L.T. 184; 23 T.L.R. 165—C.A.

Partner Working on Partnership Work.—It was arranged between three partners, who had entered into a partnership for the working of a mine, that if any of the partners should work in the mine he should be paid as an ordinary workman. One of the partners acted as working foreman, and was constantly engaged in manual labour in the mine, receiving in respect of his work weekly wages independently of anything he might be entitled to as a partner. While so employed he by accident received an injury which caused his death:—*Held*, that, as he was a partner in the firm, the Workmen's Compensation Act, 1897, did not apply to him, and the firm were not liable to pay compensation in respect of his death. *Ellis v. Ellis & Co.*, 74 L.J. K.B. 229; [1905] 1 K.B. 324; 92 L.T. 718; 53 W.R. 311; 21 T.L.R. 182—C.A.

Seaman—Ship in Dock—"Factory."—The Workmen's Compensation Act, 1897, does not apply to seamen. *Houlder Line, Lim. v. Griffin*, 74 L.J. K.B. 466; [1905] A.C. 220; 92 L.T. 580; 53 W.R. 609; 21 T.L.R. 486—H.L. (E.)

The owner of a ship floating in a dock is not the "occupier" of the dock within the meaning of section 23 of the Factory Act, 1895. The word "dock" in that Act means the solid structure and body of the dock, not the water space within its limits; and a ship floating in a dock is not "premises within the same or forming part thereof." A seaman, therefore, doing the ordinary work of a seaman on a ship so situated is not, under the Workmen's Compensation Act, 1897, entitled to compensation for injury sustained in the course of such work. (LORD JAMES OF HEREFORD dissenting.) *Raine*

v. Jobson & Co. (70 L.J. K.B. 771; [1901] A.C. 404) distinguished. *Ib.*

"Employment in agriculture"—Farm Carpenter—Occasionally Assisting in Agricultural Work.—The applicant was engaged on a farm as farm carpenter and keeper. As carpenter he attended to the necessary repairs on the farm, and for about three months in the year he acted as gamekeeper, keeping down rabbits, &c. He lent a hand at hay and corn harvest, and occasionally assisted in threshing, in rick-making, and in mangold-carting. He never did ploughing. Having met with an accident on the farm, he claimed compensation. The County Court Judge, being of opinion that the applicant's employment came within the protection of the Workmen's Compensation Act, 1900, as being employment in agriculture, made an award in his favour:—*Held*, that the question whether the applicant's work was "employment in agriculture" was a question of fact, and that on the evidence before him the County Court Judge was entitled to come to the conclusion he did. *Smith v. Coles*, 75 L.J. K.B. 16; [1905] 2 K.B. 827; 93 L.T. 754; 54 W.R. 81; 22 T.L.R. 5—C.A.

Per ROMER, L.J.—"Employment in agriculture" is not necessarily limited to persons mainly employed in the course of a particular year in the manual operations of tilling, sowing, and reaping. *Ib.*

Workman Mainly Employed in Agriculture, but Occasionally in Other Work.—A workman in the employment of the owner of a portable threshing mill, driven by a traction engine, in the capacities of assistant thresher and traction-engine driver, was injured while the threshing mill was being drawn by the traction-engine from a farm on which threshing had been finished to another farm where his employer had contracted to thresh on the following day:—*Held* (*dubitante* the LORD JUSTICE CLERK), that the workman was entitled to compensation, inasmuch as he was a person employed mainly in agricultural work—that is, threshing—and partly or occasionally in other work, within the meaning of section 1, sub-section 3 of the Workmen's Compensation Act, 1900. *Per* LORD TRAYNER, that, apart from sub-section 3, the workman was entitled to compensation, as he was injured in the course of his employment as a thresher, the transit between one farm and another not forming any break in the course of that employment. *Proctor v. Cumiskey*, 6 F. 832—Ct. of Sess.

(2) Accident in Course of Employment.

Question of Fact.—The question whether the death of a workman resulted from or has been accelerated by an accident is a pure question of fact. *Warnock v. Glasgow Iron and Steel Co.*, 6 F. 474—Ct. of Sess.

"Accident."—The word "accident" in section 1 of the Workmen's Compensation Act, 1897, involves the idea of something fortuitous and unexpected. *Hensley v. White*, 69 L.J. Q.B. 188; [1900] 1 Q.B. 481; 81 L.T. 767; 48 W.R. 257; 63 J.P. 804—C.A.

Contravention of Orders.—The question

whether a servant who violates his master's order is or is not acting in the course of his employment depends on whether the order is or is not one limiting or defining the scope of the servant's employment. *Whitehead v. Reader*, 70 L. J. K.B. 546; [1901] 2 K.B. 48; 84 L. T. 514; 49 W. R. 562; 65 J. P. 408—C.A.

Jar bringing on Gout.—A workman, employed as a smith at the engineering works of the appellants, was holding a flatter on an anvil for a fellow-workman to strike the flat end of the flatter. The fellow-workman made a bad stroke and struck the rod or round part of the flatter and jarred the workman's hand, causing it to swell and bringing on gout in the hand. The workman had previously been attended for gout in the hand and elbow by a doctor, who was of opinion that the swollen hand was caused by gout brought on by the jar, and who also certified that the workman was suffering from a weak hand caused partially by the injury:—*Held*, that the injury to the workman was caused by an "accident," and that the provisions of section 1 of the Workmen's Compensation Act, 1897, applied so as to entitle the workman to recover compensation under the Act. *Lloyd v. Sugg & Co.*, 69 L. J. Q.B. 190; [1900] 1 Q.B. 481; 81 L. T. 768; 48 W. R. 257—C.A.

Strain of Unusual Exertion.—A woman, who was employed as a box maker, was ordered to work upon boxes which were larger and heavier than those upon which she had previously worked. When she had finished some of the boxes and was working upon another, she suffered internal injury from the strain of the unusual exertion. The County Court Judge found that the injury did not arise from an "accident" within the meaning of section 1, sub-section 1 of the Workmen's Compensation Act, 1897:—*Held*, that the Judge had properly found that the injury did not arise from an "accident" within the meaning of the Act. *Roper v. Greenwood*, 83 L. T. 471—C.A. *And see col. 1498.*

Moving Frozen Planks.—A workman was employed by the defendants in the work of lifting and removing planks from a stack of timber. One night there was rain and frost, and the planks became frozen together, the planks lower in the stack being more firmly frozen together than those above; on the next day the workman began the work in the morning, and lifted and removed planks all day; about 4 P.M., while trying to lift a plank, he ruptured himself. The workman claimed compensation under the Workmen's Compensation Act, 1897, and the County Court Judge found that the injury was caused by the lifting of the plank, and was an injury by "accident" within the meaning of the Act:—*Held* (dismissing the appeal), that there was evidence of something fortuitous and unexpected upon which the County Court Judge might properly find that the injury was caused by "accident" within the meaning of the Act. *Timmins v. Leeds Forge Co.*, 83 L. T. 120—C.A.

Accident Occurring after Workman had been Suspended from Work.—Workman Remaining.—The applicant, who was employed as a gang-boy in a pit, was suspended from work, and ordered by the deputy-manager to go to the pit-bottom, where it was the usual practice for

disputes to be settled by the under-manager. This order to go to the pit-bottom was given about 1.30 P.M. The applicant disobeyed the order and remained in a "pass-by" in the workings till 3.40 P.M., when a part of the roof fell and injured him. It was against the rules for workmen to remain in the workings when not at work; but it was admitted that in the ordinary course the applicant could not have been taken up the shaft till four o'clock. The County Court Judge found that, although the applicant had not been guilty of serious and wilful misconduct, he was not entitled to compensation, as the accident, having happened two hours after he had been suspended from work and in a place where he had no right to be, did not arise out of and in the course of his employment:—*Held*, that there was evidence upon which the County Court Judge could so find. *Smith v. Normanton Colliery Co.*, 72 L. J. K.B. 76; [1903] 1 K.B. 204; 88 L. T. 5; 51 W. R. 209; 67 J. P. 381—C.A.

Missile Thrown in Anger by One Fellow-workman at Another.—One of a large number of boys employed in the coach-painting department of the works of a railway company, while engaged in his work, received an injury by a blow from a piece of iron thrown in anger by one of two other boys in the same employment at the other, neither of them being at the time engaged upon his work:—*Held*, that the accident causing the injury did not arise out of the employment of the injured boy within the meaning of section 1, sub-section 1 of the Workmen's Compensation Act, 1897. *Armitage v. Lancashire and Yorkshire Railway*, 71 L. J. K.B. 778; [1902] 2 K.B. 178; 86 L. T. 883; 66 J. P. 613—C.A.

Workman Seized with Epileptic Fit—Fall into Hold of Ship—Proximate Cause of Accident.—A workman was employed on a wharf and was engaged in the discharge of coal from the hold of a ship. His duty was to stand on a staging close to the open hold, direct the course up and down of a bucket in which the coal was being discharged, and give the necessary signals to the crane-man. While so engaged he was suddenly seized with an epileptic fit, and the result was that he fell into the hold and was seriously injured. It appeared that on previous occasions he had been subject to fits:—*Held*, that the workman's injuries were caused by an accident "arising out of and in the course of his employment," and that he was entitled to compensation. *Wilkes v. Dowell & Co.*, 74 L. J. K.B. 572; [1905] 2 K.B. 225; 92 L. T. 677; 53 W. R. 515; 21 T. L. R. 487—C.A.

Engine-driver Injured by Stone Wilfully Thrown at Engine—Risk Incident to Employment.—An engine-driver while driving an engine was injured by a stone thrown wilfully by a boy from a bridge under which the railway passed:—*Held*, that the injury was due to an accident arising out of and in the course of the engine-driver's employment, inasmuch as the risk of being struck by stones thrown at trains is one to which engine-drivers are specially exposed. *Armitage v. Lancashire and Yorkshire Railway* (71 L. J. K.B. 778; [1902] 2 K.B. 178) and *Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co.* (3 Ct. of Sess. Cas. (5th. Ser.) 564) considered. *Challis v.*

London and South-Western Railway 74 L. J. K.B. 569; [1905] 2 K.B. 154; 93 L. T. 830; 53 W. R. 618; 21 T. L. R. 486—C.A.

Blood-Poisoning.]—A workman, having a blistered finger, was handling oil and red lead in the ordinary course of his employment, and, in so doing, failed to keep the red lead from the blistered finger, which accordingly became inflamed and was seriously injured:—*Held*, that he had not suffered any injury by “accident” within the rule laid down in *Hensey v. White* (69 L. J. Q.B. 188). *Walker v. Lilleshall Co.*, 69 L. J. Q.B. 192; [1900] 1 Q.B. 481; 81 L. T. 769; 48 W. R. 257; 64 J. P. 85—C.A.

A miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood-poisoning set in and the workman died:—*Held*, that his death was the result of an “injury by accident” within section 1 of the Workmen’s Compensation Act, 1897. *Thompson v. Ashington Coal Co.*, 84 L. T. 412; 65 J. P. 356—C.A.

A workman, who was employed in a colliery, died from blood-poisoning resulting from an injury to his finger. He was working at night, and on the evening of the accident he left his home, which was just over a mile from the pit, with his finger well. He arrived at the pit with his finger uninjured. He arrived home early next morning with his finger crushed. He continued to work for some days, when blood-poisoning set in, and he died. His widow claimed compensation under the Workmen’s Compensation Act, 1897, but the County Court Judge held that he was not entitled to draw the inference that the accident arose in the course of his employment, as it might have occurred on the way home:—*Held*, that the Judge was at liberty to draw the inference that the accident arose in the course of the employment. *Per* SIR GORELL BARNES, P.: The probability was that the accident happened at the time when the workman was at the pit, because accidents did happen there, rather than at the time when in the ordinary course of life accidents did not happen. *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588—C.A.

The applicant, a caulker in the employment of shipbuilders, was seized with paralysis caused by lead poisoning, and became totally incapacitated for work. In the course of his work, in which he had been employed by the shipbuilders for a period of two years before he became incapacitated, he had to smear either with red or white lead certain places between the plates of ships into which water-tight shoes were put. The poisoning was such as might be expected from the nature of the work. It might be caused either by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. Only a small proportion of cases of poisoning of this description occurred amongst an number of persons working with red or white lead. The poisoning could not be traced to any particular day, and its development was a gradual process, and generally took a considerable time:—*Held*, that the lead poisoning could not be described as an “accident” in the popular and ordinary use of that word so as to entitle the applicant to compensation for personal injury by accident arising

out of and in the course of his employment within the meaning of section 1 of the Workmen’s Compensation Act, 1897. *Fenton v. Thorley & Co.* (72 L. J. K.B. 787; [1903] A.C. 443) and *Brintons, Lim. v. Turvey* (74 L. J. K.B. 474), considered. *Steel v. Cammell, Laird & Co.*, 74 L. J. K.B. 610; [1905] 2 K.B. 232; 93 L. T. 357; 53 W. R. 612; 21 T. L. R. 490—C.A.

Anthrax Contracted from Infected Wool.]—A workman who died of anthrax contracted from the wool on which he was working *held* to have died from an “accident arising out of and in the course of” his employment, within the meaning of the Workmen’s Compensation Act, 1897. (LORD ROBERTSON dissenting.) *Brintons, Lim. v. Turvey*, 74 L. J. K.B. 474; [1905] A.C. 230; 92 L. T. 578; 53 W. R. 641; 21 T. L. R. 444—H.L. (E.)

Tortious Act of Stranger.]—A was in the employment of B, a contractor, as foreman of sewage works. Certain pipes which had been laid in the street in the course of the work were wantonly broken. B directed A to protect the pipes, and while A was so engaged further damage was done, for which A, under B’s direction, demanded payment from the wrongdoers. This led to an altercation, in the course of which B was struck and fell, and A on going to his rescue was stabbed, and died:—*Held*, that A’s death was not caused by an accident arising out of and in the course of his employment. *Collins v. Collins*, [1907] 2 Ir. R. 104—C.A.

Workman Falling Out of Train while Travelling—Onus of Proof.]—In an arbitration under the Workmen’s Compensation Act, 1897, the burden is upon the applicant to prove that the injury was caused by accident arising “out of” as well as “in the course of” the employment of the workman, and if the applicant leaves the case in doubt as to whether those conditions are fulfilled or not, the evidence being equally consistent with their being fulfilled or not fulfilled, he has not discharged the burden of proof. *Pomfret v. Lancashire and Yorkshire Railway*, 72 L. J. K.B. 729; [1903] 2 K.B. 718; 89 L. T. 176; 52 W. R. 66—C.A.

A workman in the employ of a railway company was in the course of his employment travelling in an ordinary compartment of a passenger train. Persons travelling in the same compartment gave evidence that they saw him put the window down and place his basket in the rack, standing close to the door with his face towards it, but that they did not see him do anything else, until, when the train had travelled three hundred yards only from the place at which he entered it, they heard a crash, and he had disappeared. The workman was found lying close to the rail suffering from injuries which caused his death:—*Held*, that, there being evidence that the workman was simply passing as an ordinary passenger might pass, and acting as an ordinary passenger might act, in a train upon a railway, there was evidence on which the County Court Judge was justified in finding that the accident arose “out of” as well as “in the course of” his employment. *Id.*

Voluntary Attempt by Workman to Rescue

Fellow-workman.]—A steamship was moored to a quay in a dock discharging her cargo under a stevedore who had contracted with her owners to unload her. The labourers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. One of the labourers who was employed on the quay to discharge cargo from the after-hold, and who did not require, in the performance of his duty, to go on board the vessel, on being informed that one of his fellow-workmen employed in the forehold was lying there in an unconscious condition owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied round his mouth he was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic-acid gas. In doing what he did the workman acted without instruction from his employer—the stevedore—who had gone for rescue appliances:—*Held*, that the workman met his death by an accident arising out of and in the course of his employment. (LORD KYLLACHY dissenting.) *London and Edinburgh Shipping Co. v. Brown*, 7 F. 488—Ct. of Sess.

Assisting in Emergency.]—A clerk employed at engineering works, whose duty it was to weigh and record all articles sent out from the works, met with an accident, which resulted in his death, while helping workmen to carry a heavy article to the weighing-machine. It was found in fact that his duty in relation to articles sent out was "confined to weighing the articles, which it was the duty of other employees to carry to the weighing-machine":—*Held*, that the accident arose out of and in the course of his employment, and that his widow was entitled to compensation. *Goslan v. Gillies*, [1907] S.C. 68—Ct. of Sess.

A labourer, employed in a steam joinery shop, whose duties were not connected with the management of the machinery, met with a fatal accident while assisting a machineman to replace some loose belting upon the machinery while in motion. It was found in fact that the foreman might have ordered the deceased to assist in replacing the belting, but no such order had been given:—*Held*, that the accident arose out of and in the course of the labourer's employment within section 1, sub-section 1 of the Act. *Menzies v. McQuibban*, 2 F. 732—Ct. of Sess.

The Workmen's Compensation Act, 1897, applies to the case of a workman engaged in an employment within that statute, who, on an emergency, does in his master's interest an act outside the scope of that employment, and is injured by an accident arising out of and in the course of so doing. *Rees v. Thomas*, 68 L. J. Q.B. 539; [1899] 1 Q.B. 1015; 80 L. T. 578; 47 W. R. 504—C.A.

Accident Occurring in England—Employer Resident in Scotland—Application for Arbitration—Jurisdiction of County Court.]—Where a workman resident in England is engaged by an employer resident in Scotland, and during the engagement meets with an accident in England, the Judge of the County Court within whose district the accident happens has jurisdiction under the Second Schedule, paragraph (9) of the

Workmen's Compensation Act, 1897, to hear an arbitration for the settlement under the Act of the compensation due to the workman. *Rees v. Owen*, 71 L. J. K.B. 770; [1902] 2 K.B. 436; 87 L. T. 298; 51 W. R. 168—D.

Strain.]—A workman while engaged in the course of his employment in replacing a derailed coal hutch on the rails severely strained his back:—*Held*, that he had been injured by an "accident" within the meaning of the Act. *Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120—Ct. of Sess.

Injury by over-strain or over-exertion sustained by a man in doing his work is injury by "accident" within the meaning of the Workmen's Compensation Act, 1897. *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (5 Fraser, 120), approved. *Hensley v. White* (69 L. J. Q.B. 188; [1900] 1 Q.B. 481), *Lloyd v. Sugg & Co.* (69 L. J. Q.B. 190; [1900] 1 Q.B. 481), *Walker v. Lilleshall Coal Co.* (69 L. J. Q.B. 192; [1900] 1 Q.B. 481), and *Roper v. Greenwood* (83 L. T. 471) disapproved. *Fenton v. Thorley*, 72 L. J. K.B. 787; [1903] A.C. 443; 89 L. T. 314; 52 W. R. 81—H.L. (E.)

Workman Injured Internally while Lifting Beam.]—A workman in normal health was engaged in the course of his duty in removing a beam from a loom. He was in the act of lifting the beam on to his shoulder, when, finding it was not evenly balanced, he gave it an extra lift, or hitch up, and in doing so ruptured several fibres of the muscles of his back, which incapacitated him for work:—*Held*, that he had sustained personal injury by "accident" within the meaning of section 1 of the Workmen's Compensation Act, 1897. *Boardman v. Scott*, 71 L. J. K.B. 3; [1902] 1 K.B. 43; 85 L. T. 502; 50 W. R. 184; 66 J. P. 260—C.A.

Employment in Coal Mine—Gradual Injury to Hand and Knee.]—One coal miner was incapacitated for work by "beat hand," and another by "beat knee." "Beat hand" is an injury caused by an abscess gradually produced by the jar, friction, or pressure to the hand caused by using the pick; and "beat knee" is an injury caused by an abscess in the knee gradually developed by long-continued kneeling whilst at work. Both are common injuries in the ordinary course of work in a coal mine:—*Held*, that the injuries were not caused by "accident" within the meaning of section 1, sub-section 1 of the Workmen's Compensation Act, 1897. *Marshall v. East Holywell Coal Co.*, 93 L. T. 360; 21 T. L. R. 494—C.A.

Fellow-workman Pulling Brush Away.]—M., a workman, was oiling with a brush a machine at which he was working. The brush was not the brush belonging to the machine, and M. knew this. While M. was so engaged, C., a fellow-workman to whose machine the brush belonged and who required it for his work, came up angrily, said the brush was his, and took hold of it. M. asked C. to wait a moment, but C. pulled the brush out of M.'s hand, and in doing so unintentionally injured M.'s hand by drawing it across a sharp piece of iron:—*Held*, that the injury to M. was caused by an accident arising out of and in the course of his employment, and that he was therefore entitled to compensation. *McIntyre v. Rodger*, 6 F. 176—Ct. of Sess.

Act Done for Workman's Own Pleasure.]—A workman in the employment of a railway company as a platelayer was occasionally engaged in the duty of collecting tickets, and on one occasion, after having completed the collection of tickets, got on to the footboard of a carriage to speak to a passenger. It was found as a fact that he got on to the footboard not for any object of his employers, but only for his own pleasure. In getting off the train after it had started he fell between the platform and the train, and was killed:—*Held*, that the accident did not arise out of his employment within the meaning of section 1, sub-section 1 of the Workmen's Compensation Act, 1897; that to render an employer liable to pay compensation, the accident must arise not only "out of," but also "in the course of" the employment, and consequently that the railway company were not liable. *Smith v. Lancashire and Yorkshire Railway*, 68 L. J. Q.B. 51; [1899] 1 Q.B. 141; 79 L. T. 638; 47 W. R. 146—C.A.

Servant's Amusement.]—Two servants of the defendant company took two horses out of the defendants' stables to ride them to a neighbouring forge to be shod, and raced the horses furiously along the public road, vying with each other who should get there first. The plaintiff's horse took fright, and the plaintiff was thrown out of her trap and injured:—*Held*, that the defendants were liable for the negligence of their servants, inasmuch as—the first and main purpose of the servants being in the ordinary course of their employment and for their employers' benefit—the existence of a secondary object—the servants' own amusement—did not exonerate their employers. *Gracey v. Belfast Tramway Co.*, [1901] 2 Ir. R. 322—Q.B. D.

Leaving Work to Get a Drink.]—A miner left the pithead, where he was working, to get a drink of water, and was killed by a runaway hutch when he was returning:—*Held*, that he was killed "in the course of his employment" within the meaning of the Act. *Keenan v. Flemington Coal Co.*, 5 F. 164—Ct. of Sess.

Lightning—Death of Workman from—Increased Risk of Employment owing to Position of Workman.]—A workman who was employed upon a building exceeding thirty feet in height, which was being constructed by his employers by means of a scaffolding, was struck by lightning and killed when he was working on the scaffold about twenty-three feet above the level of the ground. The County Court Judge held, having heard evidence upon the point, that the workman was under the circumstances exposed to a substantial and abnormally increased risk owing to the position in which he had to work, and awarded compensation to his widow under section 1, sub-section 1 of the Workmen's Compensation Act, 1897:—*Held*, that there was evidence to justify the County Court Judge in coming to the conclusion that the workman was killed by an accident arising out of, as well as in the course of, his employment. *Andrew v. Failsforth Industrial Society*, 73 L. J. K.B. 510; [1904] 2 K.B. 32; 90 L. T. 611; 52 W. R. 451; 68 J. P. 409; 20 T. L. R. 429—C.A.

Workman not in Good Health—Acceleration of Death by Injury.]—On February 28, 1902, a

workman who was then affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years, received an injury in the course of his employment which so lowered his system that the disease from which he was suffering was accelerated in its operation, and he died on May 8, 1902:—*Held* that the workman's death resulted from the injury. *Golder v. Caledonian Railway*, 5 F. 123—Ct. of Sess.

—Where a workman in attempting, in the ordinary course of his duty, to start an engine by turning a wheel, ruptured some blood-vessels in his stomach and died shortly afterwards, and it was shewn that his internal organs were not in their natural state, it was held that his death, not being occasioned by anything fortuitous or unforeseen, was not caused by an "accident" within the meaning of the Workmen's Compensation Act, 1897, s. 1. *Hensley v. White*, 63 J. P. 804—C.A.

Walking on Railway Line.]—A fish porter, in the employment of a fish stevedore, who had a contract with a railway company for the portage of fish delivered at one of their stations, left the siding where the trucks were customarily discharged, and going along the line of railway was run down and killed by a railway engine near a shunter's bothy, to which the fish-porters were in the habit of going in order to find out the number of fish boxes that were in transit. The sheriff found, in fact, that the fish porters had no right to walk along the railway, that they had never been instructed by any one to go to the bothy to find out the number of fish boxes that were in transit, and that the information was not of any use to them, or to their employer, the fish stevedore, in their work:—*Held*, that the deceased had not been killed through an accident arising out of and in the course of his employment. *Hendry v. Caledonian Railway*, [1907] S.C. 732—Ct. of Sess.

Engine-driver Crossing Railway Line before Commencement of Duty.]—An engine-driver was required to be on duty at an engine-shed each morning at 7.45 A.M. To reach the engine-shed his usual and proper mode of access to the railway company's premises was by a gate, from which a path led direct to the engine-shed without involving crossing the rails. On the morning of the accident he left his house considerably earlier than was necessary, so far as his duties were concerned; and when he reached the gate referred to, instead of turning to the left and going direct to the engine-shed, he went in the opposite direction to a signal-box standing in the middle of the lines of rails, in order, for his own purposes, to make certain enquiries of the signalman. Having made these enquiries, he left the signal-box and went in the direction of the engine-shed, and in crossing the rails he was fatally injured:—*Held*, that the accident did not arise out of and in the course of his employment, and that therefore the company were not liable to pay compensation to his dependants. *Benson v. Lancashire and Yorkshire Railway*, 73 L. J. K.B. 122; [1904] 1 K.B. 242; 89 L. T. 715; 52 W. R. 248; 68 J. P. 149; 20 T. L. R. 139—C.A.

Miner Going to His Work.]—A miner, while proceeding above ground to his work, slipped

and broke his leg upon rails belonging to the mine leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between nine and thirteen feet from the doorway:—*Held*, that the accident arose out of and in the course of the workman's employment. *Mackenzie v. Coltness Iron Co.*, 6 F. 8—Ct. of Sess.

Workman Killed whilst Going to Work.—A workman living near and usually employed at King's Cross was ordered to work four miles distant at an engine-shed near Hornsey. He was carried by his employers free of charge to Hornsey every morning and back every evening. While on his way from Hornsey Station to the shed, shortly before his day's work began, he was run over by a train and killed:—*Held*, that the man's employment commenced at King's Cross, and that the accident arose "out of and in the course of his employment" within the meaning of section 1, sub-section 7 of the Workmen's Compensation Act, 1897. *Holmes v. Great Northern Railway*, 69 L. J. Q.B. 854; [1900] 2 Q.B. 409; 83 L. T. 44; 48 W. R. 681; 64 J. P. 532—C.A.

A workman employed in the renovation of the interior of a church found the church door locked on his arrival in the morning, and was unable to unlock the door. To gain access to his work he climbed the iron railing of a neighbouring schoolyard, which enabled him to scale the churchyard wall and enter the church by a window. The railing was topped by spikes, one of which pierced his foot, from the effects of which injury he died:—*Held* (LORD MONCREIFF *dubitante*), that the accident did not arise "out of and in the course of the employment" of the workman. *Gibson v. Wilson*, 3 F. 661—Ct. of Sess.

— **Licence to Pass over Railway.**—A workman employed by contractors, in the course of the execution of a contract made by them with a railway company, in ballasting a siding near the company's line of railway, was, while going to his work, killed by accident by a train upon the railway about one hundred and fifty yards from the place where his work lay, and seven minutes before the time for the commencement of his work. The employers had obtained the licence of the company for their workmen to go to the work by getting upon the railway at a certain gate, from which a footpath led by the side of the railway to the work without crossing the main line or going upon it, several sidings intervening between the path and the main line, and they had instructed the workmen to go to the work by this gate:—*Held* (ROMER, L.J., *dissentiente*), that it was no part of the employers' contract with the workman that he should go to the work by the railway, and that the employers owed no duty to him while he was passing along the railway, over which they had no control; and that in the circumstances, as the workman had not at the time of the accident arrived at the place where his work lay, and as the time for the commencement of his work had not arrived, the accident did not arise out of and in the course of the workman's employment within the meaning of section 1, sub-section 1 of the Workmen's Compensation Act, 1897. *Brydon v. Stewart* (2 Macq. H.L. 80) and *Tunney v. Midland Railway* (L. R. 1

C.P. 291) discussed. *Holness v. Mackay*, 68 L. J. Q.B. 724; [1899] 2 Q.B. 319; 80 L. T. 831; 47 W. R. 531—C.A.

Workman Returning from Work.—A workman, employed at a coal mine, had finished his day's work, and was proceeding home along a private line of railway occupied by the colliery, when he was run over and killed at a point two hundred and thirty yards distant from the place where he worked:—*Held* (LORD YOUNG *dissentiente*), that the accident did not arise out of and in the course of his employment. *Caton v. Summerlee and Mossend Iron Co.*, 4 F. 989—Ct. of Sess.

Employment on or in or about a Mine.—*Per* the LORD JUSTICE CLERK,—The accident did not happen "on or in or about a mine" within the meaning of the Act. *Id.*

Accident Occurring Twenty Minutes before Time for Actual Commencement of Work.—A workman, in accordance with his usual practice, arrived on his employers' premises about twenty minutes before the time for actually beginning work, the train by which he travelled each morning—the only practicable one—taking him thus early to his destination. In giving up his time-ticket immediately after arrival to a night watchman, who said he would deposit it for him at the proper place, the workman sustained injuries by falling into a hole. To the knowledge of the foreman, a number of the workmen arrived equally early and spent the time till the moment for beginning work in a mess cabin on the premises, which was provided by the employers:—*Held*, that the accident arose out of and in the course of the workman's employment. *Sharp v. Johnson & Co.*, 74 L. J. K.B. 566; [1905] 2 K.B. 139; 92 L. T. 675; 53 W. R. 597; 21 T. L. R. 482—C.A.

Accident Happening during Dinner-hour—Dinner-hour Excluded in Calculating Wages—Workman not Obligated to Spend Dinner-hour on Employer's Premises.—A workman was paid by the hour for the number of hours he was actually at work, the daily dinner-hour being excluded from the calculation, and the wages paid weekly. During the dinner-hour the workman was at liberty either to leave the employer's premises or to remain upon them and take his dinner there. The workman was injured by an accident after he had sat down on the premises to eat his dinner. In an arbitration under the Workmen's Compensation Act, 1897, the County Court Judge held that, as the workman had sat down for the purpose of eating his dinner, the accident did not arise "out of and in the course of the employment":—*Held*, that the fact that the workman was not actually paid for and was not obliged to remain on the employer's premises during the dinner-hour did not necessarily take the case out of the Act. *Blövelt v. Sawyer*, 73 L. J. K.B. 155; [1904] 1 K.B. 271; 89 L. T. 658; 52 W. R. 508; 68 J. P. 110; 20 T. L. R. 105—C.A.

Unskilled Labourer Cleaning Machinery in Factory—Violation of Rules.—If a person is employed in a factory to do purely unskilled labour, and is expressly forbidden to touch any of the machinery, and he meets with an accident

in attempting, in violation of such orders, to clean a certain machine, such accident is not one "arising out of and in the course of the employment" within section 1, sub-section 1 of the Workmen's Compensation Act, 1897, so as to entitle him to compensation from his employer. *Lowe v. Pearson*, 68 L. J. Q.B. 122; [1899] 1 Q.B. 261; 79 L. T. 654; 47 W. R. 193—C.A.

Engine-driver Crossing Line.]—An engine-driver in the employment of a railway company having brought a train into a station belonging to the company about 10 P.M. was ordered to take his engine into a particular bye in the station, there to await his next duty, which was to take a train out of the station at 11 P.M. Having taken his engine into the bye, he left the engine and crossed over four or five sets of rails to ask a traffic regulator in the company's employment why he had been sent to that particular bye, which was not his usual bye. He then crossed two more sets of rails to a point about twelve or thirteen yards further from his engine, where he spoke for a moment or two to another of the company's employees. This conversation was merely a casual conversation, and had nothing to do with his duties as an engine-driver. Immediately afterwards, while recrossing the last-mentioned lines of rails on his way back to his engine, he was knocked down and killed by a train that was being shunted:—*Held*, that the accident was one arising out of and in the course of his employment. *Goodlet v. Caledonian Railway*, 4 F. 986—Ct. of Sess.

Watchman Using Shanty—Cooking Food at Night.]—The applicant was a watchman in the employment of a borough council, and was employed to watch at night some sewer work, his duty being to look after tools and traffic lamps, and to prevent accidents. There was a watch-box for him to sit in. The tools were kept in a shanty which was constructed of scaffold poles, trestles, planks, and a tarpaulin. Upon the night in question there was a fire outside the watch-box, but as it was raining the applicant lighted a fire in the shanty and proceeded to cook his food there. While so engaged the shanty fell down and injured him. The evidence shewed that the workmen were in the habit of having their food in the shanty in the daytime, and there was no evidence that the applicant was expressly prohibited from making use of the shanty, though the borough engineer gave evidence that the applicant had no business in the shanty at all, and that he would discharge a watchman if he had a fire in the shanty at night. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the County Court Judge found that the applicant was not properly in the shanty, having regard to his duties, and that therefore the accident did not arise out of the employment:—*Held*, that, in the absence of a prohibition against the applicant using the shanty, the evidence shewed that the accident arose out of and in the course of the employment, and the Act applied. *Morris v. Lambeth Borough Council*, 22 T. L. R. 22—C.A.

Workman Returning Home by Short Cut Across Railway Siding.]—A workman employed at a coal mine proposing to go home by

crossing a railway siding on the premises of the mine owners, and by trespassing along a railway, was injured while crossing the siding. There were two exits provided for leaving the mine, neither of which crossed the siding. The workman was aware that the short cut was not the proper exit, but there was no express prohibition against workmen leaving the mine at this spot:—*Held*, that the accident did not arise out of and in the course of the workman's employment. *Haley v. United Collieries*, [1907] S.C. 214—Ct. of Sess.

Roadman Mounting Steam-roller—Accident Arising Out of and in the Course of the Employment.]—A roadman in the employment of a county road authority was injured when stepping down from a steam road roller belonging to the employers. The accident occurred before 7 A.M., the roadman's hour for beginning work. He had gone on to the roller for the purpose of breaking up the boiler fire so as to get up steam by 7 A.M. It was not part of his duty to do so, his employment being solely to sweep and put "blinding" on the road. He had privately arranged with the engineman to break up the fire so as to save the engineman and fireman, who had gone to their homes for the night, from returning before 7 A.M.:—*Held*, that the accident did not arise "out of and in the course of" the workman's employment. *McAllan v. Perthshire County Council*, 8 F. 783—Ct. of Sess.

Starting Engine—No part of Applicant's Duty to Start or Stop Engine.]—The applicant was employed as a brow girl at the respondent's colliery pit, and her work as such was to pick out rubbish from the coal as it was slowly moved along on a belt to the wagons. It was found as a fact by the County Court Judge that it was no part of the duty of the girls who did this work to start or stop the engine which worked the band, and that the applicant on the occasion in question was told by the other girls not to touch the engine. The man whose duty it was to start the engine being at the moment absent, the applicant started the engine herself, and, her dress catching in the wheel, she was drawn in and seriously injured:—*Held* (MATHEW, L.J., dissenting), that as the County Court Judge had found as a fact that it was no part of the applicant's duty to stop or start the engine, and as there was evidence to justify such finding, the accident did not arise out of or in the course of her employment with the respondents. *Per* MATHEW, L.J., that there was no evidence to support the finding that it was no part of the applicant's duty to touch the engine. *Lowe v. Pearson* (68 L. J. Q.B. 122; [1899] 1 Q.B. 261) followed. *Losh v. Evans*, 51 W. R. 243—C.A.

Girl Leaving Threshing-machine.]—A girl, employed as a farm-servant by the defender, was engaged on the platform of a steam threshing-machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and warned of the danger of moving about; but, notwithstanding this, she, in the absence of the millman, attempted to step across the opening through which the mill was fed with sheaves, in order to speak to another servant. In attempting to cross her foot slipped and she

was caught in the machinery and injured. For the performance of her work she did not require to speak to the other servant or to leave her place:—*Held*, that the accident was one not "arising out of and in the course of" her employment, and also that she had been guilty of "serious and wilful misconduct." *Callaghan v. Maxwell*, 2 F. 420—Ct. of Sess.

Accident Caused by Fellow-workmen Engaged in Horse-play.]—A workman in the course of his employment in a "factory" within the meaning of the Act met with an accident caused by his fellow-workmen, who at the time were not engaged at their work, but were indulging in horse-play:—*Held* (LORD MONCREIFF dissenting), that the accident was not one arising "out of" the employment in the sense of section 1, sub-section 1 of the Act, and that the injured workman was not entitled to compensation under the Act. *Falconer v. London and Glasgow Engineering &c. Co.*, 3 F. 564—Ct. of Sess.

Riding on Tram against Orders.]—A fireman in a coal pit employed to report to the colliery office on the state of the mine was riding, in breach of his orders, upon a tram laden with ashes and drawn by a horse in the direction of the office. The horse bolted, and the man ran to check it, in attempting which he fell and was run over by the tram:—*Held*, that he was injured by an accident arising out of and in the course of his employment within section 7 of the Workmen's Compensation Act, 1897. *Rees v. Thomas*, 68 L. J. Q.B. 539; [1899] 1 Q.B. 1015; 80 L. T. 578; 47 W. R. 504—C.A.

Ascending by Hoist against Orders.]—A workman engaged in the process of filling scrap iron into barrows was killed owing to the defective condition of a hoist in which he was ascending to a furnace platform in order to procure hand-leathers which were necessary to his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist in question. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist had been rendered especially dangerous by recent alterations. There was no finding that the deceased knew of the notice, and it was stated that there was no proof that his attention was directed to the changed condition of the hoist. It was further stated that some of the workmen knew of the notice and that some did not, but that all of them used the hoist:—*Held*, first, that the workman was killed in the course of his employment; and secondly, that the arbitrator was right in holding that the deceased had not been guilty of serious and wilful misconduct. *Logue v. Fullerton*, 3 F. 1006—Ct. of Sess. See SERIOUS AND WILFUL MISCONDUCT, *infra*.

Servant under General Control of Master—Special Control of Another—Negligence of Servant—Liability of Master.]—The defendant agreed with a firm of ironworkers to supply them daily with vans in complete working order, with horses, and men to drive and take charge of them. The vans, horses, and all necessaries were agreed to be the property of the defendant. The men in the defendant's employ and all charges and claims in reference

to vans, horses, and men were to be paid for by the defendant, and he was to be responsible for the same. The hirers were only to be responsible for the hire. The man in charge of a horse and van so supplied, in delivering an iron girder by the direction of the hirers, was guilty of negligence, causing personal injury to the plaintiff:—*Held*, that under the agreement the man remained under the control and in the service of the defendant, who was therefore liable. *Waldock v. Winfield*, 70 L. J. K.B. 925; [1901] 2 K.B. 596; 85 L. T. 202—C.A.

Rourke v. White Moss Colliery Co. (46 L. J. C.P. 283; 2 C.P.D. 205) and *Donovan v. Laing, Wharton, and Down Construction Syndicate* (63 L. J. Q.B. 25; [1893] 1 Q.B. 629) distinguished. *Ib.*

Burden of Proof.]—The burden of proving that an accident arose out of and in the course of the workman's employment lies on the plaintiff; but the burden of proving serious and wilful misconduct lies on the defendant. *McNicholas v. Dawson*, 68 L. J. Q.B. 470; [1899] 1 Q.B. 773; 80 L. T. 317; 47 W. R. 500—C.A.

A workman employed by the defendants to attend to a steam engine within a shed and to a mortar pan outside the shed worked by the steam engine and used to grind mortar for a building, was seen to start the engine. Very shortly afterwards he was found involved in the machinery, whereby he was killed. The shed had two doors, one of which was safe; the other, a small one, used occasionally for ventilating the shed, was dangerous by reason of proximity to a revolving shaft, and the man had been forbidden to use it. It appeared that the man was approaching the small door when he met with an accident:—*Held*, that there was evidence that the accident arose out of and in the course of his employment. *Ib.*

(3) Buildings and Scaffolding.

Building Less than Thirty Feet in Height on which Machinery is being used.]—The Workmen's Compensation Act, 1897, applies to employment on, in, or about a building less than thirty feet in height on which machinery driven by mechanical power is being used for the construction, repair, or demolition thereof. *Mellor v. Tomkinson*, 68 L. J. Q.B. 214; [1899] 1 Q.B. 374; 79 L. T. 715; 47 W. R. 240; 63 J. P. 55—C.A.

Building Exceeding Thirty Feet in Height—Part of Building Below Ground—Foundations.]—The question whether or not a building exceeds thirty feet in height, in proceedings under the Act, is one of fact for the determination of the arbitrator. Whether in estimating the height of a building for the purposes of the Act the foundations are to be taken into account, *quære*. *Halstead v. Thomson*, 3 F. 668—Ct. of Sess.

Measurement.]—In an arbitration before the County Court under the Workmen's Compensation Act, 1897, the question whether a building "exceeds thirty feet in height" within

the meaning of section 7, sub-section 1 of the Act, is a question of fact to be determined by the County Court Judge, having regard to the particular circumstances existing at the time of the accident to the workman. *McGath v. Neill*, 71 L. J. K.B. 58; [1902] 1 K.B. 211; 50 W. R. 162; 66 J. P. 180—C.A.

The height of a building is not necessarily and under all circumstances its height only above the ground level. *Ib.*

— **Construction by means of a "Scaffolding"**
— **Loose Planks Resting on Trestles in Room for Purpose of Plastering Walls and Ceiling.**—In the construction of a dwelling-house, which was roofed in and exceeded thirty feet in height, to enable the workmen employed in doing the plastering work to reach the ceilings and tops of the walls in the rooms, which were about nine feet in height, trestles with loose planks laid across the tops of the trestles were being used. A workman standing on the top landing of the house doing the plastering work of the walls of the staircase as far as he could reach from the floor of the landing fell over the staircase and was killed:—*Held* (COLLINS, L.J., dissenting), that the house was being constructed by means of a "scaffolding" within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, and that the dependants of the workman were entitled to compensation under the Act. *Maude v. Brook*, 69 L. J. Q.B. 322; [1900] 1 Q.B. 575; 82 L. T. 39; 48 W. R. 290; 64 J. P. 181—C.A.

— **Building More than Thirty Feet in Height**
— **Demolition of Building Less than Thirty Feet in Height.**—At the side of an inn standing in a street was a beerhouse. The wall between the inn and the beerhouse was a party wall, and there was internal communication between them by means of a doorway in the wall. The inn and beerhouse belonged to the same person, and were used by him for the common purpose of his business as an innkeeper. The inn exceeded, but the beerhouse was less than, thirty feet in height. During the demolition of the beerhouse, for the purpose of enlarging the inn, a workman sustained personal injury. He claimed compensation from his employers under the Workmen's Compensation Act, 1897:—*Held*, that, as the building which was being in fact demolished did not exceed thirty feet in height, the workman was not engaged at the time of the injury in an employment to which the Act applied. *Rixson v. Pritchard*, 69 L. J. Q.B. 494; [1900] 1 Q.B. 800; 82 L. T. 186—C.A.

In the construction of a cottage which was roofed in and exceeded thirty feet in height, to enable the workman employed in doing the plastering work to reach the ceilings and tops of the walls in the rooms, a platform had been erected composed of trestles with loose boards laid across the tops of the trestles. A workman using this platform was injured. In proceedings under the Workmen's Compensation Act, 1897, the arbitrator found that this platform did not constitute a scaffolding within the meaning of section 7:—*Held*, that the question was a question of fact, and that the Court would not interfere with the finding. *Maude v. Brook* (69 L. J. Q.B. 322; [1900] 1 Q.B. 575) discussed. *Ib.*

— **"Constructed or repaired"**—**"Scaffold-**

ing."—By section 7, sub-section 1 of the Workmen's Compensation Act, 1897, the Act is to apply to employment by undertakers "on in or about any building which exceeds thirty feet in height and is either being constructed or repaired by means of a scaffolding":—*Held*, that "construction" in the sense of the Act is not limited to original construction; that it includes reconstruction; that it may be partial just as repair is partial; and that whenever new material is put into a building so that it becomes an integral part of the structure the building is "being constructed" within the meaning of the Act. *Hoddinott v. Newton, Chambers & Co.*, 70 L. J. K.B. 150; [1901] A.C. 49; 84 L. T. 1; 49 W. R. 380—H.L. (E.)

The question whether a temporary staging is a "scaffolding" within the Act is a mixed question of fact and law. When the facts are ascertained the question becomes one of law, on which the Court is bound to express an opinion. *Ib.*

The appellant's husband was killed whilst at work in a building over thirty feet high, which was being strengthened by the addition of iron stays, by falling from a removable platform formed by boards lashed on ledgers lashed to iron columns and supported in the middle by trestles:—*Held*, that she was entitled to compensation, as the building was "being constructed," and the platform constituted a "scaffolding" within the meaning of the Act. *Ib.*

— **Extension of Existing Building.**—A contractor contracted with the owners of an electrical generating station for the erection of an extension of the station upon adjoining land, the intention being that the walls of the extension should be joined on to the end wall of the existing building, which exceeded thirty feet in height, and that doorways should be made so that the extension and the existing building should become one building. A workman employed by the contractor upon the extension was injured by accident in the course of and arising out of his employment, before the walls of the extension were thirty feet in height, and before the end wall of the existing building had been dealt with, save only that trenches for the footings of the walls of the extension had been excavated up to it, and the footings had been put in and were in absolute contact with it:—*Held*, that the workman was, in the circumstances of the case, employed about a building exceeding thirty feet in height within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897. *Hartley v. Quick*, 74 L. J. K.B. 257; [1905] 1 K.B. 359; 92 L. T. 191; 21 T. L. R. 207—C.A.

— **Fall while Silicating Wall.**—A workman was killed by falling from a ladder while engaged in silicating the wall of a house over thirty feet in height. The work of silicating consisted in washing or cleaning stones in the walls of a house which had begun to decay, and in painting or covering them with a preparation known as silicate, for the purpose of preserving them. This kind of work was usually done by means of a scaffold suspended by a rope from the roof of the house, but occasionally, when the work was limited to certain portions of the house (as it was in the case in

question); it was more conveniently done by means of ladders. It did not appear whether the ladders on which the deceased and his fellow-workmen were working were fastened to the wall or to each other, or that they were otherwise than placed against the wall in the usual way:—*Held*, that the ladder from which the deceased fell was not a scaffolding within the meaning of the Act—dissenting LORD TRAYNER, who held that while a ladder was not *per se* a scaffolding, the ladder in question was, in the circumstances, a scaffolding *pro hac vice*. *Campbell v. Sellars*, 5 F. 900—Ct. of Sess.

— **Building Intended to Exceed Thirty Feet.]**—Personal injury by accident arising out of and in the course of his employment was caused to a workman employed on a building being constructed by means of a scaffolding. At the time the injury was caused the building did not in fact exceed thirty feet in height, but it was intended that it should exceed that height:—*Held*, that the employment of the workman did not come within the terms of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, and that the employer was not liable to pay compensation. *Billings v. Holloway*, 68 L. J. Q.B. 16; [1899] 1 Q.B. 70; 79 L. T. 396; 47 W. R. 105—C.A.

Building "being constructed"—Building Completed and in Use—Removal of Scaffolding.]—A building in the construction of which scaffolding is used is not completely "constructed" within the meaning of section 7 of the Workmen's Compensation Act until the scaffolding has been removed, and the removal of the scaffolding is a part of the work of construction. *Frid v. Fenton*, 69 L. J. Q.B. 436; 82 L. T. 193—C.A.

A chimney shaft exceeding thirty feet in height was constructed in such a position that access to the work could only be obtained from a lower level than that on which the shaft was placed, and it was necessary for the purpose of doing the work to erect a staging from the lower level. After the shaft had been erected and the inside scaffolding, by means of which it was erected, had been removed, a workman was injured while removing gear used in the construction from the staging to the lower level, the shaft then being in working order and in actual use:—*Held*, that the employment of the workman at the time of the accident was on, in, or about a building "being constructed by means of a scaffolding," within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Ib.*

— **"Undertakers"—Scaffolding—Building.]**—Certain work of construction was being done under a contract to a building exceeding thirty feet in height by means of a scaffolding which the contractor erected. Another contractor was doing certain woodwork alterations in the building under an independent contract with the owner which did not require the use of a scaffolding, and none was supplied by him. A workman in the employment of the woodwork contractor was injured by an accident while engaged on the woodwork of the building. It appeared that the workman had previously made some use of the scaffolding as a matter of convenience, but it was in no way

necessary for his work, and at the time of the accident he was not using it. In proceedings against his employer to assess compensation under the Workmen's Compensation Act, 1897, —*Held*, that it was not necessary that the scaffolding should have been put up by the undertaker in whose employment the workman was; that it was sufficient if the building was being constructed or repaired by means of a scaffolding; and that the workman was entitled to compensation. *Fletcher v. Hawley*, 21 T. L. R. 191—C.A. See UNDERTAKERS, *infra*.

Building being Repaired by means of a Scaffolding—Ladder.]—A slater's labourer, employed about a building exceeding thirty feet in height which was being repaired, was carrying slates up a ladder to the roof of the building for the purpose of the repair, when the ladder slipped and he fell to the ground. Upon the hearing of an arbitration under the Workmen's Compensation Act, 1897, in respect of the injuries thereby received, the County Court Judge found as a fact that the building was not being repaired by means of a scaffolding:—*Held*, that on the true construction of section 7, sub-section 1 of the Act of 1897, the County Court Judge was not debarred from finding that the ladder was not "a scaffolding" within the meaning of the sub-section. *Marshall v. Rudeforth*, 71 L. J. K.B. 781; [1902] 2 K.B. 175; 86 L. T. 752; 50 W. R. 596; 66 J. P. 627—C.A.

— **Ordinary Pair of Painter's Steps.]**—A workman was injured by a fall from an ordinary pair of painter's steps on which he had been standing for the purpose of painting the wall of a house, which exceeded thirty feet in height, above the height he could reach when standing on the ground. On the hearing of an arbitration upon a claim by the workman for compensation under the Workmen's Compensation Act, 1897, the County Court Judge was of opinion that the steps, though used by the workman to support him while doing his work, afforded no evidence that the house was being repaired by means of a scaffolding, and made an award in favour of the employers:—*Held* (STIRLING, L.J., dissenting), that there was evidence upon which the Judge might find that the house was being repaired by means of a "scaffolding" within the meaning of section 7, sub-section 1 of the Act. *Elvin v. Woodward*, 72 L. J. K.B. 468; [1903] 1 K.B. 838; 88 L. T. 671; 51 W. R. 518; 67 J. P. 413—C.A.

Hoddinott v. Newton, Chambers & Co. (70 L. J. K.B. 150; [1901] A.C. 49), *Veazey v. Chattle* (71 L. J. K.B. 252; [1902] 1 K.B. 494), and *Marshall v. Rudeforth* (71 L. J. K.B. 781; [1902] 2 K.B. 175) considered. *Ib.*

— **Ladder.]**—A workman was injured, in the course of his employment, while engaged in whitewashing the interior of a building over thirty feet in height. Part of the work was done by the workmen standing on the rungs of an ordinary ladder placed against the walls of the building, thus using the ladder as a kind of platform. The County Court Judge found that a ladder was not a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, and refused to award compensation;

—*Held*, that the Court could not say as a matter of law that a ladder when so used must necessarily be a "scaffolding" within the meaning of the Act, and, the County Court Judge having drawn his conclusion of fact, the Court could not interfere with his decision. *Crowther v. West Riding Window Cleaning Co.*, 73 L. J. K.B. 71; [1904] 1 K.B. 232; 52 W. R. 374; 68 J. P. 122—C.A.

— **Crawling Board on Roof of House.**—For the purpose of executing repairs to the roof of a building exceeding thirty feet in height a "crawling board" was carried to the roof by a workman and his fellow-workman. The crawling board was a scaffold-board, about eighteen feet long and ten inches wide, with pieces of wood nailed across the upper surface at intervals of a foot or two, and at one end a piece of wood, about three inches thick and nine inches deep, was nailed to the underneath surface so as to form a hook, to be placed over the ridge of the roof, to hold the crawling board and keep it fixed. The crawling board was used to enable the workman to pass safely over the roof and to stand on while doing his work. The workman and his fellow, having reached the roof by means of a ladder placed against the side of a building, pushed the crawling board along the roof. As the workman was going over the roof along the crawling board, which was being supported at one end by his fellow-workman standing on the top of the ladder, in order to hook the crawling board over the edge of the roof, the crawling board slipped, and the workman fell and was injured:—*Held* (STIRLING, L.J., dissenting), that the building was being repaired by means of a "scaffolding" within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, and that the Act applied to the workman's employment. *Wood v. Walsh* (68 L. J. Q.B. 492; [1899] 1 Q.B. 1009) considered. *Veazey v. Chattle*, 71 L. J. K.B. 252; [1902] 1 K.B. 494; 85 L. T. 574; 50 W. R. 263; 66 J. P. 389—C.A.

"Repair"—by Painting.]—The expression "repair" in section 7, sub-section 1 of the Workmen's Compensation Act, 1897, does not include merely "painting" the outside of a building which exceeds thirty feet in height. *Wood v. Walsh*, 68 L. J. Q.B. 492; [1899] 1 Q.B. 1009; 80 L. T. 345; 47 W. R. 504; 63 J. P. 212—C.A.

Repair by Means of "Scaffolding"—Ladder.—Repairs done by means of a ladder are not repairs done "by means of a scaffolding" within the meaning of section 7, sub-section 1; nor are repairs to a building which exceeds thirty feet in height done by means of a ladder placed outside the building with one end of a plank tied to a rung of the ladder and the other end resting on a window-sill, repairs done "by means of a scaffolding" within the meaning of the same sub-section. *Id.*

— **Whitewashing Inside Ceiling and Walls of School-house.**—The inside walls and ceiling of a school building were being whitewashed under a contract for that purpose by a firm of painters, decorators, and contractors:—*Held*, that the building was "being repaired" within the meaning of section 7, sub-

section 11 of the Workmen's Compensation Act, 1897. *Dredge v. Conway, Jones & Co.*, 70 L. J. K.B. 494; [1901] 2 K.B. 42; 84 L. T. 345; 49 W. R. 518—C.A.

Wood v. Walsh & Sons (68 L. J. Q.B. 492; [1899] 1 Q.B. 1009), in so far as it decided that the "painting" of the building in that case was not "repair" of the building within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, is in effect overruled by the decision of the House of Lords in *Hoddinott v. Newton, Chambers & Co.* (70 L. J. Q.B. 150; [1901] A. C. 49), col. 1508. *Id.*

— **Painting and Whitewashing—Scaffolding.**—The word "repair" in section 7, sub-section 1 of the Workmen's Compensation Act, 1897, may include painting, whitewashing, and dubbing the ceiling and walls of the interior of a building where the painting and whitewashing is portion of the work necessary to finish the building. "Scaffolding" includes an internal staging arranged with planks resting on the step of a ladder and upon one of the roof principals, in the centre of a room. *Wood v. Walsh* (68 L. J. Q.B. 492; [1899] 1 Q.B. 1009) dissented from. *Reddy v. Broderick*, [1901] 2 Ir. R. 328—C.A.

Scaffolding not in Use nor Erected at Time of Accident.—In the construction of a building, scaffolding, consisting of trestles and planks, was used from time to time from the beginning to the end of the job. During the construction an accident happened to a workman at a time when the scaffolding, although its component parts were there, was neither in use nor erected:—*Held*, that at the time of the accident the building was being constructed by means of a scaffolding within section 7, sub-section 1 of the Workmen's Compensation Act, 1897. *Halstead v. Thomson*, 3 F. 668—Ct. of Sess.

"Scaffolding"—Ladder.]—An ordinary ladder resting against the wall of a building, if used for the purpose of enabling a workman, by standing on the rungs, to perform work upon the building at a height from the ground, may constitute a "scaffolding" within section 7, sub-section 1 of the Workmen's Compensation Act, 1897. *O'Brien v. Dobbie*, 74 L. J. K.B. 268; [1905] 1 K.B. 346; 92 L. T. 721; 53 W. R. 374; 21 T. L. R. 218—C.A.

— **Ladder.**—A ladder used in the ordinary way by a painter in painting beams in a building over thirty feet in height is not a "scaffolding" within the meaning of section 7 of the Workmen's Compensation Act, 1897. *McDonald v. Hobbs*, 2 F. 3—Ct. of Sess.

— **Trestles and Boards.**—The question what constitutes a scaffolding within the meaning of section 7 of the Workmen's Compensation Act, 1897, is a question of fact. *Ferguson v. Green*, 70 L. J. K.B. 21; [1901] 1 K.B. 25; 83 L. T. 461; 49 W. R. 105; 64 J. P. 819—C.A.

In the construction of a cottage which was roofed in and exceeded thirty feet in height, to enable the workman employed in doing the plastering work to reach the ceilings and tops of the walls in the rooms, a platform had been

erected composed of trestles with loose boards laid across the tops of the trestles. A workman using this platform was injured. In proceedings under the Workmen's Compensation Act, 1897, the arbitrator found that this platform did not constitute a scaffolding within the meaning of section 7:—*Held*, that the question was a question of fact, and that the Court would not interfere with the finding. *Maude v. Brook* (69 L. J. Q.B. 322; [1900] 1 Q.B. 575) discussed. *Ib.*

(4) Engineering Work.

"Construction"—Mechanical Power.]—A contracted with B to erect a machine on the third floor of B's building. C, who was in the employment of A, had to superintend the carrying out of the work. The machine was delivered in parts at B's building; and the heavy parts of the machine were raised to the third floor by pulleys, while the lighter parts were carried up by the lift, to work which mechanical power was required. When all the parts were on the third floor, and whilst C was engaged in erecting the machine, for which no mechanical power was required, a piece slipped and injured C:—*Held*, the erecting of the machinery was a distinct and separate part of the contract from the delivery of the parts on to the third floor. The erection alone constituted the "construction" within the meaning of the statute, and, as no mechanical power was required for that purpose, the injured workman was not entitled to compensation under the Act. *Murphy v. O'Donnell*, 54 W. R. 149—C.A.

Adding New Storey to Building—Steam Winch Used.]—A steam winch was used in the work of adding a new storey to a building:—*Held*, that the work was an "engineering work" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Cosgrove v. Partington*, 64 J. P. 788—C.A.

Repair of Road by Steam-roller.]—Where a steam-roller is used for the purpose of repairing a road, the operation is an engineering work within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Chambers v. Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132) distinguished. *Middlemiss v. Berwickshire County Council*, 2 F. 392—Ct. of Sess.

A road was being repaired by means of a steam-roller and a water-cart. In the course of the work the steam-roller was taken to a piece of road some little distance from where the water-cart was, and there used in rolling the road, water not being required at that particular spot. The driver of the water-cart was directed to water a piece of the road some further distance off from where the roller was at work, and while he was yoking his horse it bolted, with the result that he was run over and killed:—*Held*, that he was employed in an "engineering work" at the time of the accident. *Ib.*

Construction of Reservoir and Laying of Pipes for Water-supply of Town—Reservoir being Constructed by Means of Machinery Driven by Steam Power—Injury to Workman Engaged in Laying

Pipes Six Hundred Yards from Reservoir.]—The expression "engineering work" in section 7 of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment "on in or about," amongst other things, an "engineering work," refers not to the character of the labour which the workman is performing, but to the character of the physical thing or area upon which his labour is bestowed. *Atkinson v. Lumb*, 72 L. J. K.B. 460; [1903] 1 K.B. 861; 88 L. T. 789; 51 W. R. 516; 67 J. P. 414—C.A.

A reservoir was being constructed and a line of pipes therefrom laid down for the water-supply of a town distant about two miles from the reservoir, the whole of the works being executed by a contractor under one contract. Machinery driven by steam power was being used for the construction of the reservoir. A workman in the employment of the contractor was injured while setting up a hand derrick for the purpose of laying the pipes at a point about six hundred yards distant from the reservoir. The land where the pipes were to be laid between the place where the workman was at work and the reservoir had been staked out and a small part of the trench dug at the part farthest from the reservoir, but no pipes had been laid nor other work of laying the pipes done. In an arbitration under the Workmen's Compensation Act, 1897, the County Court Judge found as a fact that the construction of the reservoir and laying of the pipes therefrom was one entire work, and that, the construction of the reservoir being an "engineering work" within the meaning of the Act, the whole was an "engineering work":—*Held*, that, having regard to the finding of the County Court Judge, the workman was employed "on" an "engineering work," and consequently that the Act applied. *Ib.*

Chambers v. Whitehaven Harbour Commissioners (68 L. J. Q.B. 740; [1899] 2 Q.B. 132) and *Middlemiss v. Berwick County Council* (2 Ct. of Sess. Cas. (5th Ser.) 392) considered. *Ib.*

Workmen Employed on Board Ship—Ship Moored in Navigable River Alongside Quay—Steam Crane—Employer's Limited Use of—Discontinuance of Use—Accident on Board Ship—"Factory"—Quay—Shipbuilding Yard.]—The appellants, a firm of marine-engine builders, contracted with shipbuilders to construct engines for a steamship which was built at the shipbuilders' yard on the river Wear. When built the ship was towed to the appellants' yard on the other side of the river, where she received the heavier machinery, and was then towed back and moored in the river alongside the shipbuilders' quay. Other parts of the machinery were brought here and put on board by the appellants, some of them by means of a travelling steam crane which belonged to the shipbuilders and was under the shipbuilders' control. Some days after the machinery was all on board, and the use of the crane for the appellants' purpose had been entirely discontinued, a workman employed by the appellants in finishing the engines on board the ship was injured by an accident arising out of such employment:—*Held*, that the workman was not entitled to compensation under the Work-

men's Compensation Act, 1897, either on the ground that he was employed by the appellants as undertakers in respect of a factory, quay, or shipbuilding yard, or in respect of engineering work. The mere fact that a vessel is berthed alongside a quay which is used for obtaining access to or from the land to the vessel is not enough to bring either the vessel itself or the portion of the quay which it so uses within the definition of a factory under the Act. *Harrison v. Oceanic Steam Ship Co.* (76 L. J. K.B. 959n) followed. *Handford v. Clark*, 76 L. J. K.B. 958; [1907] 2 K.B. 409; 97 L. T. 124—C.A.

Repair to Boiler.]—A workman in the employment of a firm of boiler-makers was injured in the course of repairing a boiler in a spinning-mill belonging to a third person. The work in which he was engaged at the time of the accident was all done by hand, and no mechanical power was being used, although there was on the premises steam power available for use:—*Held*—first, that as the spinning-mill was not a factory occupied by the workman's employers, it was not a factory of which they were the undertakers; secondly, that the work in which the workman was engaged was not an "engineering work" within the meaning of the Act; and thirdly, that the workman was not entitled to compensation. *Cooper & Greig v. Adam*, 7 F. 681—Ct. of Sess.

Carting for Railway Construction.]—A workman who was employed as a carman to cart sand from a sandpit to a place where a railway was being constructed met with an accident while driving a cart with sand in it, at a place two and a half miles distant from the place where the work of construction was being carried on:—*Held*, that the accident did not happen "about" the engineering work, within the meaning of section 7 of the Workmen's Compensation Act, 1897, the word "about" signifying a physical locality. *Pattison v. White & Co.*, 20 T. L. R. 775—C.A.

Making Trench to Connect House Drain with Sewer.]—A workman in the employment of the respondent, who had contracted with the local authority to do the work of connecting house drains with the main sewer in the road, was injured by an accident while engaged in the work of connecting a house drain with the sewer. At the time of the accident the trench for the connecting pipe had been opened across the footway in front of the house, but it had not reached the sewer, and the workman was engaged in making the trench. The sewer had not been touched:—*Held*, that the work on which the workman was engaged at the time of the accident was "engineering work" within section 7 of the Workmen's Compensation Act, 1897, which included work done for the purpose of obtaining access to the sewer as well as the actual work of making the alteration in the sewer. *Coles v. Anderson*, 69 J. P. 201; 21 T. L. R. 204—C.A.

Hopper Carrying to Sea Mud Dredged by Steam Dredger.]—The words "on or in or about" in section 7, sub-section 1 of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment on or in or about a railway, factory, mine, quarry, or engineering work, are used to indicate locality.

Chambers v. Whitehaven Harbour Commissioners, 68 L. J. Q.B. 740; [1899] 2 Q.B. 132; 80 L. T. 586; 47 W. R. 533—C.A.

A workman was employed upon a steam dredger used for dredging a harbour, it being part of his duty to go to sea with the hoppers, into which the mud from the harbour was dredged by the steam dredger, and empty them outside the harbour at sea. The workman was killed by an accident in the course of emptying one of the hoppers outside the harbour at sea:—*Held*, assuming that the steam dredger was an "engineering work" within the meaning of the Act, that the workman was not at the time of the accident employed "on or in or about" it within the meaning of section 7, sub-section 1, and therefore the Act did not apply. *Ib.*

"Railroad"—Construction of Railway Signal-Box.]—A workman was accidentally injured in the course of his employment on the construction of a signal-box on a new line of railway:—*Held*, that his employment was on, in, or about a work of construction of a "railroad" within the meaning of the definition of "engineering work" in section 7 of the Workmen's Compensation Act, 1897, so as to entitle him to compensation under the Act. *Fullick v. Evans, O'Donnell & Co.*, 84 L. T. 413—C.A.

Laying of Telephone-wires under Tramway—Opening of Roadway between Up and Down Tram-lines—"Work of alteration of a railroad."—A contractor had contracted with a telephone company to lay a telephone-wire under and across a tramway consisting of two sets of lines—an up and a down line—laid in a public roadway. For the purpose of carrying out the work a trench was dug in the roadway to within a short distance of the outer rail of one of the sets of lines, a tunnel was made under these two rails, including the space between the lines, and then a trench was made in the surface of the intervening space of the roadway between the up and down lines. Another tunnel was made under the other set of rails, and also a trench in the roadway outside these rails. This work did not interfere with either the tramway itself or the working of its traffic. A workman in the employment of the contractor, whilst at work close to and just outside the tramway itself, was killed by a passing tramcar. In proceedings by the widow to recover compensation under the Workmen's Compensation Act, 1897, —*Held* (ROMER, L.J., dissenting), that, inasmuch as the carrying of the wire under and across the tramway involved the digging of a trench between the up and down lines of the tramway, that constituted an "alteration of a railroad" within the meaning of section 7, sub-section 2 of the Act of 1897, and that the deceased workman was therefore engaged at the time of his death in "engineering work" within the meaning of the definition of that expression so as to entitle the widow to compensation. *Adams v. Shaddock*, 75 L. J. K.B. 7; [1905] 2 K.B. 859; 93 L. T. 725; 54 W. R. 97; 22 T. L. R. 15—C.A.

Hydraulic Lift under Repair—Machinery of Lift made Use of.]—A workman employed to repair a hydraulic lift, making use of the machinery of the lift itself for the purpose,

is engaged on work for the repair of which machinery driven by water-power is used within the meaning of the definition of "engineering work" in section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Tulloch v. Waygood & Co.*, 75 L. J. K.B. 557; [1906] 2 K.B. 261; 95 L. T. 223—C.A.

Employment on Tramway—"Railway"—"Railroad."—A workman was injured by an accident arising out of and in the course of his employment in laying the line of an electric tramway:—*Held*, that the tramway, though not a "railway," was a "railroad" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897, and therefore came within the definition of "engineering work," and that the workman was entitled to compensation. *Fletcher v. London United Tramways Co.*, 71 L. J. K.B. 653; [1902] 2 K.B. 269; 86 L. T. 700; 50 W. R. 597; 66 J. P. 596—C.A.

Area of Tramway—Repair of Overhead Electric Wires.—The C. Corporation owned the electric tramways in C., and were under the obligation of keeping the tram-line and overhead wires in proper repair. The applicant was employed by the corporation, and his duty was to attend to the repairs of the overhead wires. On the day of the accident he had repaired the wires at one place, and was proceeding along the tram-route to another place some distance off to do repairs there, when he was injured, and in respect of his injuries he claimed compensation. The County Court Judge, in view of the obligation of the corporation to keep the whole of their tramway system in repair, found that the area of the "engineering work" on which the applicant was employed was co-extensive with the whole area of the tramway, and awarded compensation:—*Held*, that there was evidence justifying the County Court Judge in so finding. *Rogers v. Cardiff Corporation*, 75 L. J. K.B. 22; [1905] 2 K.B. 832; 93 L. T. 683; 54 W. R. 35; 70 J. P. 9; 4 L. G. R. 1; 22 T. L. R. 9—C.A.

Unloading Rails for Contractors.—A workman was injured in unloading rails for contractors, who were converting a horse tramway into an electric tramway, at a distance of seven hundred yards from the site of actual operations and fifty yards from part of the tramway so to be converted. He was at work in a railway yard in which by arrangement with the railway company the rails were stacked:—*Held* (LORD LOREBURN, L.C., and LORD JAMES OF HEREFORD dissenting), that he was not employed "on or in or about an engineering work" within the meaning of the Workmen's Compensation Act, 1897, s. 7. *Back v. Dick, Kerr & Co.*, 75 L. J. K.B. 569; [1906] A.C. 325; 94 L. T. 802; 22 T. L. R. 548—H.L. (E.)

Hay-cutter.—A firm of engineers sold a hay-cutting machine to a customer, and undertook to fit it up in the customer's premises and test its working before delivery. In the process of fitting it up one of the engineer's workmen, for the purpose of testing its working, connected it with a revolving shaft driven by electricity, forming part of the customer's plant already in the premises, and while doing so was injured:—*Held*, first, that the hay-cutter was an engi-

neering work within the meaning of the Act; and secondly, that the workmen's employers were the undertakers for its construction. *Reid v. Fleming*, 3 F. 1000—Ct. of Sess.

(5) Factory.

Factory of the Undertakers, not of Third Persons.—Employment by the undertakers "on or in or about" a factory in section 7 of the Workmen's Compensation Act, 1897, means employment by them "on or in or about" their factory, and not that of a third person. *Francis v. Turner*, 69 L. J. Q.B. 182; [1900] 1 Q.B. 478; 81 L. T. 770; 48 W. R. 228; 64 J. P. 53—C.A.

Not Limited to Premises of Employer.—The Workmen's Compensation Act, 1900, is not limited in its application to employment on or in or about the land or premises of the employer. *Smithers v. Wallis*, 72 L. J. K.B. 57; [1903] 1 K.B. 200; 87 L. T. 556; 51 W. R. 261; 67 J. P. 381—C.A.

Bakehouse Underground—Place Underground "used" as a Bakehouse on January 1, 1896.—A place underground had been used as a bakehouse for about fifteen years down to October, 1895, when the premises of which it formed part became vacant. The landlord then had the premises, including the bakehouse, put into repair, and while the work of repair was in progress a notice was exhibited upon the premises to the effect that they were to let as baker's premises. The repairs were completed by Christmas, 1895, but the premises remained unoccupied until February, 1896, when they were let to a baker, who entered into possession and used the bakehouse for the purposes of his business. By sub-section 3 of section 27 of the Factory and Workshop Act, 1895, "a place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act"—that is, January 1, 1896:—*Held*, that the place in question was "used" as a bakehouse within the meaning of the above exception, and was therefore not a place underground the use of which as a bakehouse was prohibited by the Act. *Schweitzerhof v. Wilkins*, 67 L. J. Q.B. 476; [1898] 1 Q.B. 640; 78 L. T. 229; 62 J. P. 247—D. *And see supra*, FACTORY AND WORKSHOP.

Beer-bottling Stores — Mechanical Power — Manufacturing Process — Adapting for Sale — Non-textile Factory.—Bottling stores used for aerating and bottling beer, where carbonic-acid gas and beer are mixed together by mechanical power and then put into bottles by a tap, the nozzle of which is pulled down by hand into the neck of the bottle, the beer flowing from the tap and filling the bottle by the pressure of the gas, come within the definition of a non-textile factory in section 93 of the Factory and Workshop Act, 1878, and it is an offence to employ a young person in such beer-bottling stores beyond the period permitted by section 13 of that Act or section 36 of the Factory and Workshop Act, 1895. *Law v. Graham* (70 L. J. K.B. 608; [1901] 2 K.B. 327) distinguished. *Hoare v. Truman, Hanbury, Buxton & Co.*, 71 L. J. K.B. 380; 86 L. T. 417; 50 W. R. 396; 66 J. P. 342; 20 Cox C.C. 174—D.

"Bottle-washing work" — Hotel Storeroom

—**Cellar.**]—A storeman employed in the wine-cellars of a hotel was injured by the breaking of a bottle which he was corking with his hand. In the cellars there were two small revolving brushes (worked, when desired, by water-power from a tap) for washing the interior of bottles. The cellars were primarily used for storage, and the processes of corking and bottle-washing were ancillary to that object:—*Held*, that the cellars were not a “bottle-washing work,” and therefore not a factory within the meaning of the Factory and Workshop Act, 1901, or of the Workmen’s Compensation Act, 1897. *Kavanagh v. Caledonian Railway*, 5 F. 1128—Ct. of Sess.

Bicycle Exhibition Shed.]—A workman was injured by accident in the course of his employment in a building exceeding thirty feet in height, and in which more than twenty persons, not being domestic servants, were employed for wages, and certain provisions of the Factory and Workshop Act, 1901, as to notice of accident and the formal investigation of accidents, were by section 105, sub-section 2 of that Act to have effect in the case of such a building as if it were included in the word “factory.” The building contained no machinery or plant worked by mechanical power, but was used for exhibiting and selling bicycles and tricycles, and also for repairing the same:—*Held*, that the building was not by virtue of section 105, sub-section 2 of the Act of 1901 a “factory,” so as to be brought within the definition of that word contained in section 7, sub-section 2 of the Workmen’s Compensation Act, 1897. *Dyer v. Swift Cycle Co.*, 73 L. J. K.B. 566; [1904] 2 K.B. 86; 90 L. T. 613; 52 W. R. 483; 68 J. P. 394; 20 T. L. R. 429—C.A.

“**Bleaching and dyeing works**”—**Processes not Incidental to Bleaching or Dyeing.**]—If any one or more of the processes mentioned in clause 2 of part 1 of the 4th schedule to the Factory and Workshop Act, 1878, is or are carried on in any premises, such premises are a “factory” within the meaning of the definition of that expression contained in section 93 of the Act, although such processes are not incidental to the operation of bleaching or dyeing. *Rogers v. Manchester Central Packing Co.*, 67 L. J. Q.B. 310; [1898] 1 Q.B. 344; 78 L. T. 17; 46 W. R. 350; 62 J. P. 166; 18 Cox C.C. 698—D.

Employment “about a factory”—Carting Water to Supply Factory.]—A workman was conveying water in a water cart for the supply of a steam engine which was a factory within the meaning of the Workmen’s Compensation Act, 1897, when at a distance of at least 110 yards from the engine injury was caused to him in consequence of the horse drawing the cart running away:—*Held*, that on these facts it could not be rightly found that the workman was at the time of the accident employed “about” a factory within the meaning of section 7, sub-section 1 of the Act. *Fenn v. Miller*, 69 L. J. Q.B. 439; [1900] 1 Q.B. 788; 82 L. T. 284; 48 W. R. 369; 64 J. P. 356—C.A.

A firm of contractors were under contract to do all the carting work in connection with a factory. One of the carters in the employment of the carting contractors was injured within the factory when engaged in carting work under

this contract. He claimed compensation against the occupiers of the factory as the undertakers in the sense of the Act:—*Held*, that the carting work in which he was engaged at the time of the accident was not, within the meaning of section 4 of the Act, “merely ancillary or incidental to,” but “was part of the trade or business carried on” by the defenders in the factory, and that they were liable to him in compensation under section 4. *Bee v. Owens*, 2 F. 439—Ct. of Sess.

Per LORD MONCREIFF.—Under section 4 an undertaker may be liable to the servant of a contractor, although his own employer—the contractor—is not liable to him either under the Act or otherwise. *Id.*

—**Carter Delivering Goods at Distance from Factory—Injury to Workman.**]—A carter employed by the occupiers of a factory sustained personal injury by accident arising out of and in the course of his employment while delivering goods taken from his employers’ factory upon their dray at a distance of one mile and a-half from the factory. At the hearing of a claim for compensation under the Workmen’s Compensation Act, 1897, a County Court Judge held that the workman was not at the time of the accident employed “about” a factory within the meaning of section 7, sub-section 1 of the Act:—*Held*, that, as upon the true construction of the word “about” in the sub-section, the question of fact for the County Court Judge was whether the employment was in close propinquity to the factory, and not whether it related to the business of the factory, the decision of the County Court Judge must be upheld. *Louth v. Ibbotson*, 68 L. J. Q.B. 465; [1899] 1 Q.B. 1003; 80 L. T. 341; 47 W. R. 506—C.A.

—**Carter Loading Timber in Street—Proximity to Factory.**]—A carter in the employment of the defendants, who were the occupiers of a timber factory, was engaged in loading timber on to one of the defendants’ carts which was standing in the street close to the entrance to the factory. Whilst standing in the cart waiting to complete the loading, a piece of timber tilted up and the carter was thrown on to the road and subsequently died from injuries received:—*Held*, that loading the timber on carts was part of the business of the factory, and that the accident happened to the carter whilst employed “about” the factory within the meaning of section 7, sub-section 1 of the Workmen’s Compensation Act, 1897, so as to make the employers liable to pay compensation. *Powell v. Brown*, 68 L. J. Q.B. 151; [1899] 1 Q.B. 157; 79 L. T. 631; 47 W. R. 145—C.A.

Crane Carrying Platform—“Building”—Temporary Wooden Structure to Carry Platform for Crane.]—A wooden structure exceeding thirty feet in height, and consisting of three upright legs which support a platform to carry a crane for the purpose of hoisting up materials to be used in the erection of a building, the structure being removed when the building has been erected, may be a “building” within the meaning of section 7, sub-section 1 of the Workmen’s Compensation Act, 1897. *Aylward v. Matthews*, 74 L. J. K.B. 336; [1905] 1 K.B.

343; 92 L. T. 189; 53 W. R. 292; 21 T. L. R. 196—C.A.

Dock or Wharf.—The effect of the decision of the House of Lords in *Raine v. Jobson & Co.* (70 L. J. K.B. 771; [1901] A.C. 404) is to overrule the decision of the Court of Appeal in *Hall v. Snowden, Hubbard & Co.* (No. 2) (68 L. J. Q.B. 645; [1899] 2 Q.B. 136), and every dock or wharf is therefore a "factory" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Balfrett v. Kemp Brothers*, 73 L. J. K.B. 138; [1904] 1 K.B. 517; 90 L. T. 305; 52 W. R. 257; 68 J. P. 196; 20 T. L. R. 162—C.A.

Dock.—Whether the provisions of section 18 of the Factory and Workshop Act, 1895, apply to a dock in which no accident has yet occurred, so as to make it a factory in the sense of section 7 of the Workmen's Compensation Act, 1897, *quere*. *Hall v. Snowden, Hubbard & Co.* ([1899] 2 Q. B. 136) commented on. *Bruce v. Henry*, 2 F. 717—Ct. of Sess.

— **Employer Using Machinery to Unload from Dock.**—Employers using machinery in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, are, upon the true construction of section 23, sub-section 1 of the Factory and Workshop Act, 1895, occupiers of a factory within the meaning of that Act, and are therefore "undertakers" within the meaning of the Workmen's Compensation Act, 1897. *Carrington v. Bannister*, 70 L. J. Q.B. 31; [1901] 1 Q.B. 20; 83 L. T. 457—C.A.

— **Machinery on a Ship Loading from a Barge.**—The word "dock" in section 7 of the Workmen's Compensation Act, 1897, and in section 23 of the Factory and Workshop Act, 1895, includes the land bounding the water as well as the water itself. *Hennessy v. McCabe*, 69 L. J. Q.B. 173; [1900] 1 Q.B. 491; 81 L. T. 575; 48 W. R. 231; 64 J. P. 4—C.A.

Where a ship is loading from a barge floating in, but not part of, a dock, a workman employed on such a ship is not employed on or in or about a dock, and is therefore not employed on or in or about a factory within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897. *Ib.*

Machinery on board such a ship used for the purpose of loading from such a barge is not machinery used in the process of loading from a dock, and is therefore not treated as included in the term "factory" in section 23 of the Factory and Workshop Act, 1895, and consequently is not a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Ib.*

— **"Occupiers."**—A labourer (not a seaman) was employed to bring the employers' barges, which were kept in the employers' dock at night, from their places in the dock, when the dock gates were opened, alongside vessels in an adjoining river, for the purpose of taking cargo into the barges and bringing it back to the quay of the dock to be there unloaded. In the course of this employment the labourer fell into the dock and was drowned:—*Held*, that the dock was a "factory," and that the employers were the "occupiers" of it within the meaning of

the Act. *Hanlon v. North City Milling Co.*, [1903] 2 Ir. R. 163—C.A. *s.p. Fogarty v. Wallis*, [1903] 2 Ir. R. 522—C.A.

Dock, Wharf, or Quay—"Occupier"—Actual Use or Occupation.—The defendants were the owners of a ship which entered the dock for the purpose of discharging cargo. They had engaged a workman to assist in discharging the cargo into lighters. As the ship came alongside the quay the workman with the help of others was putting a gangway from the quay-side on to the ship, when he slipped and fell over the edge and was crushed to death between the moving ship and the dock wall. His widow claimed compensation under the Workmen's Compensation Act, 1897:—*Held*, that the space of quay alongside the ship was a "factory" within section 7 of the Workmen's Compensation Act, 1897. *Held* also, that at the time of the accident the defendants were "occupiers" of such part of the quay within section 23 of the Factory and Workshop Act, 1895, and therefore were "undertakers" within section 7 of the Workmen's Compensation Act, 1897, and liable to pay compensation under that Act. *Merrill v. Wilson*, [1901] 1 Q.B. 35; 83 L. T. 490; 49 W. R. 161—C.A.

Machinery on Board Lighter—Dock.—A lighter and machinery thereon, the property of and worked by stevedores, was employed in raising goods from the hold to the deck of a vessel moored between the lighter and a quay, the goods being thereafter transferred to the quay, not by the stevedores, but by dock workmen:—*Held* (Lord Young dissenting), that section 23 of the Factory and Workshop Act, 1895, did not apply either to the lighter or to the machinery thereon, and that therefore they did not constitute a "factory" in the sense of the Workmen's Compensation Act; and further, that the process which was being performed by the lighter and its machinery was not one of unloading to a quay in the sense of the Act of 1895. *Laing v. Young and Leslie*, 3 F. 31—Ct. of Sess.

"Wharf" or "Quay"—Structure Moored in River for Loading and Unloading Vessels—No Connection with Shore.—A floating structure carrying cranes for loading and unloading ships was moored in the river Thames 500 feet from the shore by chains fastened to piles driven into the bed of the river. There was no connection with the shore except by boats:—*Held*, that the structure was a "wharf" within the meaning of section 23 of the Factory and Workshop Act, 1895, and section 7 of the Workmen's Compensation Act, 1897. *Ellis v. Cory*, 71 L. J. K.B. 72; [1902] 1 K.B. 38; 85 L. T. 499; 50 W. R. 131; 66 J. P. 116—C.A.

— **Accident immediately Outside Wharf.**—The applicant, employed by the respondents as a quay labourer at a wharf occupied by them, was assisting in removing girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded. The girders were lifted by a hand-crane on to a hand-truck, by which they were conveyed to the ship's side. While removing the hand-crane from one pile of girders to another pile, both of which lay in the street immediately

outside the wharf shed, the applicant was jammed between the platform of the crane and one of the girders and sustained injuries:—*Held*, first, that as one or more of the provisions in section 23 of the Factory and Workshop Act, 1895, applied to the wharf, it was a factory within the meaning of the Act of 1897; and secondly, the fact that the accident happened on a public street, immediately outside the wharf shed, did not *per se* exclude a claim for compensation. *Hall v. Snowden, Hubbard & Co.* (68 L. J. Q.B. 645; [1899] 2 Q.B. 186) disapproved. *Strain v. Sloan*, 3 F. 663—Ct. of Sess.

Dock, Wharf, or Quay—Timber Yard adjoining Dock.—A piece of land within the ambit of a system of docks was leased by the proprietors of the docks to a firm of timber merchants for the purpose of storing timber. The land was situated about forty yards from the water of one of the timber docks forming part of the dock system. An unfenced dock railway and an unfenced dock road ran along in front of the land between it and the water of the adjoining dock, but otherwise the land was not separated by any fence or physical barrier from the adjoining quay or wharf space, the limits of the piece of land being merely marked off by alley posts. Timber stored on the land had at times been unloaded from the dock in front and brought across the railway and roadway to the land; but for twelve months prior to the date of an accident to a workman employed in moving timber on the piece of land, though timber had been brought to the land from other docks in the dock system, none had been brought from the dock in front:—*Held*, that there was evidence upon which the County Court Judge, in proceedings for compensation under the Workmen's Compensation Act, 1897, might hold that the piece of land was a "dock, wharf or quay" so as to come within the meaning of the word "factory" in section 7 of the Act. *Haddock v. Humphrey* (69 L. J. Q.B. 327; [1900] 1 Q.B. 609) distinguished. *Kenny v. Harrison*, 71 L. J. K.B. 788; [1902] 2 K.B. 168; 87 L. T. 318—C.A.

Wharf to which any Provision of Factory Acts is Applied by Factory Act, 1895.—The word "factory" in sub-section 2 of section 7 of the Workmen's Compensation Act, 1897, does not include a "wharf" unless such wharf is one to which some provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. *Hall v. Snowden, Hubbard & Co.* (No. 2), 68 L. J. Q.B. 645; [1899] 2 Q.B. 186; 80 L. T. 554; 47 W. R. 486—C.A.

Engine-house in Workhouse—Fencing Machinery for Generating Electrical Energy—Public Building.—Upon the premises of a workhouse under the control of the appellants were an engine-house and machinery used for the purpose of generating electrical energy for the lighting of the workhouse and for other purposes. The machinery included an engine, which was not securely fenced:—*Held*, that the engine-house was a "factory" within the meaning of section 149, sub-section 1 (a) of the Factory and Workshop Act, 1901, the workhouse being a "public building" within Part I. (20) of the Sixth Schedule, and that the appellants were therefore properly convicted of

not having securely fenced the engine. *Mile End Old Town Guardians v. Hoare*, 72 L. J. K.B. 651; [1903] 2 K.B. 483; 89 L. T. 276; 67 J. P. 395; 1 L. G. R. 732—D.

Fire Escape—Meaning of "Factory"—Adjoining Houses Connected by External Gangway.—Adjoining houses were let upon separate leases by the same owner to the same tenant, who occupied them for the purposes of a manufacturing business. Regarded separately, one of the houses would have been a "factory" and the other a "workshop" within the Factory and Workshop Act, 1901. In the former house more than forty persons and in the latter less than forty persons were employed. The buildings were connected by an external iron gangway joining the first-floors; certain processes commenced in the one house were finished in the other, and the two were used by the tenant as one set of manufacturing premises:—*Held*, that, under these circumstances, an arbitrator, to whom a dispute between the owner and the local authority as to the provision of means of escape from fire under section 14 of the Act had been referred, was amply justified in holding that the two buildings constituted a single "factory" within the meaning of the Act. *London County Council and Tubbs, In re*, 1 L. G. R. 746; 68 J. P. 29—D.

—Jurisdiction to require Stair Encroaching on Lower Floors—Award—Validity.—The owner of a building let the second, third, and fourth floors before 1892 to tenants who during their tenancies had carried on businesses each of which was of such a nature as to render the premises in which it was carried on a "factory" within section 93 of the Factory and Workshop Act, 1878, and in each of which more than forty persons were employed. The tenants of the basement and ground and first floors did not carry on businesses of the nature aforesaid:—*Held*, that the second, third, and fourth floors only were factories within that section; and that under section 7, sub-section 2 of the Factory and Workshop Act, 1891, neither the sanitary authority nor an umpire appointed pursuant to that sub-section had jurisdiction to require the owner to provide as a means of escape in case of fire for the persons employed in such factories a staircase which would encroach upon the lower floors of the building. *London County Council v. Lewis*, 69 L. J. Q.B. 277; 82 L. T. 195; 64 J. P. 39—D.

Gas Main.—A workman, in the employment of a gas company, engaged in work in connection with a gas main at a distance from the gas works where the gas is manufactured is not employed "on or in or about a factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897, for the gas mains, being used merely for the distribution of the gas, are no part of the "factory"—that is, of the place where the gas is manufactured. *Spacey v. Dowlais Gas and Coke Co.*, 75 L. J. K.B. 5; [1905] 2 K.B. 879; 93 L. T. 685; 54 W. R. 198; 22 T. L. R. 29—C.A.

Locomotive Shed—Employment on, in, or about Factory—Shed Leased by Employers Half a Mile from Factory.—The applicant, who was injured while in the service of the defenders—a firm of engineers, whose works were a factory within

the meaning of the Act—as one of a squad of men “working at a locomotive engine,” the property of the defenders, in a shed belonging to and used by a railway company, of which shed the defenders were tenants under an agreement with the railway company. The shed was about half a mile from the defenders’ works, and had no direct connection therewith by rail; it had previously been used on many occasions by the defenders for similar purposes. No steam, water, or other mechanical power was used in the shed:—*Held*, that the applicant was not employed “on or in or about” the defenders’ factory, and was not entitled to compensation. *Ferguson v. Barclay*, 5 F. 105—Ct. of Sess.

Machinery.—Machinery in a “factory” as defined by the Factories Acts, 1878 to 1891, or upon premises included in the term “factory” by section 23 of the Factory and Workshop Act, 1895, is itself a “factory” within the meaning of the Workmen’s Compensation Act, 1897, s. 7. *McNicholas v. Dawson*, 68 L. J. Q.B. 470; [1899] 1 Q.B. 773; 80 L. T. 317; 47 W. R. 500—C.A.

Mill Grinding Meal on Farm by Movable Engine and Fixed Mill—Labour for Purposes of Gain.—A movable engine which can be connected by a driving band and fly-wheel with a mill which is fixed in a farmer’s farmyard, and which is used for grinding meal for feeding the stock on the farm, and not for the purposes of gain, is not a “factory” within the meaning of that term in section 7 of the Workmen’s Compensation Act, 1897. *Nash v. Hollinshead*, 70 L. J. K.B. 571; [1901] 1 K. B. 700; 84 L. T. 433; 49 W. R. 424; 65 J. P. 357—C.A.

Old Iron Store—Machinery Worked by Hand Power—Sheds Used for Storing Iron—“Factory” —“Warehouse.”—Machinery actuated by hand power is not worked by “steam, water, or other mechanical power,” within the meaning of section 93 of the Factory and Workshop Act, 1878; and therefore the user of such machinery does not constitute the premises in which it is employed a “factory.” *Wilmott v. Puton*, 71 L. J. K.B. 1; [1902] 1 K.B. 287; 85 L. T. 569; 50 W. R. 148; 66 J. P. 197—C.A.

A “warehouse,” within the meaning of section 7, sub-section 2 of the Workmen’s Compensation Act, 1897, need not necessarily be in contiguity to water. *Ib.*

Plumbing Work—Measuring up of Work when Finished—“Building.”—A sub-contract for plumbing work was entered into with certain contractors who had undertaken the erection of a factory exceeding thirty feet in height, and the plumbing work, when finished, was to be measured up. Before the construction of the factory had been completed, and whilst steam pipes, which were a necessary part of the factory, were being put up by means of a scaffolding, a workman of the appellants was employed in measuring up the plumbing work in the factory, and in the course of such employment sustained injuries:—*Held*, that the measuring up of the plumbing work was part of the work of constructing the factory, and consequently that the workman sustained injuries arising out of and in the course of his employment on, in, or about a building exceed-

ing thirty feet in height, which was being constructed by means of a scaffolding, within the meaning of section 7, sub-section 1 of the Workmen’s Compensation Act, 1897, and was entitled to compensation. *Frid v. Fenton* (69 L. J. Q.B. 436) applied. *Plant v. Wright & Co.*, 74 L. J. K.B. 331; [1905] 1 K.B. 353; 92 L. T. 720; 53 W. R. 358; 21 L. T. R. 217—C.A.

Refuse Works—Steam Power.—In the “Refuse Dispatch Works” of the Glasgow Corporation certain saleable parts of the city refuse were separated from the unsaleable part by processes in which steam power was used. The sums realised by the sales were applied in reducing the cost of the disposal of the refuse, which fell on the rates:—*Held*, that these works were a “factory,” and that a workman in the employment of the corporation injured therein was entitled to compensation. *Henderson v. Glasgow Corporation*, 2 F. 1127—Ct. of Sess.

Repairing Workshop—Repairs merely Incidental to Non-factory Business.—A cable tramway company had a covered shed for their cars 550 feet long and 160 feet wide, and adjoining it a machine-room or workshop 75 feet long and 50 feet wide, which contained lathes, turning-machines, and boring-machines, driven by two electric motors. This workshop was used solely for the repair of the grippers and other parts of the cars. The cars were always brought to the shed for repairs, and were repaired in it. No mechanical power was used in the shed except the power employed to move a travelling platform for moving the cars, which was derived from a steam-engine adjoining the shed. A car-driver was injured when employed in oiling his car in the shed at a point 374 feet distant from the machine-room:—*Held* (LORD MONCREIFF dissenting), that the machine-room was a factory in the sense of the Act, and that the accident occurred on, in, or about a factory within the meaning of section 93, sub-section 3 (b) of the Factory and Workshop Act, 1878. *Mooney v. Edinburgh and District Tramway Co.*, 4 F. 390—Ct. of Sess.

Grindstone Driven by Gas Engine.—The employer’s premises consisted of a yard in which stones were dressed by manual labour, and included an engine-house, where the workmen’s tools were sharpened on a grindstone driven by a gas engine. No other mechanical power was used in the premises. The claimant, while dressing stones, was struck in the eye by a piece of metal from a chisel, and thereby sustained the injuries for which he claimed compensation:—*Held*, that the premises were premises in which mechanical power was “used in aid of the manufacturing process carried on therein” within the meaning of the Factory and Workshop Act, 1878, s. 93, sub-s. (3), and were therefore a factory within the meaning of the Workmen’s Compensation Act, 1897, s. 7, and that the claimant was entitled to compensation. *Petre v. Weir*, 2 F. 1041—Ct. of Sess.

Threshing Machine Connected with Engine for Haulage Purposes only—Threshing Machine in Transit.—A threshing machine and traction engine in transit to a place where they are to be used for threshing, the engine being connected with the machine for no purpose but that of haulage, do not constitute a “factory”

within the meaning of the Factory and Workshop Act, 1878, or the Workmen's Compensation Act, 1897. *George v. Macdonald*, 4 F. 190—Ct. of Sess.

Whether a traction engine and threshing machine engaged in threshing at a particular place fall within the statutory definition of "factory," *quære. Ib.*

"Tenement factory"—**Notice to Owner of Building to Provide Staircase for Escape from Fire—Right to Enter on Lower Factory to Execute Works for Benefit of Upper Factory.**—The effect of section 14, sub-section 2 of the Factory and Workshop Act, 1901, is that the owner of a factory which is in danger can be required to carry out works for the protection of that factory, and that the owner has power to execute works so reasonably required "notwithstanding any agreement with the occupier" of the factory. The Act gives him, as against his tenant, the right to enter and do works required in respect of the property included in his demise, but it gives him no other rights. Whether the works are "reasonably required" or not is to be determined in manner directed by the Act. *Toller v. Spiers & Pond*, 72 L. J. Ch. 191; [1903] 1 Ch. 362; 87 L. T. 578; 51 W. R. 381; 67 J. P. 234; 1 L. G. R. 193—Buckley, J.

The plaintiff was the owner of a large building, which consisted of a basement, a ground floor, and seven upper floors. The building from the basement up to and including the fourth floor (but with the exception of the second floor) formed one factory (factory A) within the Factory and Workshop Acts, and was occupied by the defendants under leases. The fifth, sixth and seventh floors formed another factory (factory B), and was occupied by F. & Co. under leases. The occupiers of factories A and B respectively provided their own mechanical power from fixed engines on their respective premises. The London County Council had served upon the plaintiff a notice under the Factory and Workshop Act, 1901, requiring him to carry out certain alterations and additions to the buildings, so as to provide means of escape in case of fire for the persons employed therein. Such alterations consisted in the construction of a new staircase at the southern end of the building and connected with all floors, and certain alterations to existing staircases. The defendants declined to permit the plaintiff to enter upon the premises occupied by them and execute the necessary works:—*Held*, that factories A and B were separate factories, and that the building did not constitute a "tenement factory" within section 149 of the Act of 1901. *Held* also, that section 14, sub-section 2 of the Act only enabled the owner of factory A to enter as against the occupier of factory A to do works for the benefit of factory A, but gave him no power to open through factory A an exit for persons employed in factory B. *Held*, therefore, that the plaintiff had no right as against the defendants to enter and do the works required by the Council. *Ib.*

Tripe Manufacturer—Steam Power used in Manufacture—"Non-textile factory."—Where in a tripe manufactory cold water was supplied to a boiler by pressure of steam, and steam was

used to heat the water in the coppers wherein the tripe was prepared and adapted for sale, it was held that there was a use of steam power rendering the premises a "non-textile factory" within the meaning of section 149, sub-section (1) (c) of the Factory and Workshop Act, 1901; and that, therefore, a claim under the Workmen's Compensation Act, 1897, for compensation by the widow of a deceased workman, who had been killed by an accident in the course of his employment, was enforceable. *Petrie v. Weir* (2 Fraser, 1041) considered and applied. *Doswell v. Cowell*, 95 L. T. 38; 22 T. L. R. 628—C.A.

Onus of Proving Course of Employment on Applicant.—A workman was employed, along with other men in the same employment, in putting down a flooring of cement in a house which exceeded thirty feet in height, and was constructed by means of scaffolding. The workman left the house to fetch a pickaxe from his employer's yard. On his way he slipped and fell, receiving injuries in respect of which he claimed compensation. No evidence was given as to the exact spot where the accident happened, or as to how far it was from the building where the applicant was working:—*Held*, that it lay on the applicant to shew that the accident arose out of and in the course of his employment "on, in, or about" the building, and that not having discharged this onus by giving evidence of the exact locality where the accident happened, he was not entitled to compensation. *McAdam v. Harvey*, [1903] 2 Ir. R. 511—C.A.

(6) "Forestry."

"Forestry"—Workmen Engaged in.—A workman, in the employment of a saw-miller, was employed to cut down growing trees, which had been purchased by his employer, and cart them to the saw-mill, and while so employed was killed by being crushed between a standing tree and the trunk of a tree which he was removing on a cart. The cutting down and removing of the trees was an ordinary part of the employer's business:—*Held*, that the employment in which the deceased was killed was not "forestry" within the meaning of the Workmen's Compensation Act, 1900. *Meally v. McGowan*, 4 F. 883—Ct. of Sess.

(7) Mines.

Employment "about" a Mine.—A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway waggon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of—first, railway siding (123 yards); secondly, the breadth of a public road; and thirdly, a private cart road leading to the pit (259 yards):—*Held*, that the workman was not injured in the course of employment on or in or about a mine within the meaning of the Act. *Coylton Coal Co. v. Davidson*, 7 F. 727—Ct. of Sess.

Siding—Private Railway to Main Line.—A mine was connected with a main line of

railway by a private line, about a mile and a quarter in length. At a point in this private line about eight hundred yards from the mine there was a drum house and sidings connected therewith. At this point an engine-driver in the employment of the mine-owners was killed in the course of his employment:—*Held* (the LORD JUSTICE-CLERK dissenting), that the place where the accident occurred was on, in, or about a “mine” within the meaning of the Workmen’s Compensation Act. *Anderson v. Lochgelly Iron and Coal Co.*, 7 F. 187—Ct. of Sess.

Siding Adjacent to and Belonging to Mine.]

—A colliery company, owners of a coal mine and siding connecting the mine with a main line of railway, entered into a contract with the owner of a sand-pit situated on the main line to carry sand from the sand pit in railway waggons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by an engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about eighty yards in length, and served only the one mine. The sand-pit was three hundred or four hundred yards from the siding. In the course of executing this contract the brakeman of the engine, who was in the employment of the colliery company, was killed while uncoupling waggons on the main line at or near the extremity of the siding:—*Held*, first, that the employment of the deceased was locally “about” a mine in the sense of section 7, sub-section 1 of the Workmen’s Compensation Act, 1897; and secondly (*dissentiente* LORD ADAM), that a claim for compensation arose, although the work upon which the deceased was employed at the time of the accident was not part of the proper business of the colliery. *Monaghan v. United Collieries*, 3 F. 149—Ct. of Sess.

Sidings belonging to a Mine.]—The Workmen’s Compensation Act, 1897, s. 7, sub-s. 2, provides that “in this Act, ‘mine’ means a mine to which the Coal Mines Regulation Act, 1887, applies”; and the latter Act, section 75, provides that, “in this Act, unless the context otherwise requires, ‘mine’ includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine.” The defendants owned a number of collieries, and also a private railway about twelve miles long, not being a “railway” within the meaning of the Workmen’s Compensation Act, 1897. This railway connected all the collieries, and was used for conveying coal from all the collieries, and was the sole means by which coal was conveyed away from them; and there was on this railway a dépôt, with sidings, where coal was stored and distributed to purchasers. An engine-driver employed by the defendants was killed by accident when he was driving the engine of a train carrying coal from one of the collieries to the dépôt; the accident occurred about three-quarters of a mile from the pit mouth of this colliery and close to the sidings of the dépôt:—*Held*, that the workman was not employed “on or in or about a mine,” within the meaning of the Act, when the accident happened. *Turnbull v. Lambton Collieries Co.*, 82 L. T. 589; 64 J. P. 404—C.A.

(8) Railways.

“On or in or about” a Railway—Private Railway.]—A trading company’s premises were connected by a siding, which was its own property, with a line of railway belonging to a railway company. The siding, which was not constructed or carried on under any Act of Parliament, was used solely for the traffic of the trading company, and for that purpose was used by the railway company by means of its own rolling-stock and servants. A servant of the railway company, while so employed, was accidentally injured at a point on the siding three-quarters of a mile from its junction with the line of railway:—*Held*, that the accident had not occurred “on or in or about” a railway within the meaning of the Workmen’s Compensation Act. *Brodie v. North British Railway*, 3 F. 75—Ct. of Sess.

— **“Public Traffic.”**—A smith in the employment of a railway company was injured while shoeing horses belonging to the company. The smithy where the accident occurred, and the stables in which the horses were kept, were both situated in a yard within the area occupied by the railway company as a general station. The yard was separated from the station proper by a fence of sleepers and partly by the stable wall. The horses were used for collecting and delivering goods and for hauling trucks:—*Held*, that the smithy was “used for the purposes of public traffic” within the definition of “railway” given in section 3 of the Regulation of Railways Act, 1873, and adopted in the Workmen’s Compensation Act, 1897, and that the company were liable to the injured workman. *Caledonian Railway v. Breslin*, 2 F. 1158—Ct. of Sess.

— Carter Injured at a Point 315 Yards from Railway Station near which his Horse Bolted.]

—A carter, in the employment of contractors who had a contract with a railway company for the cartage of goods to and from a station of the company, had delivered certain goods at the station. This finished his day’s work, and as he was leaving the station with his horse and lorry, on the way to the contractor’s stables, the horse took fright and bolted just outside the gate of the station, and in consequence the carter was injured by the horse and lorry dashing into a shop 315 yards distant:—*Held* (*diss.* LORD MONCREIFF), that the carter did not sustain his injuries “on or in or about” a railway, within the meaning of section 7, sub-section 1 of the Act. *Bathgate v. Caledonian Railway*, 4 F. 313—Ct. of Sess.

— Refreshment-room at Railway Station—

Barmaid.]—A refreshment-room at a railway station is not a part of the station “used for the purposes of public traffic” so as to come within the meaning of the term “railway” in the Regulation of Railways Act, 1873. *Milner v. Great Northern Railway*, 69 L. J. Q.B. 427; [1900] 1 Q.B. 795; 82 L. T. 187; 48 W. R. 387; 64 J. P. 291—C.A.

The employment by a railway company of a barmaid at a refreshment-room at their railway station is not an employment “on in or about a railway” within the meaning of the Workmen’s Compensation Act, 1897. *Id.*

Work "ancillary or incidental" to Business of Railway Company—Contractors Fitting up Signals—"Undertakers."—A railway company employed a firm of signal-makers to fit up the necessary signals for new sidings, which they were constructing in connection with their existing line. While fitting the signal wires, a workman employed by the signal-makers was knocked down by a train on the main line and killed:—*Held*, that the work on which the deceased was engaged at the time of the accident was part of the business of the railway company, and was not merely ancillary or incidental thereto, and that the company were, in terms of section 4 of the Act, liable as undertakers to pay compensation. *Burns v. North British Railway*, 2 F. 629—Ct. of Sess.

— Greasing Wheels of Trucks.]—The applicant, a boy of fifteen, was employed to grease the wheels of railway trucks. At the time when the accident occurred out of which the claim arose, he had finished greasing all the trucks that were ready, and while waiting for more he went to a fire that was close to a lever used for moving points. Seeing an engine coming, and thinking it was necessary that the points should be moved, he pulled the lever for the purpose of opening them; the engine came up and forced the points—which were automatic—open, and the handle of the lever, catching the applicant, threw him against the engine, severely injuring him. It was no part of the applicant's duty to touch the points, but he had not been ordered not to do so. Upon these facts the County Court Judge found that the accident to the applicant "arose out of and in the course of his employment," and that he had not been guilty of "serious and wilful misconduct":—*Held*, that there was evidence to support these findings. *Harrison v. Whitaker*, 64 J. P. 54—C.A.

— Carting Contractor.]—A railway company charged a through rate, inclusive of all charges for collection and delivery, for the conveyance of goods by their railway. A firm of carting contractors contracted with the railway company for the collection and delivery from and to the public of goods sent or to be sent by rail, receiving from the railway company in payment of such collection and delivery a proportion of the through rates paid by the public. A servant of the contractors, acting in pursuance of the contract between his employers and the railway company, was fatally injured while he was engaged in transferring goods from a lorry to a goods train for transmission by rail:—*Held*, that the work in which he was engaged at the time of the accident was part of the work undertaken by the railway company and not merely ancillary or incidental thereto, and that the company were liable to pay compensation. *Greenhill v. Caledonian Railway*, 2 F. 736—Ct. of Sess.

— Repairing and Painting Railway Station by Contractor.]—The work of building, repairing, and painting the stations of a railway company is "merely ancillary or incidental to and is no part of or process in the trade or business carried on by" the company. Therefore, where the railway company enter into a contract with a contractor for the execution of such work, and a workman in the employment of the con-

tractors sustains injury in the course of executing the work, section 4 of the Workmen's Compensation Act, 1897, does not apply, and the company are not, as undertakers within the Act, liable to pay compensation to the workman. *Pearce v. London and South-Western Railway*, 69 L. J. Q.B. 683; [1900] 2 Q.B. 100; 82 L. T. 487; 48 W. R. 599—C.A.

Playing in Railway Waggon.]—Some boys employed in steel works were allowed an interval of half an hour for rest between two jobs. During this interval they got into one of a number of waggons that were standing on a steeply inclined line of rails in the yard of the works. After the boys had got into the waggon, the waggons began to move down the incline, and one of the boys jumped off the waggon in order to sprag the wheels. While thus engaged he was fatally injured. The boys had no occasion to be near the waggons, and had repeatedly been warned not to go near them. *Held*—first, that the accident did not "arise out of" the boy's employment; and secondly, that the accident was attributable to the "serious and wilful misconduct" of the boy. *Powell v. Lanarkshire Steel Co.*, 6 F. 1089—Ct. of Sess.

(9) Ships.

Shipbuilding Yard—Electrical Station—Undertakers of an "engineering work"—"Dock"—Accident in Erection of Gas Engines at Considerable Distance from Dock.]—In the course of the construction of a shipbuilding yard, which was to consist of three dry docks and one wet dock, it became necessary to erect on some part of the yard a station for generating electricity, the use of electricity both for light and power having been decided upon. For this and other purposes ten gas engines were required. A workman in the employment of a gas engine company, which had contracted to supply the gas engines, was injured while working at the gas engine machinery. The place where the accident occurred was at a distance of about 150 yards from the nearest part of any of the docks:—*Held* (*dissentiente* KENNEDY, L.J.), that, the accident not having occurred in a "dock" in any proper sense of that word, but at a considerable distance from the nearest part of any of the docks, the workman could not be said to be employed "on, in, or about" an "engineering work"—namely, the "construction of a dock"—within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Rimmer v. Premier Gas Engine Co.*, 97 L. T. 226; 23 T. L. R. 610—C.A.

— Repair of Ship in a Dock.]—By section 7, sub-section 1 of the Workmen's Compensation Act, 1897, "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891. By section 93 of the Factory and Workshop Act, 1878, the expression "non-textile factory" includes any premises named in Schedule IV. Part II. of the Act, wherein steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; and Schedule IV. Part II. (24) of the Act is "Shipbuilding yards—that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or re-

paired." A vessel was taken into a dock enclosed by warehouses and wharves, fitted with cranes for loading and discharging ships, for the purpose of having her interior painted and repaired as she lay afloat, it being the usual and ordinary course for ships to be repaired there. In order to paint the hold it was necessary to discharge the ballast, and while this was being done, concurrently with the repairs, injury was caused to a workman employed in the hold in filling a bucket in which the ballast was being hauled up by the ship's engine and crane and placed in lighters alongside:—*Held*, that the workman was not employed on, or in, or about a factory within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, by reason of the provisions of section 93 and Schedule IV. Part II. (24) of the Factory and Workshop Act, 1878. *Spencer v. Livett, Frank & Son*, 69 L. J. Q.B. 338; [1900] 1 Q.B. 498; 82 L. T. 75; 48 W. R. 323; 64 J. P. 196—C.A.

— **Dock "near the yard."**—Whether a dock two miles distant from a shipbuilding yard is "near the yard" within the meaning of section 7, sub-section 3 of the Workmen's Compensation Act, 1897, is a question of fact, and not of law. *M'Millan v. Barclay, Curle & Co.*, 2 F. 91—Ct. of Sess.

Ship.—A., a dock labourer in the employment of a firm of stevedores, was injured while engaged in stowing cargo on board a ship in a public dock. Steam winches on board the ship were used for the purpose of loading her, but steam cranes which were attached to the quays of the dock were not so used. A. claimed compensation from the stevedores as being the occupiers of a dock which was a "factory" within the meaning of the Act:—*Held*, that the defendants were not liable. *Healy v. Macgregor & Ferguson*, 2 F. 634—Ct. of Sess.

Ship in Dock.—A steamship lying in a dock is not a factory. A workman employed on a ship lying in a dock is not employed on, in, or about a factory even when the dock itself is a factory in the sense of section 7 of the Act. *Flowers v. Chambers* ([1899] 2 Q.B. 142) followed. *Low v. Abernethy*, 2 F. 722—Ct. of Sess.

— **Repair of Ship—"Shipbuilding yard."**—The mere fact of a steamship lying in a dock, while a workman employed by a firm of engineers is engaged in executing repairs on the boiler, does not make the firm occupiers of the dock in such a sense as to make them undertakers within the meaning of section 7, sub-section 1 of the Act. Whether the definition of "shipbuilding yard" in section 93 of the Factory and Workshop Act, 1878, includes places where ships are repaired but not built, *quære*. *Spencer v. Livett, Frank & Son* (69 L. J. Q.B. 338; [1900] 1 Q.B. 498) commented on. *Id.*

— **Labourer on.**—A workman employed upon a vessel in a dock is not employed on or in or about the dock so as to be employed "on or in or about a factory" within the meaning of section 7, sub-section 1 of the Workmen's Compensation Act, 1897, in cases where the dock is a "factory" within the meaning of

section 7, sub-section 2 of the Act. *Flowers v. Chambers*, 68 L. J. Q.B. 648; [1899] 2 Q.B. 142; 80 L. T. 834; 47 W. R. 513—C.A.

— **A workman employed upon a vessel lying alongside a quay in a dock, which is a "factory" within section 7, sub-section 2 of the Workmen's Compensation Act, 1897, taking in cargo partly from the quay and partly from another ship lying alongside her, is employed "on, in, or about a factory," within the meaning of section 7, sub-section 1 of the Act.** *Flowers v. Chambers* (68 L. J. Q.B. 648; [1899] 2 Q.B. 142) not followed. *Raine v. Jobson* (70 L. J. K.B. 771; [1901] A.C. 404) followed. *Cattermole v. Atlantic Transport Co.*, 71 L. J. K.B. 173; [1902] 1 K.B. 204; 85 L. T. 513; 50 W. R. 129; 66 J. P. 4—C.A.

Ship in Dry Dock Undergoing Repair.—Ship-owners took a ship into a dry dock which they had hired for the purpose of repairing the ship. A workman, who had served as ship's carpenter on board the ship during one voyage and was engaged for her next voyage, in the interval between the voyages was employed by the ship-owners in the work of repairing the ship. While engaged in unshackling the ship's cable, in order to turn it end for end, he sustained injuries from which he died:—*Held*, that the workman was employed in the repair of a ship in or about a "factory" within the meaning of the Act, and that the shipowners were liable to pay compensation. *Cayzer, Irvine & Co. v. Dickson*, 7 F. 723—Ct. of Sess.

Ship Lying in Dock in Charge of Owners—Contractors for Painting and Plumbing Work—"Actual use or occupation."—A ship, which was being made ready for a voyage, was lying in a dock for repairs in charge of her owners with part of the crew on board. A firm contracted to do the work of plumbing and painting upon her, and sent workmen from their shop on to the ship in the dock to do the work. One of the workmen while painting a hatch fell down the hatchway and was injured:—*Held*, that there was evidence upon which the County Court Judge was justified, in an arbitration under the Workmen's Compensation Act, 1897, in finding that the workman was employed on or in or about a factory, and that the firm had the actual use or possession of that factory within the meaning of section 23 of the Factory and Workshop Act, 1895, and were the undertakers in respect thereof within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Bartell v. Gray*, 71 L. J. K.B. 115; [1902] 1 K.B. 225; 85 L. T. 658; 50 W. R. 810; 66 J. P. 308—C.A.

Machinery Used for Unloading from Ship to Quay—Workman on Ship.—A workman was employed in unloading bags from a ship in dock to the quay; his work was, with another man, to make up sets of bags in the hold which were laid across a rope stop. When a set was made up the stop was fastened to the hook of the runner of a crane which stood upon the quay and was hoisted from the hold to the quay. While he was making up a set a bag fell upon him from behind, and he was killed. The runner of the crane was not at that time on the ship at all, but was ashore:—*Held*, that the case was not distinguishable from *Woodham v.*

Atlantic Transport Co. (79 L. T. 395), and that the workman was employed on, in, or about machinery which was being used in the process of unloading to a quay, and therefore on, in, or about a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Lawson v. Atlantic Transport Co.*, 82 L. T. 77—C.A.

"Process of loading or unloading Ship."—A workman, after the actual loading was completed, met with a fatal accident in putting iron crossbeams across the hatchway with the assistance of the ship's winch derrick and fall:—*Held* (LORD LINDLEY dissenting), that the man was engaged in a "process of loading" within the meaning of section 23 of the Factory and Workshop Act, 1895, which is incorporated with the Workmen's Compensation Act, 1897, inasmuch as he was doing an act without which the loading would have been incomplete, and that the machinery was a "factory" within the same section. *Lyons v. Knowles*, 70 L. J. K.B. 170; [1901] A.C. 79; 84 L. T. 65; 49 W. R. 636; 65 J. P. 388—H.L. (E.)

Owners Discharging Ship Alongside Dock Quay—Workman Employed by Shipowners—Injury on Quay—"Factory"—"Undertakers"—Actual Use and Occupation—Gangway for Workmen and Crew—Plant Used in Process of Unloading.—The owners of a ship moored her alongside a dock quay for the purpose of discharging her cargo, other than cattle, by their own workmen, on to the quay, and employed a workman to assist in discharging the cattle into lighters. The workman, while assisting to place a gangway as a means of access for the crew and workmen from the quay to the ship during the discharge of the cargo, fell into the dock and was killed:—*Held*, that the quay alongside the ship was a factory of which the shipowners were undertakers within the meaning of section 7 of the Workmen's Compensation Act, 1897, and that as the injury was caused to the workman in the course of his employment upon the factory, the shipowners were liable to pay compensation under the Act. *Held* also, that the gangway was not plant used in the process of unloading to a quay within the meaning of section 23 of the Factory and Workshop Act, 1895. *Merrill v. Wilson*, 70 L. J. K.B. 97; [1901] 1 K.B. 35; 83 L. T. 490; 49 W. R. 161; 65 J. P. 53—C.A.

"Wharf"—**Timber Yard Adjoining Dock Quay.**—By the side of the Canada Dock at Bootle is a space running back 150 yards from the water on which timber is landed. On the further side of it is a roadway, and beyond the roadway is a line of offices and a fence with gateways, behind which is a piece of land leased by the owners of the dock to timber merchants for the purpose of storing timber thereon:—*Held*, that this piece of land is not a "wharf" within the meaning of section 7 of the Workmen's Compensation Act, 1897, and section 23 of the Factory and Workshop Act, 1895. *Haddock v. Humphrey*, 69 L. J. Q.B. 327; [1900] 1 Q.B. 609; 82 L. T. 72; 48 W. R. 292; 64 J. P. 86—C.A.

Ship-repairing outside Factory.—A riveter was injured in the employment of a firm of ship-repairers, while repairing a ship in a public

dock at a distance from his employers' factory of 550 yards in a direct line, and about a mile by road. The employers' factory was not a shipbuilding yard:—*Held*, that the riveter was not, when he received the injuries, employed "about" a factory in the sense of the Workmen's Compensation Act. *Barclay, Curle & Co. v. McKinnon*, 8 F. 436—Ct. of Sess.

Seaman—Employment on Ship beside Wharf—Employment "about" a "Factory."—A seaman employed as fireman upon a passenger steamship, whilst attending to the boilers in the ordinary course of his duties, was injured by the bursting of a tube in one of the boilers. At the time of the accident the vessel was made fast by ropes to a landing-stage outside the entrance to docks, and gangways were out from the landing-stage to the vessel to enable the passengers to go on board:—*Held* (COLLINS, M.R., and ROMER, L.J.; MATHEW, L.J., dissenting), that though the landing-stage, being a wharf, might be a "factory," and the seaman's employers, the shipowners, being at the time in occupation of the landing-stage, might be "undertakers" within the meaning of section 7 of the Workmen's Compensation Act, 1897, yet the case did not come within the Act, for the seaman was not at the time of the accident in fact employed "on" or "in" such factory, nor was he employed "about" it within the meaning of the section, for his employment, though in proximity to the "factory," had no concern or connection with the purposes for which it was at the time being occupied by his employers. *Griffin v. Houlder Line, Lim.* (73 L. J. K.B. 202; [1904] 1 K.B. 510), distinguished. *Owens v. Campbell*, 73 L. J. K.B. 634; [1904] 2 K.B. 60; 90 L. T. 811; 52 W. R. 481; 68 J. P. 410; 20 T. L. R. 459—C.A.

Machinery Used in Unloading Ship in Navigable River—Statute—Construction—Reference to Repealed and Re-enacted Provision.—Section 23 of the Factory and Workshop Act, 1895, is repealed by section 161 of the Factory and Workshop Act, 1901, and by section 104 of that Act is re-enacted with modification within the meaning of section 38 of the Interpretation Act, 1889. Consequently section 7, sub-section 2 of the Workmen's Compensation Act, 1897, must now be construed as referring to section 104 of the Factory and Workshop Act, 1901, and the expression "factory" in the Workmen's Compensation Act, 1897, includes machinery used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal. *Stevens v. General Steam Navigation Co.*, 72 L. J. K.B. 417; [1903] 1 K.B. 890; 88 L. T. 542; 51 W. R. 578; 67 J. P. 415—C.A.

Quay—Machinery on Board Ship.—A shipowner was unloading a vessel at a quay by raising the cargo, by means of a steam winch derrick on board the vessel, from the hold to the deck, whence it was wheeled over gangways to the quay. In the course of unloading, a workman employed by the shipowner fell from a ladder in the ship and was killed:—*Held*, that the accident happened on, or in, or about a "factory" within the meaning of the Act. *Reid v. Anchor Line*, 5 F. 435—Ct. of Sess.

Workman on Ship Placing Goods in Basket of Crane on Quay—Machinery or Plant used in Unloading to a Quay.—A workman on board a ship

lying alongside a quay was in the course of his employment by the owners of a ship^a placing a case of percussion caps in a basket attached to the chain of a crane which was fixed on the quay and was being used in the process of unloading the ship, when the case exploded and killed him:—*Held*, that on the true construction of section 1, sub-section 1, and section 7, sub-sections 1 and 2 of the Workmen's Compensation Act, 1897, and section 23, sub-section (a) of the Factory and Workshop Act, 1895, the owners of the ship were liable to pay compensation, since the injury to the workman arose out of and in the course of his employment about machinery used in the process of unloading to a quay. *Woodham v. Atlantic Transport Co.*, 68 L. J. Q.B. 17; [1899] 1 Q.B. 15; 79 L. T. 395; 47 W. R. 106—C.A.

(10) Warehouses.

Dumping Ground Used for Old Materials.]—A yard belonging to a local authority, and used by them as a dumping ground for waste and other materials, is not a "warehouse" within the meaning of the Workmen's Compensation Act, 1897, nor is it a "factory" within that Act, even though the local authority have their own carts made in it and a blacksmith's shop is erected in it. *Buckingham v. Fulham Borough Council*, 53 W. R. 628; 3 L. G. R. 926; 69 J. P. 297; 21 T. L. R. 511—C.A.

Uncovered Yard Used for Storage of Material.]—A workman while breaking stones was injured by an accident which occurred in a yard, belonging to the P. Corporation. The yard was uncovered, but at the side of it there was a large shed in which implements were kept and work was done in wet weather. The yard was principally used to store materials for the repair of roads and drains and for other works executed by the corporation either on its own account or to a small extent for private individuals, and it contained stones in heaps which the workman was employed in breaking at the time of the accident. No mechanical power was used in the yard. *Held*, that the yard was not a warehouse in the ordinary sense and was therefore not a factory within the meaning of the Act. *M'Ewan v. Perth Magistrates*, 7 F. 714—Ct. of Sess.

Semble, the reference to warehouses in section 104, sub-section 1 of the Factory and Workshop Act, 1901, is not to warehouses in general, but merely to warehouses used in connection with docks. *Id.*

Building Used in Connection with Retail Business—Furniture—Materials.]—There is no absolute rule that a building used in connection with a retail business alone cannot be a "warehouse" within section 7 of the Workmen's Compensation Act, 1897. Each case must be decided on its own facts. The judgments of COLLINS, M.R., and MATHEW, L.J., in *Green v. Britten & Gilson* (73 L. J. K.B. 126; [1904] 1 K.B. 350) discussed. *Moreton v. Reeve*, 76 L. J. K.B. 850; [1907] 2 K.B. 401; 97 L. T. 63—C.A.

Retail Store.]—A trader carried on the business of a drysalter in premises consisting of

two rooms on the ground floor and two cellars on the basement. The business to the extent of between 85 and 90 per cent. consisted of retail sales; and in one of the rooms there was a counter over which the goods were sold. In order to meet this trade goods were stored on the premises, including casks of oil, all of which were open and ready for the delivery of small quantities; casks of white lead, of which there were generally ten or twelve on the premises, four, one of each quality, being open for retail sales; small parcels of saltpetre, soda, and varnish; paints, none of which were sold in large quantities; and starch, which was sold in 56 lb. cases. A lorryman having been injured while carrying a cask of white lead, weighing 2 cwt., from the premises to his lorry,—*Held*, that the premises were not a "warehouse" within the meaning of the Act. *Colvine v. Anderson & Gibb*, 5 F. 255—Ct. of Sess.

Quære (per LORD M'LAREN), whether the Act applies only to such warehouses as are adjuncts of a dock. *Semble* (per LORD M'LAREN), if the Act applies to other warehouses they must be *ejusdem generis* with such warehouses as are usually found in connection with a dock. *Id.*

Place Used for Storage of Goods Ancillary to Wholesale Business.]—A place where goods are stored, used in connection with, or as ancillary to a wholesale business, is a "warehouse" within the meaning of the Workmen's Compensation Act, 1897. *Green v. Britten & Gilson*, 73 L. J. K.B. 126; [1904] 1 K.B. 350; 89 L. T. 713; 52 W. R. 198; 68 J. P. 189; 20 T. L. R. 116—C.A.

"Occupiers" of Warehouse.]—The owner of six hundred bolls of peas lying in bulk in a grain store belonging to a warehouseman sold two hundred bolls thereof to a firm, who received a delivery order therefor. The grain store was a "warehouse":—*Held*, that the purchasers were not "occupiers" thereof, and that the dependants of a carter in their employment who was killed by the fall of a bag while taking delivery of part of the peas at the store were not entitled to compensation under the Act. *Ramsay v. Mackie*, 7 F. 106—Ct. of Sess.

(11) "Undertakers."

"Employer"—"Undertaker."]—An employer who is not also an "undertaker" within the meaning of the Workmen's Compensation Act, 1897, is not liable to pay compensation under the Act (LORD TRAYNER *dissentiente*). *Malcolm v. McMillan*, 2 F. 525—Ct. of Sess.

A workman in the employment of the occupier of an iron-foundry was sent in the course of his employment to do some work in the repair of a soap work, and while so engaged he fell from a scaffolding and was killed. His widow claimed compensation from her husband's employer, the iron-founder:—*Held*, that the iron-founder was not, with respect to the accident in question, an undertaker within the meaning of the Act, and therefore was not liable to the claimant in compensation under the Act. *Id.*

Public Washhouse.]—*Semble*, per LORD YOUNG,

that the "undertakers" of a public washhouse, being built to the order of police commissioners, are such commissioners, and not the tradesmen employed by them. *Halstead v. Thomson*, 3 F. 668—Ct. of Sess.

Occupiers of Dock—Shipping Agents.]—A workman in the employment of shipping agents, who had contracted with the owners of a vessel lying in a dock to load her, while engaged in removing goods from the quay to the vessel, fell into the hold and was killed:—*Held*, that the shipping agents were not the occupiers of the dock, and were therefore not "undertakers" within section 7 of the Act, and were therefore not liable under the Act to pay compensation in respect of the workman's death. *Bruce v. Henry*, 2 F. 717—Ct. of Sess.

Employment "on or in or about a factory."]—The words "a factory" in section 7, sub-section 1 of the Workmen's Compensation Act, 1897, mean the factory of the undertakers against whom compensation for injury to a workman is sought; and accordingly contractors engaged by millowners to construct a wheel on the premises of the latter were held not to be liable to pay compensation for an accident happening to one of their workmen. *Francis v. Turner Brothers* (69 L. J. Q.B. 182; [1900] 1 Q.B. 478) approved. *Wrigley v. Whittaker*, 71 L. J. K.B. 600; [1902] A.C. 299; 86 L. T. 775; 50 W. R. 656; 66 J. P. 420—H.L. (E.)

Cotton-Spinners—Putting Driving-Wheel into Steam Engine in Cotton-Spinning Factory.]—The owners of a cotton-spinning factory entered into a contract with a firm of engineers to put a new driving-wheel into an engine which was used in the factory. A workman who was in the employment of the engineering firm received injuries from which he died whilst engaged in executing the work:—*Held*, that the workman's widow was not entitled to recover compensation under the Workmen's Compensation Act, 1897, because the work was merely ancillary or incidental to, and no part of or process in, the trade or business carried on by the cotton-spinners, and consequently section 4 of the Act did not apply. *S. C. in C.A.*, 70 L. J. K.B. 538; [1901] 1 K.B. 780; 84 L. T. 415; 49 W. R. 472; 65 J. P. 372. And see *Knight v. Cubitt*, *post*, col. 1545.

Contract by Sub-Contractor to Supply, Fix, and Remove Cradles used as Scaffolding—Liability of Sub-Contractor to Indemnify Undertaker.]—The contractor for the repair of a building exceeding thirty feet in height agreed with a sub-contractor that the latter should supply, fix, and remove four travelling cradles which were used as a scaffolding in the process of repairing the building. During the process of removing the cradles (which the arbitrator found to be a substantial part of the process of repairing the building) one of the sub-contractor's workmen was fatally injured:—*Held*, that the sub-contractor was an "undertaker" for the repair of the building within the meaning of the Workmen's Compensation Act, 1897, and, as such, liable to indemnify the contractor, who had been held liable to pay compensation to the deceased workman's dependants. *Per COLLINS, M.R.*—A sub-contractor may be an "undertaker" for the repair of a building, although

the work done by him may not be a substantial part of the process of repairing. *McCabe v. Jopling and Palmer's Travelling Cradle, Lim.*, 73 L. J. K.B. 129; [1904] 1 K.B. 222; 89 L. T. 624; 52 W. R. 358; 68 J. P. 121; 20 L. T. R. 119—C.A.

Building Constructed Partly by Owner, Partly by Contractor.]—A building contractor was erecting a tenement for himself, doing the work partly by his own workmen and partly by trading firms with whom he had contracts for particular branches of the work:—*Held*, that he was the "undertaker" of the whole building within the meaning of the Workmen's Compensation Act, 1897, and was therefore liable in compensation in respect of injuries to a workman employed in the construction of the building by one of the trading firms (*LORD JUSTICE-CLERK dubit.*). *Stalker v. Wallace*, 2 F. 1162—Ct. of Sess. See also *Knight v. Cubitt*, *post*, col. 1545.

Labour Supplied by Contractor on Building being Constructed.]—A person who by agreement with a building owner supplies labourers for brickwork on a building which exceeds thirty feet in height, and is being constructed by means of scaffolding, the labourers while engaged on the building being under the control and supervision of the building owner's own foreman, but being paid their wages by the person who supplied them, is not an "undertaker" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Percival v. Garner*, 69 L. J. Q.B. 824; [1900] 2 Q.B. 406; 64 J. P. 500—C.A.

Trial of Machinery under Control of Makers.]—A firm of engineers had erected and practically completed certain ice-making and refrigerating machinery in a building belonging to a cold storage and ice company. While the engineers were making a "preliminary run" for the purpose of testing the machinery, one of their workmen engaged in the work was killed. During the preliminary run the entire control of the machinery was in the hands of the engineers. The ice made in the course of the trial belonged to the ice company under the contract between them and the engineers. No machinery driven by steam or other mechanical power had been used by the engineers in the erection of the refrigerating machinery:—*Held*, that, even if the ice company's building or the refrigerating machinery was a factory the engineers were not the occupiers of it within the meaning of the Act, and so were not liable to pay compensation in respect of the accident. *Purves v. Sterne*, 2 F. 887—Ct. of Sess.

Building being Constructed—Contractors for Part of Building.]—A contractor constructing a substantial part of a building without which the building will not be complete is a person "undertaking the construction" of the building within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Mason v. Dean*, 69 L. J. Q.B. 358; [1900] 1 Q.B. 770; 82 L. T. 139; 48 W. R. 353; 64 J. P. 244—C.A.

Work Let out to Sub-Contractor.]—Where a person has entered into a contract with a build-

ing owner to construct the whole of a building, and has then let out a part of the work by a contract to a sub-contractor, such sub-contractor is not an "undertaker" within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Mason v. Dean* (col. 1540), distinguished. *Cass v. Butler*, 69 L. J. Q.B. 362; [1900] 1 Q.B. 777; 82 L. T. 182; 48 W. R. 309; 64 J. P. 261—C.A.

Building—Ornamental Carving Work—Right of Principal Contractor to Indemnity against Sub-contractor—Accident Due to Fault of Principal Undertaker.—A sub-contractor for ornamental carving work, part of the design of a building in course of construction, is an "undertaker" within the meaning of the Workmen's Compensation Act, 1897, s. 7, and liable to a workman employed by him, and therefore liable under section 4 to indemnify the principal contractor for compensation paid by him to the workman. Whether the fact that an accident is due to the fault of a principal contractor is a good defence to a claim by him for indemnity against a sub-contractor under section 4, *quære*. *Cooper & Crane v. Wright* (71 L. J. K.B. 642; [1902] A.C. 302) followed. *Topping v. Rhind*, 6 F. 666—Ct. of Sess.

Part of or Process in their Trade or Business.—A window-cleaner, while engaged, in the employment of a window-cleaning company, in cleaning the windows of a workshop belonging to a firm of tailors, fell from one of the windows and was injured. He claimed compensation from the tailors as being the undertakers within the meaning of the Workmen's Compensation Act, 1897:—*Held*, that the work of window-cleaning was not a part of or process in the trade or business carried on by the respondents, and consequently, under section 4 of the Act, that they were not liable to pay compensation. *Dempster v. Hunter*, 4 F. 580—Ct. of Sess.

Workman Employed on Ship in Dock—Dry or Wet Dock—"Factory"—"Occupier."—A workman employed to do repairs on a ship which is in the water space of a dock, and is moored to the dock by a rope, the repairs having no relation to the structure of the dock, but relating exclusively to the ship, is not entitled to compensation under the Workmen's Compensation Act, 1897, for injury sustained by him whilst engaged on such repairs, and it makes no difference whether the dock is a wet dock or a dry dock. The employer of the workman has not under the circumstances "the actual use or occupation" of the dock so as to be deemed the "occupier" of a factory, and is not consequently an "undertaker" within section 7 of the Act. *Houlder Line, Ltd. v. Griffin* (74 L. J. K.B. 465; [1905] A.C. 220) discussed and principle applied. *Flowers v. Chambers* (68 L. J. Q.B. 648; [1899] 2 Q.B. 142) considered. *Smith v. Standard Steam Fishing Co.*; *Burdon v. Gregson & Co.*, 75 L. J. K.B. 640; [1906] 2 K.B. 275; 95 L. T. 42; 54 W. R. 582; 22 T. L. R. 578—C.A.

Actual Use or Occupation of Dock.—The defendants were the tenants of a small hut in a dock, and they supplied horses, men, and gear for hauling railway waggons loaded with coal for ships using the dock from the railway sidings to the quay where the ships lay. One

of the men in the employment of the defendants, while engaged in hauling a waggon to the quay with coal belonging to the plaintiffs' ship, fell, and the waggon went over his foot. He took proceedings against the plaintiffs under the Workmen's Compensation Act, 1897, and a third-party notice was served on the defendants. An award of compensation having been made in his favour, the plaintiffs brought an action claiming an indemnity from the defendants under section 4:—*Held*, that the defendants had the actual use or occupation of the dock, which was a factory, for the purpose of carrying on their business there, and were therefore the occupiers thereof, and so were "undertakers," and liable to indemnify the plaintiffs under section 4. *Pacific Steam Navigation Co. v. Pugh*, 23 T. L. R. 622—C.A.

—The respondents, ship repairers, hired a dry dock for the repairs of a ship. The appellant's husband was at work on the vessel, and in the course of his duty was crossing by a plank to the side of a dock, when the plank tilted, and he was thrown into the dock and killed:—*Held*, that the respondents were the "occupiers" of the dock, which, by section 7, sub-section 2 of the Workmen's Compensation Act, 1897, is a "factory," and that they were "undertakers" within section 7, sub-section 1, and therefore liable to pay compensation. *Merrill v. Wilson*, (70 L. J. Q.B. 97; [1901] 1 Q.B. 35) approved. *Raine v. Jobson*, 70 L. J. K.B. 771; [1901] A.C. 404; 85 L. T. 141; 49 W. R. 705—H.L. (E.)

Exclusive Use of Quay Berth.—The D. steamship company had a particular berth in a harbour allotted to them for loading and unloading their vessels, and had an office there and a staff of servants and clerks constantly employed in the receipt and discharge of cargo. The same berth was also used by the M. steamship company, who also had an office there. When not required by either of these companies the harbour-master allowed occasional vessels to load or discharge at the berth. A firm of coalowners who had the contract for coaling the vessels of the D. company employed a sub-contractor to trim the coal on the quay opposite the berth, and to put it on board the vessels. While so trimming the coal with a view to putting it on board one of the D. company's vessels which had not yet arrived at the berth, a servant of the sub-contractor fell off the quay and was drowned. The vessel arrived at the berth an hour after the accident:—*Held*, that the D. company were not the "occupiers" of the quay within section 7, sub-section 2 of the Act, and consequently were not liable as "undertakers" in the sense of that section. *Stewart v. Dublin and Glasgow Steam Packet Co.*, 5 F. 57—Ct. of Sess. See *Hanlon v. North City Milling Co.*, [1903] 2 Ir. R. 163—C.A.

Occupiers of Dock, Wharf, or Quay—"Undertakers."—A firm of carriers was employed by the Post-Office to carry parcels for them during the Christmas season. In consequence of the heavy traffic in parcels the Post-Office had taken temporarily from the dock authorities a transit shed at the docks for the storage of parcels. The carriers brought the parcels from different parts of the city, including the quays, to the transit shed, from which they were

forwarded to their destination. The approach to the transit shed was within the ambit of the docks, but the Post-Office had not the exclusive occupation of the roadway. A carter in the employment of the respondents was at the transit shed when he met his death by accident:—*Held*, that the place where the accident occurred was a "factory," and that the respondents were "undertakers." *Fogarty v. Wallis*, [1903] 2 Ir. R. 522—C.A.

— A coal company contracted with a steam packet company to supply the steamers of the company with bunker coal free on board at Glasgow harbour. The coal company contracted with a coal porter to put such bunker coal on board at a particular berth of the harbour, and the coal porter employed labourers, for whose wages he alone was responsible, to do the work of loading. One of the labourers so employed by the coal porter, after having been engaged in bringing coal from the coal company's carts and laying it upon the quay ready to be shipped, was awaiting the arrival of one of the packet company's steamers when he fell into the river and was drowned. His widow claimed compensation under the Act from the coal company:—*Held*, first, that, assuming the quay to be a factory, the coal company were not (on the occasion in question) the occupiers of the quay, or of any part of it, within the meaning of section 23 of the Factory and Workshop Act, 1895, and therefore, secondly, that they were not, within the meaning of section 7 of the Act of 1897, the undertakers of the employment at which the husband of the claimant met his death, and were not liable to pay compensation. *Stewart v. Darnagavil Coal Co.*, 4 F. 425—Ct. of Sess.

Per LORD TRAYNER.—A quay is not *per se* a factory within the meaning of the Acts. *Ib.*

Persons "having the actual use or occupation"
—**Contractors Erecting Wooden Pigeon-holes in Warehouse.**—Personal injury was caused to a workman by accident arising out of and in the course of his employment by contractors for the erection of wooden pigeon-holes in a warehouse in a Government dockyard, which was a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897. The warehouse consisted of two storeys, the lower storey being solely in the occupation of the Government for storage purposes, while in the upper storey, where the accident occurred, there were at the time of the accident ten or twelve men employed by the contractors in erecting the pigeon-holes; three men employed by the firm of builders who had built the warehouse engaged in finishing doors and putting on locks; and also workmen employed by the Government engaged in fixing hydraulic cranes at each end of the room. The clerk of the works of the Government was in charge of the works to see that the men did their duty, and that the contractors complied with the specifications. The premises were locked and unlocked by the person in charge of the dockyard:—*Held*, that the contractors, being in such occupation of a considerable and definite space within the warehouse as was necessary for the work which they had to do, were persons "having the actual use or occupation" of the warehouse within the meaning of section 104 of the Factory and

Workshop Act, 1901, and were by that section to be deemed the occupiers thereof, and were consequently the "undertakers" of the work within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Weavings v. Kirk and Randall*, 73 L. J. K.B. 77; [1904] 1 K.B. 213; 89 L. T. 577; 52 W. R. 209; 68 J. P. 91; 20 T. L. R. 152—C.A.

Employer Using Machinery to Unload from Dock—Occupier of Factory.—Employers using machinery in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, are, upon the true construction of section 23, sub-section 1 of the Factory and Workshop Act, 1895, occupiers of a factory within the meaning of that Act, and are therefore "undertakers" within the meaning of the Workmen's Compensation Act, 1897. *Carrington v. Bannister*, 70 L. J. K.B. 31; [1901] 1 K.B. 20; 83 L. T. 457—C.A.

Work "Ancillary" to Undertaker's Business—Shipowner—Supplying Coal for Bunkering Vessels.—The supplying of coal for bunkering the vessels of a steamship company is not part of but ancillary to the business of that company within section 4 of the Act. *Stewart v. Dublin and Glasgow Steam Packet Co.*, 5 F. 57—Ct. of Sess.

— In an arbitration under the Workmen's Compensation Act, 1897, in which compensation was claimed from a builder, who had contracted to construct a factory, in respect of injury done to a workman in the employ of a sub-contractor for the fixing of an iron roof in the course of that work, the County Court Judge found that the fixing of the iron roof was no part of the business of the builder, but that, taking into consideration the character of the business of a builder as carried on generally, the fixing of an iron roof was a part of that business, and consequently the last clause of section 4 of the Act did not exempt the builder from liability to pay compensation:—*Held*, that having regard to the finding of fact that the fixing of the roof was no part of the business of the builder, the last clause of section 4 applied, and the builder was not liable to pay compensation. *Bush v. Hawes*, 71 L. J. K.B. 68; [1902] 1 K.B. 216; 85 L. T. 507; 50 W. R. 311; 66 J. P. 260—C.A. And see *Knight v. Cubitt*, col. 1545.

— An electric tramway company employed a firm of contractors to erect coal-hauling machinery at one of their power-stations. Part of the coal-hauling machinery consisted of a trolley at which B. was engaged at work. A splinter from the head of a bolt which he was driving into the trolley struck him in the eye and destroyed his sight. B. was employed by the firm, and not by the company. At the time of the accident the firm had not handed over the coal-hauling machinery to the company, and none of the company's workmen were engaged upon it:—*Held*, that the erection of the coal-hauling machinery was work merely ancillary to the company's trade or business, and that they were not liable to pay compensation to B. *Brennan v. Dublin United Tramways Co.*, [1901] 2 Ir. R. 241—C.A.

Railway Company—Signal Cabin.—A work,

man, when engaged in the employment of a builder in the erection of a stone and lime wall in a railway cutting, was run down and killed by a passing train. The wall, which the builder had contracted to build for the railway company, was intended to prevent earth on the bank of the cutting from falling down and obstructing the access to a signal cabin belonging to the railway company. The workman's widow claimed compensation under the Workmen's Compensation Act, 1897, from the railway company, as the undertakers within the meaning of the Act:—*Held* (*dissentiente* Lord Young), that the work on which the deceased was engaged was not part of the business of the railway company, but was merely ancillary or incidental thereto, and that the railway company was not liable. *Burns v. North British Railway Co.* (2 F. 629) not followed; *Pearce v. London and South-Western Railway* (69 L. J. Q.B. 688; [1900] 2 Q.B. 100) approved. *Dundee and Arbroath Joint Railway v. Carlin*, 3 F. 843—*Ct. of Sess.*

Building being Demolished — Contract by Builders to Demolish and Rebuild—Sub-contract for Demolition — “Undertakers” — Work Ancillary to and no Part of Business of Undertakers—Building Demolished to Less than Thirty Feet, except Party-wall.—Builders having contracted to demolish a building, leaving the party-wall between it and the adjoining building standing, and to rebuild upon the site, entered into a contract with a housebreaker for the work of demolition. At the time when the building had been reduced to less than thirty feet, except that the party-wall remained intact and exceeded that height, injury resulting in death was caused to a workman employed by the housebreaker. It was the usual practice of the builders to enter into contracts for pulling down and rebuilding, but they invariably sub-let the work of pulling down:—*Held*, first, that the builders were “undertakers” in respect of the work of demolition within the meaning of section 7 of the Workmen's Compensation Act, 1897; secondly, that the work of demolition was not merely ancillary to, but was a part of the business carried on by the undertakers, and therefore the last clause of section 4 of the Act did not operate to exempt them from liability to pay compensation; and thirdly, that there was evidence on which the County Court Judge was justified in finding that the employment of the workman was upon a building exceeding thirty feet in height being demolished. *Knight v. Cubitt*, 71 L. J. K.B. 65; [1902] 1 K.B. 31; 85 L. T. 526; 50 W. R. 113; 66 J. P. 52—*C.A.*

Indemnity—Claim by Undertaker to, against Contractor—Notice.—Where undertakers, as defined by the Workmen's Compensation Act, 1897, and a contractor with them, are both made respondents to arbitration proceedings under the Act, the undertakers, if they desire to make a claim in the proceedings to indemnify against the contractor, must, five clear days before the day fixed for proceeding with the arbitration, file a notice of their claim as provided by rule 19 of the Workmen's Compensation Rules, 1898. *Appleby v. Horseley Co. (No. 2)*, 68 L. J. Q.B. 894; [1899] 2 Q.B. 521; 80 L. T. 855; 47 W. R. 614—*C.A.*

— **Fatal Accident—Compensation—“Under-**

taker” — “Contractor.”—Where an undertaker has contracted for the erection of a whole building and has made a sub-contract with another for part of the work, he is entitled to an indemnity from the sub-contractor for compensation paid by him under the Workmen's Compensation Act, 1897, in respect of an accident to a workman of the sub-contractor (Lord BRAMPTON and Lord ROBERTSON dissenting). *Cass v. Butler* (69 L. J. Q.B. 362; [1900] 1 Q.B. 777) overruled. *Cooper & Crane v. Wight*, 71 L. J. K.B. 642; [1902] A.C. 302; 86 L. T. 776; 51 W. R. 12—*H.L. (E.)*

— **by Sub-contractor to Undertaker—Right to Sue in High Court.**—Where an undertaker, as defined by the Workmen's Compensation Act, 1897, being liable under section 4 of the Act to pay compensation for injury to a workman of a sub-contractor, agrees with the workman as to the amount, he is entitled to maintain an action in the High Court of Justice to recover from the sub-contractor the indemnity given him by section 4 of the Act, and is not limited to the procedure by arbitration under the Act for the recovery thereof. *Evans v. Cook*, 74 L. J. K.B. 95; [1905] 1 K.B. 53; 92 L. T. 48; 53 W. R. 81; 21 T. L. R. 42—*C.A.*

— The defendants, having undertaken to construct a house, made a sub-contract with the third party to do the whole of the plastering work for a fixed sum, he supplying all the labour but no materials. A workman employed by the sub-contractor in the work of plastering was injured by accident, and recovered compensation from the defendants under the Workmen's Compensation Act:—*Held*, that the sub-contractor was himself an undertaker, who would have been liable to pay compensation to the workman, and that he was liable to indemnify the defendants, under section 4 of the Act. *Wagstaff v. Perks*, 87 L. T. 558; 51 W. R. 210—*C.A.*

Election to Proceed against Person other than Employer.—A workman in the employment of carting contractors was injured while employed under a contract between the contractors and a railway company, who were undertakers in the sense of the Act. The workman, under reservation of all claims he might have for compensation against other parties, asked for and accepted from the contractors a payment in full of all claims against them under any statute or at common law in respect of the injury. He afterwards claimed compensation under the Act from the railway company as undertakers:—*Held*, that the word “employer” in the sense of section 6 of the Act means “undertaker” in the sense of the Act, and consequently that the workman, in respect of the payment by the contractors, was barred by the terms of section 6 from thereafter claiming compensation under the Act from the undertakers. *Murray v. North British Railway*, 6 F. 540—*Ct. of Sess.*

(12) “*Serious and Wilful Misconduct.*”

What is.—For an act by a workman to amount to “serious and wilful misconduct,” it must be both a wilful act of misconduct and

must be not trivial or doubtful as regards quality, but must be serious. *Wallace v. Glenboig Fire Clay Co.*, [1907] S.C. 967—Ct. of Sess.

Drunk and Unfit to Work.—Being drunk and unfit to work is serious and wilful misconduct on the part of a workman within section 1, sub-section 2 (c) of the Workmen's Compensation Act, 1897. *McGroarty v. Brown*, 8 F. 809—Ct. of Sess.

Disobedience to Order.—*Held*, on the evidence, that an engine-driver who, in contravention of an order of his employers of which he was aware, left the footplate of his engine and went on the tender while the train was in motion, and was killed by collision with a bridge under which the train passed, was guilty of "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (c). *Bist v. London and South-Western Railway*, 76 L. J. K.B. 703; [1907] A.C. 209; 96 L. T. 750; 23 T. L. R. 471—H.L. (E.)

Disobedience to Order from which Serious Consequences not Expected.—The mere breach of a rule or order from which no serious consequences could reasonably have been anticipated is not such "serious and wilful misconduct" under the Workmen's Compensation Act, 1897, as disentitles to compensation for death or injury occasioned thereby. The onus of proving such misconduct lies upon the person asserting it. *Johnson v. Marshall, Sons & Co., Lim.*, 75 L. J. K.B. 868; [1906] A.C. 409; 94 L. T. 828; 22 T. L. R. 565—H.L. (E.)

A workman was found crushed to death in an empty lift. There was no evidence how he came there. On the lift there was a notice: "No one is allowed to use this hoist except in charge of a load." There was evidence that men sometimes used the lift without a load. The arbitrator dismissed a claim for compensation by the widow on the ground of "serious and wilful misconduct" by the workman:—*Held*, that there had been no "serious and wilful misconduct" within the meaning of the Act. *Ib.*

Breach of Rules.—Breaches of the rules made under the Coal Mines Regulation Act, 1887, committed by a workman employed in a coal mine, do not necessarily amount to "serious and wilful misconduct" within the meaning of section 1, sub-section 2 (c) of the Workmen's Compensation Act, 1897. *Rumboll v. Nunnery Colliery Co.*, 80 L. T. 42; 63 J. P. 132—C.A.

— **under Coal Mines Regulation Act.**—In a mine there was in force Rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act, 1887, which provided that "Where holing is being done, sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent or manager." A workman in the mine was killed by a fall of coal while holing coal with four other workmen. Three of the men had holed a distance of nearly seventeen feet before the deceased and the remaining man began, and these two had holed a further distance of three feet when the

accident happened. No sprag had been erected by any one in the space thus holed, though there was ample room for the erection of same:—*Held* (LORD YOUNG dissenting), that the deceased workman, having disobeyed rule 9, was guilty of "serious and wilful misconduct." *O'Hara v. Cadzow Coal Co.*, 5 F. 439—Ct. of Sess.

Breach of Duly Published Special Rule—Ignorance of Rule.—By the additional special rules in force in a mine under the provisions of the Coal Mines Regulation Act, 1887, it was provided (*inter alia*): "While charging shot holes or handling any explosive not contained in a securely closed case or canister a workman shall not smoke or permit a naked light to remain in his cap, or in such a position that it could ignite the explosive." These rules were duly exhibited at the mine in such a manner as to satisfy the requirements of the Act as to publication. A workman in the mine, while carrying a cartridge not contained in a closed case or canister, failed to remove a naked light from his cap, and in crawling through a narrow road two feet in height the light came in contact with the cartridge, which exploded and injured him. The workman did not know of the special rule, nor that there was any rule against having a lamp in his cap while carrying a cartridge. In acting as he did he followed his usual practice—a practice that was also followed by other miners in the mine:—*Held*, that the injury was attributable to the serious and wilful misconduct of the workman. *Dobson v. United Collieries, Lim.*, 8 F. 241—Ct. of Sess.

Semble (per the LORD PRESIDENT and LORD KYLLACHY), where a workman, except for some dominant reason, commits a breach of a duly published statutory rule, and an injury results therefrom, his *de facto* ignorance of the rule can in no circumstances prevent the injury being attributable to his serious and wilful misconduct. *Ib.*

Per LORD M'LAREN.—There may be exceptions where the workman is excusably ignorant. *Ib.*

— **Causing Danger.**—A workman was employed in a factory at a circular saw which was driven by machinery. His duty was to hold the wood and guide it when it was being sawn. He was told on several occasions, both by his employer and by the factory inspector, to keep the guard upon the saw when it was in use. The object of the guard was to prevent the wood which was being sawn, if it was jerked up, from being caught by the teeth at the back of the saw and hurled about the workshop to the danger of those at work there. The workman had worked for several years at circular saws before the guard was invented, and he had a great aversion to using a guard. Upon the day in question he intentionally did not place the guard upon the saw when using it, and the piece of wood which was being sawn jerked up and was hurled by the saw against him, and he was killed. The County Court Judge found that the injury to the workman was not attributable to his serious and wilful misconduct within section 1, sub-section 2 (c) of the Workmen's Compensation Act, 1897, and made an award of compensation in favour of his widow:

—*Held*, that the injury was caused by the serious and wilful misconduct of the workman, and that his widow was not entitled to compensation under the Act. *Brooker v. Warren*, 23 T. L. R. 201—C.A.

Breach of Statutory Rule Prior to, but not Causing Accident.]—In a mine worked by stoop and room, the rooms had been worked out, and a stoop was in course of being removed. In removing the stoop, which consisted of upper and lower seams of shale separated by a bed of blaes, the method adopted was to cut off perpendicular strips from the stoop, and in the case of each strip to remove in the first place the bed of blaes and the lower seam of shale (which operation was known as “holing”), and finally the upper seam of shale. After the removal of the whole strip the roof of the mine thereby exposed was supported by “trees.” In carrying out this method of working a stoop two miners had completed the operation of holding, but had not set up props to support the upper seam of shale, in contravention of one of the special rules in force at the mine, which provided that “where holing is being done sprags or holing props shall be set up as soon as there is room.” Immediately after the holing was completed, and before the removal of the upper seam of shale, one of the two miners proceeded to take measurements with the view of inserting a tree outside the stoop to support the roof of the mine. In taking these measurements he was killed by the fall of the upper seam of shale:—*Held*, that, though the deceased workman had in fact broken the rule in having failed to set sprags or holing props while carrying out the holing, his injury was directly attributable not to his breach of the rule, but to an act done by him after the operation of holing, to which the rule applied, had been completed, and that, on the facts, his injury was not attributable to serious and wilful misconduct. *Dobson v. United Collieries* (8 F. 241) distinguished. *Pratt v. Broxburn Oil Co.*, [1907] S.O. 581—Ct. of Sess.

— **of Rule of Factory.]**—A woman employed in a spinning mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule and practice at the factory, known to the woman, that no cleaning of machinery was to be done unless the machinery was stopped:—*Held*, that the injuries to the woman were attributable to her “serious and wilful misconduct” within the meaning of the Act, and consequently that she was not entitled to recover compensation. *Guthrie v. Boase Spinning Co.*, 3 F. 769—Ct. of Sess.

— **not Conducting to Accident.]**—A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running:—*Held*, that, although the miner was guilty of serious and wilful misconduct, his death was not “attributable” thereto within the meaning of section 2, sub-section 2 of the Act, and that his widow was not barred from claiming compensation. *Glasgow Coal Co. v. Sneddon*, 7 F. 485—Ct. of Sess.

Accident Due to Absent-mindedness.]—By the special rules in force in a coal mine under the

provisions of the Coal Mines Regulation Act, 1887, it was provided that “the bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working.” It appeared that in the mine in question a bottomer with a loaded hutch opened the gate fencing the shaft when the cage was not opposite the gate; that he, presumably through absent-mindedness, failed to notice (although there was sufficient light to enable him to do so) that the cage was not at the gate, and proceeded to push the hutch from behind till it fell down the shaft, and that he was drawn after it and was fatally injured by the fall:—*Held*, that the deceased had been guilty of serious and wilful misconduct, and that his employers were not liable to pay compensation. *United Collieries v. McGhie*, 6 F. 808—Ct. of Sess.

Fact or Law.]—A special rule for the mine in which the accident in question took place provided as follows: “While charging shot-holes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a naked light to remain on his cap, or in such a position that it could ignite the explosive.” A., a workman in the mine, committed a breach of this rule by wearing a lighted naked lamp in his cap while carrying cartridges which were not enclosed in a case or canister. A spark from the lamp ignited the cartridges, which exploded, causing injuries which resulted in A.’s death. The employers provided a special canister to carry cartridges, but it was a common practice among the miners (not known to the employers) not to use this canister when carrying cartridges. A. was not directly told not to carry cartridges in the way he did when he met his death; but the Sheriff found “that it must be assumed he knew the special rules”:—*Held*, first, that the question whether A. had been guilty of serious and wilful misconduct within the meaning of the Workmen’s Compensation Act, 1897, s. 1, sub-s. 2 (c), was a question of law; secondly, that the death of A. was attributable to his serious and wilful misconduct within the meaning of that enactment; and, therefore, thirdly, that his representatives were not entitled to compensation. *Dailly v. Watson*, 2 F. 1044—Ct. of Sess.

A miner employed in a coal mine at a place adjoining a wheel brae on which there were two sets of rails, one for ascending and the other for descending hutches, was injured in crossing the wheel brae while the hutches were running. He was well aware that it was most dangerous to do so. Had he waited until the hutches had ceased running, he could by shouting to the man in charge at the top of the wheel brae have been able to cross in safety. The Sheriff dismissed the applicant’s claim for compensation on the ground that his injuries were due to his own serious and wilful misconduct:—*Held*, by the LORD PRESIDENT and LORD ADAM, that the Sheriff’s judgment determined a question which, in the absence of anything to shew that the Sheriff had proceeded on an erroneous con-

struction of the statute, was one of fact only and not subject to review, and by LORDS M'LAREN and KINNEAR that the judgment involved a question of the construction of the statute, and that the construction on which the Sheriff had proceeded was right. *Condron v. Paul*, 6 F. 29—Ct. of Sess.

Miner Hurt while Crossing Tramline.]—While the applicant was at work in a mine, his lamp went out, and thereupon he went to the lamp station to have it relighted. In order to get back to the place where he had been at work he had to go along a way where trams were hauled by means of a rope, and in which were manholes at certain intervals in which the men could stand till trams passed. He was told, and he could himself see by the rope being in motion, that some trams were coming towards him, but he went on with the object of reaching one of the manholes, and while so proceeding the haulage rope slipped and struck him, breaking his leg:—*Held*, upon these facts, that there was no evidence of "serious and wilful misconduct" on the part of the applicant. *Rees v. Powell Duffryn Steam Coal Co.*, 64 J. P. 164—C.A.

Blasting Operations.]—In the course of blasting operations in a mine, a brushing squad, whose work it was, had drilled a hole and filled it with a charge of an explosive called saxonite, placing at the bottom of the charge a detonator which was to be electrically exploded by means of two wires passing downwards through the charge and attached to the detonator; the foreman brusher thereafter, contrary to fact and apparently for fun, informed the fireman whose duty it was to explode the charge that it was not ready, and the fireman went away. Subsequently the fireman was sent for, but could not be found, and the foreman brusher then proceeded alone to the charge, which exploded and killed him, and it was found in fact, as the only way in which the arbitrator could account for the accident, that it was caused by friction set up by the deceased having attempted to pull out the wires communicating with the detonator. It was proved that rule 12 (e) of the Coal Mines Regulation Act, 1897, which provides that "no explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged, the explosive shall not be unrammed," was well known to the deceased and carefully enforced, but it was not proved that he knew the mechanism of the detonator, or the danger of pulling the wires:—*Held*, that the accident was not caused by an attempt to unram the charge in the sense of rule 12 (e), and did not result from the "serious and wilful misconduct" of the deceased, and that it arose out of and in the course of his employment. *Lynch v. Baird*, 6 F. 271—Ct. of Sess.

Disregard of Warning of Danger.]—A miner, at work in a colliery, was walking along the main haulage road. He was warned that there was risk in going on, as a journey of trams was approaching, but notwithstanding such warning he went on and was killed by the trams:—*Held*, that there was evidence to support the County Court Judge's finding that the workman had been guilty of serious and wilful misconduct. *John v. Albion Coal Co.*, 65 J. P. 788—C.A.

Sudden Impulse.]—The applicant was a lad

who worked at a machine used to cut slits in the heads of screws. He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up and replace it, and two of his fingers were cut off. The County Court Judge found that, though the lad was negligent, he was not "guilty of serious and wilful misconduct":—*Held*, that the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, and therefore the award could be supported. *Reeks v. Kynoch, Lim.*, 50 W. R. 118—C.A.

(18) Bars to Compensation.

Voluntary Payments by Employer during Time Limit—Waiver—Estoppel.]—Where a workman has received personal injury by accident arising out of and in the course of employment to which the Workmen's Compensation Act, 1897, applies, the payment to him by the employer of the maximum weekly payment which he could have recovered under the Act, for six months after the accident, does not constitute a waiver of the provision of section 2, sub-section 1 of the Act, requiring a claim for compensation under the Act to be made within that time, and does not estop the employer from taking the objection that proceedings under the Act for the recovery of compensation are not maintainable by reason of the claim not having been made within the specified time. *Randall v. Hill's Dry Dock and Engineering Co.*, 69 L. J. Q.B. 554; [1900] 2 Q.B. 245; 82 L. T. 521; 48 W. R. 530; 64 J. P. 451—C.A.

Acceptance by Workman of Weekly Payments as Compensation—Subsequent Action under Employers' Liability Act—Election.]—A workman, who had sustained injuries, received from his employers weekly payments for a period of six months, and granted receipts for same, some of which bore to be granted "in full satisfaction of amount due to me as compensation under the Workmen's Compensation Act, 1897 . . . based on my average weekly earnings, in accordance with the said Act"; the others were on account of "compensation." He then brought an action against his employers for damages on account of the same injuries at common law, and under the Employers' Liability Act, 1880. He averred that he had accepted the payments made to him as payments to account of compensation due to him by law, and that he did not understand that he was thereby making an election to take under the provisions of the Workmen's Compensation Act, 1897:—*Held*, first, that the receipts, according to their terms, imported an election to take under the provisions of the Workmen's Compensation Act, 1897; secondly, that the pursuer had not stated a relevant ground for setting aside the receipts; and therefore, thirdly, that under the Workmen's Compensation Act, s. 1, sub-s. (2), the pursuer was barred from proceeding with the action; but the Court having in view the provisions of section 1, sub-section (4) of the Act, remitted to the sheriff to determine the amount of compensation due under that Act. *Little v. MacLellan*, 2 F. 387—Ct. of Sess.

Common-law Action for Negligence—Receipt of Compensation—“Proceeding.”—The plaintiff met with an accident through the negligence of the defendants, on whose ship he was working under the orders of his employers. The plaintiff gave notice of his accident to his employers and signed receipts for money received from them “on account of compensation which may be or become due to me under the Workmen’s Compensation Act, 1897”; but after giving the first receipt, in pursuance of advice given to him by the delegate of his trade union, the plaintiff said he could only accept payments “without prejudice.” The plaintiff subsequently refused to accept any further payments from his employers, and brought this action against the defendants, in which negligence was admitted and the damages agreed subject to the question of the defendants’ liability under section 6 of the Act:—*Held*, that the plaintiff had not so exercised his option under section 6, of proceeding against his employers for compensation under the Act, as to be debarred from maintaining his common-law action against the defendants. *Randall v. Hill’s Dry Dock &c. Co.* (69 L. J. Q.B. 554; [1900] 2 Q.B. 245) discussed. *Oliver v. Nautilus Steam Shipping Co.*, 72 L. J. K.B. 857; [1903] 2 K.B. 639; 89 L. T. 318—C.A.

Per VAUGHAN WILLIAMS, L.J.—If there is a payment and a receipt of money under the Act of 1897, and that receipt is in no way qualified, that is sufficient to bring the case within the operation of section 6 and to put the workman in the position of having proceeded against his employer for compensation and recovered it. *Ib.*

Per ROMER, L.J.—Proceedings by a workman against his employer should not be held to irrevocably bind the workman in the exercise of his option under section 6, unless they have resulted in some compensation, as such, being paid to and received by the workman in such a manner as to bind both parties. *Ib.*

Election to take Compensation under Act—Foreign Workman.—To an action for personal injuries the defender pleaded that under section 1, sub-section 2 (b) of the Workmen’s Compensation Act, 1897, the action was not maintainable, as the pursuer had claimed and accepted compensation under the Act of 1897. It appeared that the workman was an Italian imperfectly acquainted with English and wholly unable to read or write it; that he had applied for money for his injuries; that he had accepted two sums from the defenders consisting of the amount due to him under the Act of 1897 for three weekly payments, and had with his mark authenticated two receipts therefor which bore to be for payments under the Act of 1897; that he knew of his right to half wages during incapacity, but did not know of the Act by name or of his rights apart from the Act; and that the receipts were not read over or explained to him:—*Held*, that it had not been proved that the pursuer had elected to take compensation under the Act of 1897, and that consequently he was not barred from maintaining the present action. *Valenti v. Dixon*, [1907] S.C. 695—Ct. of Sess.

Unsuccessful Action against Employer—Claim

for Compensation—Right to New Trial of Action.—An action brought in the County Court by the personal representatives against the employers of a workman killed by an accident arising out of and in the course of his employment having been decided in favour of the defendants, the plaintiffs applied under section 1, sub-section 4 of the Workmen’s Compensation Act, 1897, for compensation under that Act, and the Judge assessed the compensation and made his award in favour of the defendants. The plaintiffs duly applied to the High Court for a new trial of the action:—*Held*, that the plaintiffs by taking the proceedings for compensation had not in the circumstances exercised the option given them by section 1, sub-section 2 (b) of the Act, and were not disentitled to a new trial of the action, inasmuch as, in order to avail themselves of the remedy provided by sub-section 4, they must have proceeded on the footing that the defendants were not liable in the action, and as they had applied for a new trial they had not proceeded on that footing. *Isaacson v. New Grand, Lim.*, 72 L. J. K.B. 227; [1903] 1 K.B. 539; 88 L. T. 291—D.

Unsuccessful Proceedings under Workmen’s Compensation Act—Right to Institute Subsequent Proceedings Independently of the Act.—When a workman has proceeded to have compensation for his injuries assessed under the Workmen’s Compensation Act, and is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act to enforce any previously existing remedy to which he may have been entitled (*HOLMES, L.J.*, dissenting). *Beckley v. Scott*, [1902] 2 Ir. R. 504—C.A.

Failure of Action under Employers’ Liability Act, 1880—Assessment of Compensation not Applied for—Subsequent Proceedings.—A workman who has exercised his option under section 1, sub-section 2 (b) of the Workmen’s Compensation Act, 1897, and brought an action under the Employers’ Liability Act, 1880, to recover damages for injury happening in the course of his employment, is not entitled, when he has failed in such action, to take proceedings under the Act of 1897, where he has not applied in that action for compensation to be assessed under section 1, sub-section 4 of the Act of 1897. *Edwards v. Godfrey*, 68 L. J. Q.B. 666; [1899] 2 Q.B. 333; 80 L. T. 672; 47 W. R. 551—C.A.

Joint and Several Liability.—A workman, while engaged in the employment of a glass merchant in repairing the roof of a factory occupied by a firm of wool manufacturers, fell from the scaffold on the roof and was killed. His dependants claimed compensation from the glass merchant and the firm of wool manufacturers jointly and severally or severally, or in such proportions as to the Court should seem just:—*Held*, that, as the Act imposed no joint liability, the application as directed against the two defenders jointly and severally was incompetent, and that it should be dismissed. *Herd v. Summers*, 7 F. 870—Ct. of Sess.

Workman Earning Same Wages after Accident as before—Earning Capacity in the Future.—

The test of a workman's right to compensation under the Act of 1897 is the diminution of his earning capacity in the future by reason of the injury received, and the mere fact that at the date of his claim he is earning the same wages as he did before the accident does not necessarily exclude the claim under the Act. *Freeland v. Macfarlane*, 2 F. 832—Ct. of Sess.

Injury Owing to Negligence of Third Person—Action against Third Person.]—A workman, having been injured in the course of his employment by the negligence of a third person, obtained an award under the Workmen's Compensation Act, 1897, against his employer. He then brought an action against the third person claiming damages for pain and suffering, and the expenses he had been put to, and the balance of his wages:—*Held*, that the action would not lie by virtue of section 6 of the Workmen's Compensation Act, 1897. *Tong v. Great Northern Railway*, 86 L. T. 802; 66 J. P. 677—Wright, J.

(14) Claim for Compensation.

Requisites of.]—To satisfy the requirements of section 2, sub-section 1 of the Workmen's Compensation Act, 1897, a "claim" for compensation must be a claim for a definite and specified amount, and not merely an intimation of a demand for compensation. *Maver v. Park*, 8 F. 250—Ct. of Sess.

Declaration of Employer's Liability—No Loss Suffered by Workman.]—If a workman has not, when he makes his claim for compensation, suffered any loss, the proper course is not to dismiss the claim, but for the arbitrator to make a declaration of the liability of the employer, leaving the amount and the duration of the compensation to be fixed upon an application under schedule 1, clause 12, to vary the award should the workman at any future time be unable, by reason of the accident, to earn the same wages. *Irons v. Davis & Timmins* ([1899] 2 Q.B. 830) and *Chandler v. Smith* ([1899] 2 Q.B. 506) approved. *Freeland v. Macfarlane*, 2 F. 832—Ct. of Sess.

"Arising out of or in the course of the employment."]—When a claim for compensation is made under section 1 of the Workmen's Compensation Act, 1906, it is still as necessary as before to establish that the accident arose not only out of but "in the course of the employment." *Cremins v. Guest, Keen & Nettlefold*, 77 L. J. K.B. 326; [1908] 1 K.B. 469—C.A.

A "claim for compensation" under section 2, sub-section 1 of the Workmen's Compensation Act, 1897, must be a claim for a specific sum, and not merely an intimation of a demand for compensation. *Kilpatrick v. Wemyss Coal Co.*, [1907] S. C. 320—Ct. of Sess.

Claim not Made Within Six Months—Payments.]—A woman who had been totally incapacitated by an accident in the course of her employment received from her employer for a period of about six months thereafter the sum of 10s. a week, which was 9d. a week in excess of the maximum under the Workmen's Com-

pensation Act, 1897. The payments were made without anything being said as to the Act. The employer having proposed to reduce the payments to 5s. a week, the woman, without having made any claim to compensation under the Act within six months of the date of the accident, applied for arbitration under the Act, contending that her employer was barred from pleading the omission to make a claim within six months, in respect that the payment by him of 10s. a week amounted to a representation that he admitted her right to compensation under the Act:—*Held*, that there was nothing in the circumstances to take the case out of the strict rule of the statute, and consequently that the application was incompetent. *O'Neill v. Motherwell*, [1907] S. C. 1076—Ct. of Sess.

Notice of Claim—Effect of.]—A notice making a claim for compensation under the Workmen's Compensation Act, 1897, stating the name and address of the injured man and the nature of the accident, cannot be regarded and receive effect as a notice under the Employers' Liability Act, 1880. *Thomson v. Baird*, 6 F. 142—Ct. of Sess.

Failure to Give Notice of Accident—Prejudice to Employer—Onus of Proof.]—In a claim for compensation under the Workmen's Compensation Act, 1897, where no notice of the accident has been given to the employer, the onus of showing that the employer has not thereby been prejudiced in his defence lies on the workman claiming the compensation. *Shearer v. Miller*, 2 F. 114—Ct. of Sess.

Failure to Give Notice as Soon as Practicable—Mistake.]—A workman who had sustained injury in the course of his employment failed to give notice of the accident until five months thereafter, when he made a claim for compensation under the Act. The reasons for his failure to give earlier notice were that at first he did not regard his injury as so serious as his doctor's advice should have led him to suppose, and that he did not intend to make any claim under the Act if his recovery had been as satisfactory as he expected:—*Held*, that, even if the employers were prejudiced by the workman's failure to give notice earlier, the want of notice was occasioned by mistake for which there was reasonable cause, and that the workman was not precluded from obtaining compensation. *Rankine v. Alloa Coal Co.*, 6 F. 375—Ct. of Sess.

No Notice Given of Accident—"Mistake or other reasonable cause."]—On November 20, 1905, a workman in the course of his employment fell and racked the muscles on his left side and over his lower ribs. Notwithstanding medical advice to rest, he continued working till February, 1906, when he had to go to a hospital. He designedly did not give notice of his accident at the time, believing that his injuries would not keep him from work. After going to the hospital he realised that his injuries were more serious than he had thought, and on February 14, 1906, he gave written notice of the accident to his employers:—*Held*, that the delay in giving notice was due to mistake or other reasonable cause within section 2, sub-section 1 of the Workmen's Com-

pensation Act, 1897, and that consequently the delay in giving notice was not a bar to proceedings under the Act. *Rankine v. Alloa Coal Co.* (6 F. 375) followed. *Brown v. Lochgelly Iron and Coal Co.*, [1907] S.C. 198—Ct. of Sess.

— **Notice of Accident previously given by Plaintiff to his Employer—No Further Proceedings against such Employer—Wages Paid as before.**—The plaintiff, who worked for J., met with an accident caused by the negligence of a servant in the defendant's employment. Having given notice of the accident to his own employer, the plaintiff's wages were paid as before, and no further proceedings were taken by him under the Workmen's Compensation Act, 1897. In a common-law action against the defendant, *Held*, that the action was maintainable because a mere notice of an accident given under section 2 of the Act of 1897 to the employer was not a "proceeding" within the meaning of section 6, and did not, therefore, preclude the plaintiff from bringing an action against a person other than his employer, whose negligence caused the injury. *Perry v. Clements*, 49 W. R. 669—Ridley, J.

Time for Making Claim.—The requirement of section 2, sub-section 1 of the Workmen's Compensation Act, 1897, that the claim for compensation is to be made within six months of the accident, is fulfilled by a written notice served within the time limited by the injured workman on the employer, referring by date to the accident and stating the amount of compensation demanded. *Powell v. Main Colliery Co.*, 69 L. J. Q.B. 758; [1900] A.C. 366; 83 L. T. 85; 49 W. R. 49; 65 J. P. 100—H.L. (E.)

— **Limit of.**—By section 2, sub-section 1 of the Workmen's Compensation Act, 1897, proceedings for the recovery of compensation are not maintainable unless . . . the claim for compensation has been made within six months from the occurrence of the accident causing the injury. In proceedings by the workman under the statute, *Held*, that the employer may by his conduct preclude himself from objecting that the claim was made more than six months from the occurrence of the accident. *Wright v. Bagnall*, 69 L. J. Q.B. 551; [1900] 2 Q.B. 240; 82 L.T. 346; 48 W. R. 533; 64 J. P. 420—C.A.

Claim by Sole Dependant—Death of Sole Dependant before Request for Arbitration—Right of Administratrix to Claim—"Actio personalis moritur cum persona"—Non-application of Maxim.—If a notice of claim under the Workmen's Compensation Act, 1897, has been given by a "sole dependant," who dies before a request for arbitration is made or other proceedings are taken, the right to claim survives to such dependant's legal personal representative, and the maxim "*Actio personalis moritur cum persona*" does not apply. *O'Donovan and Cameron, Swan & Co., In re* ([1901] 2 Ir. R. 633), distinguished. *Darlington v. Roscoe*, 76 L. J. K.B. 371; [1907] 1 K.B. 219; 96 L. T. 179; 23 T. L. R. 167—C.A.

Claim not in Writing—Payment by Employers in Respect of Claim—Admission of Claim.—It is not necessary that a claim for compensation by a workman under section 2, sub-section 1 of the Workmen's Compensation Act, 1897, should be in writing. The arbitrator under the Act may

take into consideration any facts or admissions for the purpose of ascertaining whether a claim for compensation has been made within six months from the occurrence of the accident. *Low v. Myers*, 75 L. J. K.B. 651; [1906] 2 K.B. 265; 95 L. T. 35; 22 T. L. R. 614—C.A.

Withdrawal of Claim—Subsequent Action under Employers' Liability Act, 1880.—A workman who withdraws notice of injury and request for arbitration under the Workmen's Compensation Act, 1897, upon the employer objecting that the workman's claim is not within that Act, is not debarred from bringing an action in respect of the same injury under the Employers' Liability Act, 1880, inasmuch as the workman has not exercised his "option" within the meaning of section 1, sub-section 2 (b) of the Act of 1897. There is no real option where there is no liability under the Act of 1897. *Rouse v. Dixon*, 73 L. J. K.B. 662; [1904] 2 K.B. 628; 91 L. T. 436; 53 W. R. 237; 68 J. P. 406; 20 T. L. R. 553—D.

Edwards v. Godfrey (68 L. J. Q.B. 666; [1899] 2 Q.B. 333) is a decision upon section 1, sub-section 4 of the Workmen's Compensation Act, 1897, only, and no expressions in the judgments in that case ought to be adopted as laying down any general principle. *Id.*

Action for Damages Dismissed—Motion to have Compensation Assessed—Delay.—On May 18, 1906, a workman was injured in the course of his employment. He brought an action for damages, which was dismissed on February 5, 1907. On February 19, 1907, the workman applied to the Court to remit the case to have compensation assessed under the Workmen's Compensation Act. The Court refused the application on the ground that it was not made timeously. *Baird v. Higginbotham* (3 F. 673) followed. *M'Gowan v. Smith*, [1907] S.C. 548 Ct. of Sess.

(15) Medical Examination.

Conditions—Examination of Workman by Duly Qualified Medical Practitioner—No Notice of Accident Given.—Where proceedings by a workman for compensation under the Workmen's Compensation Act, 1897, are pending the employer may, under Schedule I. clause 3, require the workman to submit himself for examination by a duly qualified medical practitioner, notwithstanding that the workman has not given notice of the accident in respect of which the compensation is claimed. *Osborn v. Vicars, Son & Maxim*, 69 L. J. Q.B. 606; [1900] 2 Q.B. 91; 82 L. T. 491—C.A.

Refusal of Workman to Submit to Treatment.—An employer held not bound to continue weekly payments to an injured workman where the continuance of his incapacity was due to his neglect to comply with certain simple medical directions which had been given to him. *Dowds v. Bennie*, 5 F. 268—Ct. of Sess.

Semble, per LORD ADAM: A workman who has been incapacitated by an accident is not bound in every case to submit to any medical or surgical treatment that is proposed, under the penalty, if he refuses, of forfeiting his right

to a weekly payment—e.g. in a case where a serious surgical operation is proposed with more or less probability of a successful cure. *Ib.*

Refusal of Workman to Undergo Surgical Operation.]—A workman became entitled to compensation under the Act in consequence of an injury he received to one of his thumbs on April 18, 1901, and his employers began to pay him compensation voluntarily. Shortly after the accident part of the thumb was amputated, and in June, 1901, a further operation was performed. The workman, having continued to be incapacitated for his ordinary work, was advised to undergo a third operation, but refused. His employers stopped paying compensation to him. It appeared that the third operation "would in all probability remove the sensitiveness of the injured part and enable the workman to earn wages as before, or at least to earn more than he is able to do now," and "that the operation so advised is a simple operation, not attended with serious risk or pain, and is such as a reasonable man not claiming compensation or damages would for his own advantage and comfort elect to undergo":—*Held* (LORD YOUNG dissenting), that the workman's refusal to undergo the operation disentitled him in the circumstances to a continuance of substantial compensation. *Anderson v. Baird*, 5 F. 373—Ct. of Sess.

A workman who had sustained injury to his right elbow, which disabled him from work, and who had been paid compensation by his employers for more than a year, was then examined by two surgeons on their behalf, who advised that he should undergo an operation for the removal of a piece of the elbow-bone which prevented the free use of the arm. The workman refused, and the payments were discontinued. On an application thereafter to assess compensation the arbitrator found "that the operation (1) is an important minor operation, (2) is not in the nature of an experiment, but is established in surgical practice; (3) has been attended with complete success in all similar cases (five in number) regarding which evidence was led before me; (4) is not attended by any appreciable risk; (5) will in all probability within two months, or a little longer, restore to the [workman] the use of his right arm, and enable him to earn wages as before; and (6) is such as a reasonable man not claiming compensation or damage would, for his own advantage and comfort, elect to undergo"; he accordingly refused to award compensation. It was stated at the hearing of the appeal, and not disputed, that an eminent surgeon, who had not been a witness before the arbitrator, had examined the workman after, as well as before the arbitration, and was of opinion that the workman should not undergo the operation proposed:—*Held*, on the facts, that the workman was not bound to submit to the operation, and that his refusal to do so did not disentitle him to compensation. *Held* also, that the Court was entitled to take into consideration the facts admitted at the Bar, which shewed that the workman's refusal was reasonable. *Sweeney v. Pumpherston Oil Co.*, 5 F. 972—Ct. of Sess.

Weekly Payments—Medical Examination of

Workman by Employer's Medical Practitioner—Refusal of Further Examination by Medical Referee—"Such examination"—**Examination Condition Precedent to Right to Proceed for Compensation—Stay of Proceedings.]**—By clause 11 of the First Schedule to the Workmen's Compensation Act, 1897, "Any workman receiving weekly payments under this Act shall, if so required by the employer, . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer . . .; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the "medical referees appointed for the purposes of the Act, and the certificate of that medical referee "as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place".—*Held*, that, upon the true construction of clause 11, it was not a condition precedent to the right of a workman to have compensation assessed under the Act of 1897 that he should submit himself for examination not only by a medical practitioner provided and paid by the employer, but also by one of the medical referees appointed for the purposes of the Act; that the provisions of clause 11 as to submission for examination, if required by the employer, to a medical practitioner provided and paid by the employer were compulsory, but that the provisions as to examination by one of the medical referees appointed for the purposes of the Act were optional on the part of the workman; and that the words "such examination" in the last paragraph of clause 11 referred not to an examination by one of the medical referees, but to the examination by the employer's medical practitioner. *Neagles v. Nixon's Navigation Co.*; *Edwards v. Guest, Keen & Nettlefolds, Lim.*, 73 L. J. K.B. 165; [1904] 1 K.B. 339; 90 L. T. 49; 52 W. R. 356; 68 J. P. 297; 20 T. L. R. 160—C.A.

The decision in *Niddrie and Benhar Coal Co. v. M'Kay* (40 Sc. L.R. 798) and the dissenting judgment of LORD YOUNG in *Davidson v. Summerlee and Mossend Steel and Iron Co.* (5 Ct. of Sess. Cas. (5th Series), 991) approved. *Ib.*

No Examination by Medical Referee—Effect of.]—The employers of a workman, who had sustained injuries, orally agreed to pay him 18s. 3d. weekly as compensation under the Act, but no memorandum of the agreement was recorded. The workman, after being in receipt of these weekly payments for nearly a year, on the requisition of the employers, submitted himself to examination by a medical practitioner provided and paid by them. A certificate having been granted by that medical practitioner, the workman was dissatisfied therewith, but did not submit himself for examination to one of the medical practitioners appointed under the Act, whereupon the employers discontinued the weekly payments. The workman then instituted an arbi-

tration under section 1, sub-section 3 of the Act:—*Held*, that he was not precluded from so doing because of his failure to submit himself to one of the medical practitioners appointed under the Act. *Niddrie and Benhar Coal Co. v. M'Kay* (5 F. 1121) and *Neagle v. Nixon's Navigation Co.* (73 L. J. K.B. 165; [1904] 1 K.B. 339) approved and followed. *Davidson v. Summerlee and Mossend Iron Co.* (5 F. 991) disapproved. *Strannigan v. Baird*, 6 F. 784—Ct. of Sess.

Obstruction of Medical Examination.]—An injured workman in receipt of weekly payments under the Act went to Australia without intimating to his employers that he was going or leaving his address. In an application by the employers for review of the weekly payments, the Court suspended *in hoc statu* the workman's right to the weekly payments, on the ground that he was obstructing medical examination within section 11 of the First Schedule of the Act. *Finnie v. Duncan*, 7 F. 254—Ct. of Sess.

A workman who was receiving weekly payments as compensation under the Act, and who had twice submitted himself for examination by a medical practitioner provided by the employers, and being certified not to have recovered, immediately after the second examination went to Ireland to reside with his father. About two months thereafter he was again required to submit himself at Glasgow for examination by the employers' medical man. He offered to submit himself to a medical man near the place where he was residing in Ireland, but he refused to come to Glasgow for examination unless his expenses were paid:—*Held*, that the workman had not refused to submit himself to medical examination or obstructed the same within the meaning of section 11, Schedule I. of the Act, and that the employers were not entitled to suspend payment of his compensation. *Finnie v. Duncan* (*supra*) distinguished. *Baird v. Kane*, 7 F. 461—Ct. of Sess.

— A workman who had been receiving compensation under the Act from his employers by agreement, but without a memorandum of agreement having been registered, submitted himself, at his employers' request, for examination by a medical man provided by his employers, in terms of clause 11 of the First Schedule of the Act. The medical man reported that the workman had so far recovered as to be able to do his former work. The workman was dissatisfied with this report, but did not apply to be examined by one of the medical practitioners appointed for the purposes of the Act by the Secretary of State. The employers having discontinued payment of compensation, the workman instituted proceedings for arbitration to have the amount of compensation determined:—*Held* (LORD YOUNG dissenting), that so long as the workman did not submit himself for examination by one of the medical practitioners appointed under the Act his right to compensation was suspended and proceedings by way of arbitration were excluded. *Davidson v. Summerlee and Mossend Iron Co.*, 5 F. 991—Ct. of Sess.

A workman in receipt of a weekly payment

under an agreement registered in terms of the Act was examined on November 7, 1902, and certified to be fit for work by a medical practitioner provided by the employers. The workman intimated to the employers that he was dissatisfied with his medical certificate, but did not submit himself to examination by one of the medical practitioners appointed for the purposes of the Act, owing, as he alleged, to inability to pay the fee. In an application by the employers to review the weekly payment, the employers opposed an allowance of proof on the ground that under clause 11 of Schedule I. of the Act the right of the workman to the weekly payments had, as he had not submitted himself for examination by a medical practitioner appointed for the purposes of the Act, been suspended at the date on which he had been certified to be fit for work. The workman produced a certificate by a medical practitioner dated February 14, 1903, certifying that he was unfit for his usual work. The arbitrator then remitted to the statutory medical referee to report, and on his report that the workman was fit for light work diminished the weekly payment. On appeal by the employers, —*Held*, that the workman, having submitted to an examination by a medical practitioner provided by his employers, his failure to submit to examination by one of the medical practitioners appointed for the purposes of the Act did not infer a suspension of his right to compensation, and did not disentitle him to a proof; and secondly, that it was competent for the arbitrator, with the view of fixing the weekly payment in the application for review, to remit, under Schedule II. (13) of the Act, to a medical practitioner appointed for the purposes of the Act, to report as to the condition of the workman. *Davidson v. Summerlee and Mossend Iron Co.* (*supra*) questioned. *Niddrie & Benhar Coal Co. v. M'Kay*, 5 F. 1121—Ct. of Sess.

Medical Referee—Conclusiveness of Report.]—The report by a medical referee under section 13 of the Second Schedule to the Act is conclusive evidence of the condition of the workman to whom it refers. *Ferrier v. Gourlay*, 4 F. 711—Ct. of Sess.

Review of Award.]—In an application by an employer for review of an order for weekly payments of 6s. 3d. to an injured workman, the sheriff remitted to the medical practitioner appointed by the Secretary of State to report, as to the workman's condition. The report bore that the power of vision of the right eye was permanently reduced by one-half, and that the left eye was quite sound, and that in the opinion of the reporter "he will never be able for any work for which unimpaired vision is essential, but he is quite able to undertake his ordinary work as a labourer." The sheriff, without further proof, reduced the compensation to 5s. a week:—*Held* (LORD YOUNG dissenting), that the report was conclusive evidence that the incapacity of the workman arising from his injuries had ceased to the effect of disentitling him to a continuance of the compensation at the present rate, and remitted to the sheriff to reduce the compensation to one penny per week until further orders. *Id.*

A mason's labourer, sixty-six years of age,

whose left eye had been injured was awarded under the Act the maximum weekly payment for total incapacity. Prior to an application by the employers to have the payment diminished, the workman was examined by one of the medical men appointed by the Secretary of State. The medical certificate stated that the workman's right eye was healthy and the vision good, but that the left eye was seriously defective; "his disability is however at present great enough to unfit him for his usual occupation of a mason's labourer though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight of two eyes is necessary":—*Held* (Lord Young dissenting)—first, that the medical certificate under section 11 was conclusive evidence of the workman's condition; and secondly, that, as the certificate stated that the workman was unfit for his usual occupation, although fit for work of a particular character, and as his employers did not state or offer to prove that he could get such employment, the sheriff was entitled to decide as he did without further evidence that the workman's earning capacity had not increased to such an extent as to justify a reduction or termination of the previous award. *Bryce v. Connor*, 7 F. 193—Ct. of Sess.

—The certificate given by a medical referee under Schedule I. (11) of the Act stated that a workman who was in receipt of weekly payments under the Act had recovered from the injuries in respect of which the payments were made, and that although he was suffering from partial disability for work, such disability was not connected with the injuries, but was "the result of deficient natural vigour of constitution, together with advancing years":—*Held* (Lord Young dissenting), that such certificate was conclusive against any further claim by the workman for compensation under the Act. *McAvan v. Boase Spinning Co.*, 3 F. 1048—Ct. of Sess.

Semble, the report of a medical referee made under rule 2 of the regulations as to the appointment, &c., of medical referees of May 2, 1898, is not to be taken by the arbitrator as final and conclusive, but falls to be considered by him along with the other evidence before him. *Dowds v. Bennie*, 5 F. 263—Ct. of Sess.

Application for Review—Refusal to Allow Proof—Remit to Medical Practitioner.—In an application by an employer under section 12 of Schedule I. of the Workmen's Compensation Act, 1897, for review and ending of a weekly payment made under agreement, in respect that the workman had recovered and had been certified as recovered by a medical practitioner selected by the employer, the workman moved to be allowed to call evidence; but the sheriff refused this application, and remitted to a medical practitioner appointed by the Secretary of State, and thereafter, on a consideration of his report, terminated the weekly payment:—*Held*, that the sheriff was not entitled to refuse the application of the workman to be allowed to call evidence, and that the case must be sent back to him for this application to be granted. *Johnstone v. Cochran & Co.*, 6 F. 854—Ct. of Sess.

VOL. II.

(16) Scale of Compensation.

How Calculated.—The "average weekly earnings during the previous twelve months," on the basis of which compensation is payable during a workman's disablement under Schedule I., section 1 (b) of the Workmen's Compensation Act, 1897, are to be calculated by ascertaining the amount of money earned by the workman during the previous twelve months and dividing that amount by fifty-two. *Kecsk v. Barrow Haematite Steel Co.*, 63 J. P. 56—C.A.

—**Earnings by Workman after Accident.**—Clause 2 of Schedule I. of the Workmen's Compensation Act, 1897, which provides that in fixing the weekly payment (which is to be the compensation under the Act in the case of the workman's incapacity for work) regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, does not cut down the limit imposed by clause 1 (b), which provides that the weekly payment is not to exceed 50 per cent. of the workman's average weekly earnings. *Illingworth v. Walmsley*, 69 L. J. Q.B. 519; [1900] 2 Q.B. 142; 82 L. T. 647—C.A.

Maximum Compensation—Employment for Less than Three Years.—*Semble*, the maximum of 300% mentioned in the First Schedule to the Workmen's Compensation Act, 1897, as the limit of compensation, applies to cases where the deceased workman has been in the employment for less than three years. *Russell v. McCluskey*, 2 F. 1312—Ct. of Sess.

Minimum Compensation—Workman Less than Three Years in Employment of Master.—The minimum sum of 150% fixed by section (1) (a) (i.) of the First Schedule to the Workmen's Compensation Act, 1897, as the compensation for a deceased workman's dependants, applies, although the deceased workman has been less than three years in the employment. *Doyle v. Beattie* (2 F. 1166) reconsidered and disapproved. *Forrester v. McCallam*, 3 F. 650—Ct. of Sess.

"Where death results from the injury"—Reasonable and Probable Consequence.—Schedule I., paragraph 1 (a) of the Workmen's Compensation Act, 1897, prescribes a scale of compensation payable to the dependants of a workman "where death results from the injury":—*Held*, that the dependants are entitled to compensation on that scale if death results in fact from the injury, even though at the time of the injury it could not be reasonably expected as the probable consequence thereof. *Dunham v. Clare*, 71 L. J. K.B. 683; [1902] 2 K.B. 292; 86 L. T. 751; 50 W. R. 596; 66 J. P. 612—C.A.

"Average Weekly Earnings"—Employment of Workman for Less than a Fortnight.—The right to compensation for injury conferred in general terms by section 1, subsection 1 of the Workmen's Compensation Act, 1897, on workmen to whom the Act applies is not qualified or restricted by Schedule I. clause 1 (a) and (b), by which the scale of

compensation is based on "average weekly earnings," and it is not a condition precedent to the right, that the workman injured or killed should have been a fortnight or any other definite period in his employment. *Lysons v. Knowles*, 70 L. J. K.B. 170; [1901] A.C. 79; 84 L. T. 65; 49 W. R. 636; 65 J. P. 388—H.L. (E.). Reversing C.A., 69 L. J. Q.B. 449; [1900] 1 Q.B. 780; 82 L. T. 189; 48 W. R. 408; 64 J. P. 292; and overruling *Stuart v. Nixon*, 69 L. J. Q.B. 598; [1900] 2 Q.B. 95; 82 L. T. 453; 48 W. R. 598—C.A.

— **How Calculated.**—*Per* LORD ADAM.—In calculating the average weekly earnings of a workman, the actual earnings for each week should be taken, irrespective of the number of working days in that week. *Russell v. M'Chuskey*, 2 F. 1312—Ct. of Sess.

"Average weekly earnings" mean the total amount actually earned by the workman during his employment divided by the number of weeks during which or part of which he was employed, and that the week to be taken as the unit of division is not the calendar week, but the trade or pay week of the particular employment. *Lysons v. Knowles* (70 L. J. K.B. 170; [1901] A.C. 79) followed. *Peacock v. Niddrie and Benhar Coal Co.* (col. 1567) explained. *Fleming v. Lochgelly Iron and Coal Co.*, 4 F. 890—Ct. of Sess.

In estimating "average weekly earnings," only the period of continuous employment prior to the accident in the service of the same employer is to be taken into account, and where that period is only part of a day the actual sum earned is to be taken as the average weekly earnings. *Ayres v. Buckeridge* (col. 1566) not followed. *Grewar v. Caledonian Railway*, 4 F. 895—Ct. of Sess.

Where a workman before his disablement has worked not a full week, but only one or more days in the week, his actual earnings are to be taken as his weekly earnings; in ascertaining the average of his weekly earnings a fraction of a week counts as a whole week; where there is no trade week the calendar week from Sunday to Saturday is to be taken as the week. *Grewar v. Caledonian Railway* (*supra*) followed. *M'Cue v. Barclay, Curle & Co.*, 4 F. 909—Ct. of Sess.

— **Employment for Less than a Fortnight.**—A workman was employed in the demolition of a house upon the terms that he was to be employed for eleven hours a day for five days in the week and for five hours a day on Saturday, making sixty hours a week, and that he was to be paid at the rate of 7½*d.* an hour. He was not employed for any specified number of weeks, and he could be discharged from his employment at an hour's notice. He worked in fact for four days, and then sustained injury which resulted in his death. In an arbitration under the Workmen's Compensation Act, 1897, the County Court Judge made an award in favour of the applicant, the widow, calculated on the basis that the average weekly earnings of the deceased were 1*l.* 7*s.* 6*d.*, and taking 156 times that sum, as provided by the First Schedule, clause 1 (a) (i.) of the Act, which amounted to 292*l.* 10*s.*, fixed this latter sum as the amount of compensation to be paid:—

Held, that the County Court Judge had awarded compensation in accordance with the principle laid down by the House of Lords in *Lysons v. Knowles & Sons* (70 L. J. K.B. 170; [1901] A.C. 79), by taking into consideration the weekly earnings which the deceased might have earned if he had not met with the accident, but had had an opportunity of continuing in his employment. *Ayres v. Buckeridge*. *Wheale v. Rhymney Iron Co.* *Jones v. Rhymney Iron Co.*, 71 L. J. K.B. 28; [1902] 1 K.B. 57; 85 L. T. 472; 50 W. R. 115; 65 J. P. 804—C.A.

Average Weekly Earnings.—A workman was employed as a haulier, and in the course of such employment sustained personal injuries. One of the men commenced to work on a Wednesday, and worked every day (including Sunday) until the following Wednesday, on which day the accident occurred. There was no regular contract of employment, and the wages were at the rate of 5*s.* 2*d.* a day. The workman received 2*l.* 1*s.* 4*d.* payment in respect of the days on which he was actually employed. In proceedings under the Workmen's Compensation Act, 1897, the County Court Judge made an award in the workman's favour calculated on the basis that his average weekly earnings were six times 5*s.* 2*d.*—namely, 1*l.* 11*s.*—and, in accordance with the provisions of the First Schedule, clause 1 (a) (i.) of the Act, made an award for a weekly payment of 15*s.* 6*d.*, being one-half of the sum of 1*l.* 11*s.*:—*Held*, that the award had been made upon a correct basis, for that since the decision of the House of Lords in *Lysons v. Knowles* (70 L. J. K.B. 170; [1901] A.C. 79; col. 1565), although the employment had extended from one week to a portion of another week, the County Court Judge was entitled in calculating the workman's weekly wages to take into consideration the wages he might have earned if he had had an opportunity of working for two weeks. *Id.*

— A miner entered the service of a coal company on Friday, March 23; he did not work on Saturday, the 24th; he worked on Monday, the 26th, and on every day thereafter until Thursday, the 29th, when he received injuries, on account of which he claimed compensation under the Workmen's Compensation Act, 1897, from his employers:—*Held*, that these facts afforded a sufficient basis for calculating the claimant's "average weekly earnings" in terms of the First Schedule (1) (b) of the Act. *Per* LORD TRAYNER, the word "weekly" in the schedule refers to calendar weeks. Opinion *per* LORD MONCREIFF reserved on the question whether a workman who had been in the employment during one week only was excluded from the benefit of the Act. *Cadzow Coal Co. v. Gaffney*, 3 F. 72—Ct. of Sess.

— In calculating a workman's "average weekly earnings" where the employment is by trade weeks, the total earnings of the workman are to be divided by the number of trade weeks in which he has been employed, and not by the number of calendar weeks. *Fleming v. Lochgelly Iron and Coal Co.* (4 F. 890) followed. *Campbell v. Fife Coal Co.*, 5 F. 170—Ct. of Sess.

— **Gratuities.**—"Earnings in the employment of the same employer" in respect of

which compensation is recoverable under the Workmen's Compensation Act, 1906, need not always come from the employer; and where the employment is of such a nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, the money thus received with his knowledge and approval must be brought into account in estimating the "average weekly earnings" in respect of which compensation has to be awarded. *Penn v. Spiers & Pond*, [1908] 1 K.B. 766—C.A.

— **Divided by Number of Calendar Weeks.**—

In computing the average weekly earnings of a workman who has been employed by the same employer for three days in one week and during the whole of the next two weeks and on the Sunday of the fourth week, the total amount of his earnings must be divided by the number of calendar weeks—that is, four—over which his employment extended. *Peacock v. Niddrie and Benhar Coal Co.*, 4 F. 443—Ct. of Sess.

— **"In the employment of the same employer"—Continuous Employment—Casual Work done for Same Employer.**—A workman engaged by employers on two nights in each week for a period exceeding two weeks, at a fixed rate of wages per night, was injured by an accident arising out of and in the course of his employment under this engagement. Besides the work done under this engagement he did casual employment for the employers and other firms:—*Held*, that he was entitled to compensation under the Workmen's Compensation Act, 1897, on the basis of 50 per cent. of his weekly earnings under the engagement; but was not entitled to anything in respect of the casual work. *Held*, by COLLINS, L.J., that mere discontinuous casual attendances and unconnected acts of employment with intervals, however short, do not constitute employment within the meaning of Schedule I. clause 1 of the Act. *Hathaway v. Argus Printing Co.*, 70 L. J. Q.B. 12; [1901] 1 Q.B. 96; 83 L. T. 465; 49 W. R. 113; 64 J. P. 804—C.A.

— **"Grade"—"Employment by same employer"—Interruptions—"Illness or other unavoidable cause."**—The provisions of clause (2)(a) in Schedule I. to the Workmen's Compensation Act, 1906, that where it is impracticable to compute the remuneration regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district, are intended to supply a guide and not a fetter; and there is no obligation to adopt the average weekly earnings so arrived at as the basis of computation, but personal considerations applicable to the particular workman may also be taken into account. *Perry v. Wright*; *Cain v. Leyland & Co.*; *Bailey v. Kenworthy*; *Gough v. Crawshaw Brothers, Cyfartha, Lim.*, 77 L. J. K.B. 286; [1908] 1 K.B. 441—C.A.

The word "grade" in clause (2) (a) refers to the particular rank in the hierarchy of labour occupied by the workman, and not to good or bad specimens of that rank. Thus, in arriving

at the average weekly earnings of a casual dock labourer it is a wrong method to divide casual dock labourers into two grades, one of good and the other of bad workmen. *Ib.*

In calculating the average weekly earnings of a workman in the employment of the same employer for the period of twelve months previous to the accident, days during which no work was done through accidents to the machinery or enforced holidays ought not to be taken into account in arriving at the average wage. *Ib.*

Where a collier was by an accident incapacitated for work in respect of which he was paid weekly compensation by his employers, and he subsequently got better and was by the same employers offered and accepted light employment at agreed weekly wages, and whilst engaged in such light employment—namely, carrying batteries in the mine—met with a fatal accident, it was held that the light employment was as a matter of fact a grade of work, and must be treated as such, and that the compensation for the first accident was no part of the earnings in such grade. *Ib.*

Per COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J.—The meaning and effect of Schedule I. (1) and (2) considered and explained. *Ib.*

— **In Same Employment during Previous Twelve Months—Less Period.**—In assessing compensation to a workman under the Workmen's Compensation Act, 1897, the period, whether it be the twelve months prior to the injury or any less period, to be taken into consideration for the purpose of computing his average weekly earnings under section 1 (b) of Schedule I. of the Act must be one period of substantially continuous and consecutive employment by the master in whose employment the workman is at the date of the injury. *Jones v. Ocean Coal Co.*, 68 L. J. Q.B. 731; [1899] 2 Q.B. 124; 80 L. T. 582; 47 W. R. 484—C.A.

At a date twelve months prior to the injury to a workman he was in the employment of the employer by whom he was employed at the date of the injury, and so continued for some months, until in consequence of a strike the employment was duly terminated. The strike continued for some months, and at its termination the workman resumed employment with the same employer, but upon terms different from those of the previous employment, and so continued until the date of the injury:—*Held*, that compensation under the Workmen's Compensation Act, 1897, must be assessed upon the basis of the workman's average weekly earnings, not during the previous twelve months, but during the period of employment subsequent to the strike only. *Ib.*

— **"Employment of the same employer."**—A workman employed as a casual dock labourer to work for a day met with an accident in the course of his employment. He was paid 8s. 3d. for the work done by him up to the time of the accident, being at the rate of so much an hour for the number of hours he had worked. There was no evidence that the workman had ever before, or would again, work for the employers.

In an arbitration under the Workmen's Compensation Act, 1897, the County Court Judge made an award in the workman's favour for 50 per cent of 18s., which the Judge found to be the average weekly earnings of an ordinary casual dock labourer in the port of Bristol (where the workman worked), taking one week with another throughout the year:—*Held*, that the award was wrong, for, there being materials before the County Court Judge upon which it was possible for him to find the weekly earnings of the workman in the employment of the employers in whose employment the accident happened, he was bound, in accordance with the provision of Schedule I. clause 1 (b) of the Act, to assess the amount of compensation upon the basis of those earnings, and was not entitled to take into consideration what the workman might possibly earn in the employment of other employers. *Bartlett v. Tutton*, 71 L. J. K.B. 52; [1902] 1 K.B. 72; 85 L. T. 531; 50 W. R. 149; 66 J. P. 196—C.A.

— **Before Accident—Fall in Rate of Wages—Partial Recovery—Wages Workman Able to Earn after Accident.**—A workman employed as a haulier in a colliery was totally incapacitated for work by reason of personal injury caused by an accident arising out of and in the course of his employment. His average weekly earnings as a haulier before the accident were 34s., and his employers after the accident continued to make him, as compensation under the Workmen's Compensation Act, 1897, weekly payments of 17s. a week, being the maximum compensation under the Act. The workman, having after a time partially recovered from his injury, was taken back by his employers into their employment at light work as a lamp-man at weekly wages of 29s. 5d. a week. At that time the wages of hauliers had fallen to 29s. 5d. a week. The employers having refused to pay the workman any sum as compensation in addition to his wages of 29s. 5d. a week, the workman filed a request for arbitration in the County Court. The County Court Judge was of opinion that, in determining the amount of compensation, if any, which should be awarded to the workman, the proper principle to be adopted was that the basis—that is, the average weekly earnings on which the amount of compensation was originally fixed—should be varied to the extent of the variation at the time in the wages earned by persons in similar employment to that in which the workman was engaged prior to the accident, and he refused to award the workman any compensation in addition to the weekly wages he was earning at the time:—*Held*, on appeal, that the principle adopted by the County Court Judge was wrong, and that the case must be remitted to him for reconsideration, having regard to all the circumstances of the case. *James v. Ocean Coal Co.*, 73 L. J. K.B. 915; [1904] 2 K.B. 213; 90 L. T. 834; 52 W. R. 497; 68 J. P. 431; 20 T. L. R. 483—C.A.

— **Workman Passing from Lower to Higher Grade in Same Employment during Previous Twelve Months.**—The provision in section 1, sub-section (b) of Schedule I. to the Workmen's Compensation Act, 1897, that where total or partial incapacity for work results from an injury, the subject of compensation under the Act, the amount of compensation shall be a

weekly payment during the incapacity, after the second week, not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months, "if he has been so long employed," means if he has been so long employed in the employment of the same employer. *Price v. Marsden*, 68 L. J. Q.B. 307; [1899] 1 Q.B. 493; 80 L. T. 15; 47 W. R. 274—C.A.

Where the workman has during the previous twelve months been employed in the employment of the same employer, compensation in case of personal injury must be based upon his average weekly earnings during the whole twelve months, although during the twelve months he may have passed into a higher grade of employment at higher weekly wages. *Ib.*

— **Continuity of Employment—Miner Employed by Contractors Passing into Employment of Mine Owners.**—A miner employed by a contractor in a coal mine was dismissed from his employment on October 7. On Friday, October 9, he got employment from the coalmaster in the same mine. On Monday, October 12, he was injured in the course of his employment. In a claim for compensation under the Workmen's Compensation Act, against his employer, —*Held* (Lord Young dissenting), that in estimating his average weekly earnings, his earnings under the contractor could not be taken into account. *Hunter v. Baird*, 7 F. 304—Ct. of Sess.

— **Partial Incapacity—Workman in Receipt of Same Wages after as before Accident.**—A workman, who was so injured as to necessitate the amputation of a thumb, on return to work for the same employers was engaged on a different class of work, but was paid the same amount of wages a week as he received before the accident:—*Held*, that there was no evidence of partial incapacity for work to justify an award for any weekly payment under clauses 1 (b) and 2 of the First Schedule to the Workmen's Compensation Act, 1897. *Irons v. Davis*, 68 L. J. Q.B. 673; [1899] 2 Q.B. 330; 80 L. T. 673; 47 W. R. 616—C.A.

— **Workman Earning same Wages with same Employers as before Accident—Enforcing Decree.**—A workman obtained a decree under the Workmen's Compensation Act, 1897, awarding him 17s. per week compensation "until further orders of the Court." Thereafter he accepted employment with the same employers and was paid 34s. per week, being the same wages as before the accident, and continued to be so employed and paid for a considerable period, during which no payments under the decree were made, and no steps under the Act were taken by the employers to have the decree for weekly payments reviewed or terminated. Having left their employment, the workman sought to enforce the weekly payments decreed for from the date of the decree:—*Held*, that the workman was not entitled to payment under the decree for the time he was earning full wages. *Beath & Keay v. Ness*, 6 F. 168—Ct. of Sess.

— **Amount of Compensation.**—In fixing the amount of compensation in cases of partial incapacity, the arbitrator may, if on the evidence he sees fit, give as compensation the whole

amount of the difference between the average earnings of the workman before the injury and the average amount of his earnings after the injury, provided that it does not exceed 50 per cent. of the average earnings before the injury, and does not exceed 1*l.* a week. *Geary v. Dixon*, 4 F. 1143—Ct. of Sess. s.p. *Parker v. Dixon*, 4 F. 1147—Ct. of Sess. s.p. *Corbet v. Glasgow Iron and Steel Co.*, 5 F. 782—Ct. of Sess.*

Break in Employment—Inability to Work.]

—A workman was employed by a firm of coal-owners for over twelve months prior to August 16, 1901, the engagement being terminable at the will of either party. On that day he was injured in the course of his employment, and thereafter, from August 31 until his recovery on October 15, 1901, he was unable to work, and was paid compensation by his employers. On October 15, having resumed his former employment, he worked for two hours, when he was again accidentally injured:—*Held*, (Lord Young *dissentiente*), that the Act contemplated a substantially continuous employment, that the period during which the workman was unable to work constituted a break in his employment; and that the workman was entitled to compensation in respect of the second injury on the footing that he had been in the employment only from the date of his resuming work on October 15, 1901. *Gibb v. Dunlop*, 4 F. 971—Ct. of Sess.

A workman, whose death resulted from personal injury caused by an accident in the course of his employment, was, during the course of the three years preceding the injury, employed by the same employer, in whose service he was at the time of the injury, for two separate continuous periods of employment, one period of employment being at the commencement of the three years, after which there was a break in the employment, and the second period immediately preceding the injury:—*Held*, that compensation to the workman's dependants must under clause 1 (a) (i) of the First Schedule of the Workmen's Compensation Act, 1897, be assessed upon the basis of his average weekly earnings during the continuous period of employment immediately preceding the injury only. *Appleby v. Horseley Co.* (No. 1), 68 L. J. Q.B. 892; [1899] 2 Q.B. 521; 80 L. T. 853; 47 W. R. 614—C.A.

Total or Partial Incapacity for Work—Weekly Payment, Fixing Amount of—Earnings, Meaning of—Review of Weekly Payment.]

—In fixing the amount of the weekly payment to be made to a workman in proceedings under the Workmen's Compensation Act, 1897, in the case of his total or partial incapacity for work resulting from injury, the sole matter to be regarded—apart from any payment not being wages which he may receive from the employer in respect of the injury during the period of incapacity—is the difference between the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. The fact that the average weekly earnings of the workman after the accident would have been greater but for the injury cannot be taken into consideration. *Irons v. Davis* (68 L. J. Q.B. 673; [1899] 2 Q.B. 330) and *Chandler v. Smith* (68 L. J. Q.B. 909; [1899] 2 Q.B. 506) followed. *Pomphrey v.*

Southwark Press, 70 L. J. K.B. 48; [1901] 1 K.B. 86; 83 L. T. 468; 65 J. P. 148—C.A.

Per A. L. SMITH, M.R.—Loss of tuition* by an apprentice is not the subject of compensation under the Act. *Per* STIRLING, L.J.—The value of the tuition received by an apprentice during his apprenticeship is too vague to be included in the expression "earnings" in clause 2 of the First Schedule to the Workmen's Compensation Act, 1897. *Ib.*

Semble, incidental advantages derived from his employment and capable of being estimated in money, such as food, clothing, or a house rent free, may be included in the workman's earnings. *Ib.*

"Earnings"—Deductions—Railway Guard—Lodging Allowance.]

—A goods guard, in the employment of a railway company, who had frequently in the course of his duty to lodge away from home, was under the terms of his employment entitled, when he did so, to receive a specified money allowance for board and lodging, the object of the allowance being to cover the guard's out-of-pocket expenses, and its amount about equal to the reasonable cost of board and lodging. No enquiry was ever made as to the actual expenses incurred by the guard, and the guard was entitled to the allowance even although he lodged and boarded with a friend without any expense to himself:—*Held*, that the allowance, being a payment to which the guard was entitled on the happening of certain events, whether he had incurred any expenses or not, came within the meaning of the word "earnings" in clause 1 (a) (i) of the First Schedule to the Workmen's Compensation Act, 1897. *Midland Railway v. Sharpe*, 73 L. J. K.B. 666; [1904] A.C. 349; 91 L. T. 181; 53 W. R. 114; 20 T. L. R. 546—H.L. (E.)

Uniform Supplied to—Property in Uniform in Railway Company.]

—A railway guard, in addition to his wages, was supplied by the railway company with a complete uniform each year. The property in the uniform remained in the railway company:—*Held*, that the value of the use of the uniform was part of the guard's "earnings" within the meaning of clause 1 of the First Schedule to the Workmen's Compensation Act, 1897. *Great Northern Railway v. Dawson*, 74 L. J. K.B. 271; [1905] 1 K.B. 331; 92 L. T. 145; 53 W. R. 309; 21 T. L. R. 193—C.A.

Lamp Oil Supplied to Miner.]

—"Earnings" in Schedule I. clause (1) (a) (i) of the Workmen's Compensation Act, 1897, means the actual amount, whether in money or in kind, which the workman receives from his employers. *Houghton v. Sutton Heath and Lea Green Colliery Co.*, 70 L. J. K.B. 61; [1901] 1 K.B. 93; 83 L. T. 472; 49 W. R. 196; 65 J. P. 134—C.A.

The average weekly earnings of a miner, who suffered injury from an accident in the course of his employment which resulted in his death, were 1*l.* 10*s.* 11*d.* a week, but a deduction of 6*d.* a week was made for oil supplied by his employers for the lamp used by the miner in his employment, so that the average amount of money actually received by him

from his employers was 1*l.* 10*s.* 5*d.* only:—*Held*, in assessing compensation to the miner's dependants under the Workmen's Compensation Act, 1897, that the compensation must be computed upon the basis that the miner's average weekly earnings were 1*l.* 10*s.* 11*d.* a week. *Ib.*

— — — **Tools.**—In calculating the amount of compensation due under the Workmen's Compensation Act, 1897, in respect of an accident to the workman no deduction should be made for tools or other necessary equipment of a workman, for the supply of which he has been called upon to pay his employer. *Houghton v. Sutton Heath and Lea Green Colliery Co.* (70 L. J. K.B. 61; [1901] 1 K.B. 93) approved. *Abram Coal Co. v. Southern*, 72 L. J. K.B. 691; [1903] A.C. 306; 89 L. T. 103—H.L. (E.)

Offer by Employer to Continue Wages Previously Earned.—Employers in whose service a workman, earning wages at the rate of 16*s.* a week, had sustained injuries resulting in the loss of an arm, offered to retain him in the same employment at the same wages. This offer was declined by the workman. The arbitrator found that the loss of his arm diminished the applicant's capacity to earn wages in the employment in question, and awarded compensation at the rate of 6*s.* a week:—*Held*, that the refusal of the workman to accept the offer of employment did not exclude his right to compensation, if otherwise well founded, and award sustained. *Fraser v. Great North of Scotland Railway*, 8 F. 908—Ct. of Sess.

Wage-earning Capacity as Affected by Age and Decrease in Rate of Wages in Trade.—In fixing the amount of compensation to be paid to a miner who had been totally incapacitated for work by an accident, the arbitrator, in view of the fact, first, that the workman had reached an age (sixty-four) when full wages as a miner could not be earned, and, secondly, that there had been a general fall in the rate of miners' wages subsequent to the accident, awarded a sum less than half the workman's wages before the accident:—*Held*, that it was incompetent for the arbitrator to take these considerations into account in fixing compensation. *Jamieson v. Fife Coal Co.*, 5 F. 958—Ct. of Sess.

Capacity of Workman at Date of Application—Capacity at Date of Hearing—Jurisdiction of Arbitrator.—In an application under section 12 of the First Schedule of the Workmen's Compensation Act, 1897, to review weekly payments made to an injured workman during incapacity, the arbitrator is not bound to regard solely the state of the workman's capacity at the date of the hearing of the application, but has jurisdiction and is bound to enquire into the workman's condition at the date when the application is filed, and *semble* also during the period between the filing and the hearing of the application. *Morton v. Woodward*, 71 L. J. K.B. 786; [1902] 2 K.B. 276; 86 L. T. 878; 51 W. R. 54; 66 J. P. 660—C.A.

Weekly Wages Fixed by Contract.—A workman was engaged for a fixed weekly wage. He entered upon his work on a Saturday, and worked for the whole of the following calendar week, at the end of which his employment was

terminated by his employers in consequence of an injury resulting in total incapacity, and entitling him to compensation under the Act:—*Held*, that the fixed weekly wage was the basis for determining the amount of the weekly payment due to the workman as compensation under the Act. *Brown v. Cunningham*, 6 F. 997—Ct. of Sess.

Earnings in Business carried on by Workman on his own Account Cannot be Excluded.—Upon an application by the employer under Schedule I., clause 12 of the Workmen's Compensation Act, 1897, to review the weekly payments directed to be made to a workman by an award under the Act upon the ground that the earnings of the workman are then such that the weekly payments should be ended or diminished, the arbitrator cannot exclude from consideration the average amount which the workman is able to earn in a business carried on by himself. *Norman & Burt v. Walder*, 73 L. J. K.B. 461; [1904] 2 K.B. 27; 90 L. T. 531; 52 W. R. 402; 68 J. P. 401; 20 T. L. R. 427—C.A.

Full Wages Paid after Injury.—The mere fact that a workman who had been injured by an accident arising out of and in the course of his employment is paid by his employer the same wages after as he received before the accident happened, does not conclusively shew that he has not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed within section 1, sub-section 2 (a) of the Workmen's Compensation Act, 1897, inasmuch as part of the wages so paid may not have been earned by him, but may have been paid to him by his employer as a matter of grace. *Chandler v. Smith*, 68 L. J. Q.B. 909; [1899] 2 Q.B. 506; 81 L. T. 817; 47 W. R. 677—C.A.

Employment for More than One Week but Wages Earned during One Week Only.—A workman in the course of his employment earned 16*s.* 2*d.* in the first week, and in the second week worked for two hours but earned nothing, and was then injured:—*Held*, that 16*s.* 2*d.* represented his "average weekly earnings." *Nelson v. Kerr & Mitchell*, 3 F. 893—Ct. of Sess.

Workman Employing Unpaid Assistant.—A miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services. The usual wage for such assistance was 2*s.* 9*d.* per day. The miner having been injured in the course of his employment claimed compensation:—*Held*, that in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son. *Ib.*

Period of Employment—Irregularity.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the injured workman had worked continuously for the employers for a period of eighteen days previous to the accident, and that he had worked for them, not continuously, but irregularly, for a period of twelve months previous to the accident. The County Court Judge found as a fact that the employment commenced at the beginning of the period of eighteen days, and

he made an award of compensation on the basis of the applicant's average weekly earnings during that period:—*Held*, that the County Court Judge had made his award on the right basis. *Jones v. Ocean Coal Co.* (68 L. J. Q.B. 731; [1899] 2 Q.B. 124) followed. *Giles v. Belford*, 72 L. J. K.B. 569; [1903] 1 K.B. 843; 88 L. T. 754; 51 W.R. 692; 67 J.P. 399—C.A.

A workman, a dock labourer, sustained an accident after being in the service of his employer, as stevedore, for three and a-half days. During the previous twelve months he had been employed by various other stevedores as well as on a number of occasions by the stevedore in whose service he was at the time of the accident, who had engaged him in every week except four during that period, but sometimes only for one day. In assessing the amount of compensation payable to the workman, the County Court Judge added the various sums he had received as wages from such stevedores during the whole period of twelve months, divided the total amount by the number of weeks, and awarded half of such weekly amount as compensation. The workman appealed and claimed that he was entitled to compensation as if he had been in the master's employment for at least two weeks at the same rate of daily wages as he was earning when the accident happened:—*Held*, dismissing the appeal, that he was not so entitled. *Williams v. Poulson*, 68 J. P. 757—C.A.

Workman Employed by the Hour.—There is no presumption for the purposes of the Workmen's Compensation Act, 1897, that a casual labourer employed by the hour will continue in his employment for more than one hour. *Case v. Colonial Wharves*, 53 W. R. 514—C.A.

No Work Done—No Wages Earned.—A miner was killed after he had descended to work in the pit in which he was employed, but before he had actually commenced to work and before he had earned anything:—*Held*, that his widow was entitled to compensation under the Act, and, the average weekly earnings of the deceased being nil, that she was entitled to the alternative sum of 150*l.* under the First Schedule of the Act. *Leonard v. Baird*, 3 F. 890—Ct. of Sess.

Setting off Costs against Weekly Payment.—An employer who has been found liable to pay compensation by way of weekly payments under the Act to a workman is not entitled to set off against those payments a sum awarded to him as costs against a workman in an application for the diminution of the weekly payments. *Rosewell Gas Coal Co. v. M'Vicar*, 7 F. 290—Ct. of Sess.

Redemption of Weekly Payments by Payment of Lump Sum—Application for Redemption Limiting the Amount of the Lump Sum.—An arbitrator has no jurisdiction under clause 13 of the First Schedule to the Workmen's Compensation Act, 1897, to entertain an application by an employer for redemption of his liability for weekly payments under the Act by payment of a lump sum where by the application the employer limits the amount of the lump sum which he is willing to pay. *Castle Spinning Co. v. Atkinson*, 74 L. J. K.B. 265; [1905] 1 K.B.

336; 92 L. T. 147; 53 W. R. 360; 21 T. L. R. 192—C.A.

(17) Agreement to Pay Compensation.

Agreement not in Writing—Registration of Memorandum Thereof.—*Per* the LORD JUSTICE-CLERK and LORD LOW.—An agreement to pay compensation under the Workmen's Compensation Act, 1897, though not in writing, may be enforced under the Act by lodging a memorandum of agreement and getting the authority of the sheriff to register it in terms of the Act; and this may be done although six months from the date of the accident have elapsed. *Cochrane v. Traill*, 2 F. 794—Ct. of Sess.

Action to Enforce Agreement to Pay Compensation.—*Per* the LORD JUSTICE-CLERK and LORD TRAYNER.—An action to enforce an agreement to pay compensation under the Workmen's Compensation Act is incompetent. *Id.*

Agreement by Letter.—A workman, who had been injured in the course of his employment, on March 15 received from his employers a letter in these terms: "We admit liability under the Workmen's Compensation Act, 1897, and are prepared to pay compensation at the rate of 12*s.* 8*d.* during incapacity in terms thereof." The employers, after paying compensation at the specified rate for some months, discontinued the payment on the ground that the workman had recovered. The workman then applied for arbitration under the Workmen's Compensation Act, maintaining that he was still disabled as the result of the accident, or otherwise that he was entitled to a declaration of his employers' liability in the event of supervening incapacity:—*Held*, that the letter of March 15 was an agreement, of which a memorandum might have been, and might still be, recorded under section 8 of the Second Schedule to the Act of 1897; that the parties having come to an agreement, procedure by arbitration was excluded; and consequently that the application for arbitration fell to be dismissed. *Dunlop v. Rankin & Blackmore*, 4 F. 203—Ct. of Sess.

Weekly Payment—Application by Employer for Review—Order Ending Weekly Payment—Second Application for Review by Workman—Jurisdiction to Entertain Application—Res Judicata.—A workman injured by an accident signed an agreement, which was duly recorded in the County Court, by which he was to receive a weekly payment during incapacity, "or until the same should be ended, diminished, increased or redeemed in pursuance of the said Act." On an application to review made by the employer, the arbitrator made an award that the weekly payments should be ended. The workman did not appeal. The workman, on a recrudescence of his injury, made an application for a review and increase of the weekly payment:—*Held*, that the award on the first application for review was final, and no second application for review could be entertained. *Nicholson v. Piper*, 76 L. J. K.B. 856; [1907] A.C. 215; 97 L. T. 119; 23 T. L. R. 620—H.L. (E.)

Quare, as to the legal effect of making a nominal award in order to keep the applicant's rights alive. *Id.*

Application to Review Weekly Payment—Change in Circumstances—Ability to Work—Decision on Medical Evidence—Res Judicata.]

—A workman was accidentally injured in the course of his employment, and a memorandum of agreement was filed for the payment by the employers to the workman of a weekly sum of 15s. during incapacity. On an application by the employers for a review of the weekly payment on the ground that the workman was able to work, the County Court Judge, acting on the weight of the medical evidence, reduced the weekly payment to a penny, leaving it open for the workman to apply again. On an application by the workman for a further review, the County Court Judge refused to hear fresh medical evidence on behalf of the workman, and held that the matter was *res judicata*.—*Held*, that the doctrine of *res judicata* was not applicable, and that, notwithstanding *Crossfield & Sons v. Tavian* (69 L. J. Q.B. 790; [1900] 2 Q.B. 629), the County Court Judge had jurisdiction to entertain the workman's application for a review. *Sharman v. Holliday*, 73 L. J. K.B. 176; [1904] 1 K.B. 235; 90 L. T. 46; 68 J. P. 151; 20 T. L. R. 135—C.A.

Indemnity—Contractor and Sub-contractor—Right to Sue.]—A contractor for the construction of a building entered into a contract with a sub-contractor whereby the latter agreed to execute part of the work. A workman in the employment of the sub-contractor was injured by an accident while at work on the building, and became entitled to compensation under the Workmen's Compensation Act, 1897. He claimed compensation under section 4 of the Act from the contractor, who agreed to pay him a certain weekly sum during incapacity. The sub-contractor was no party to this agreement. The contractor claimed to be indemnified by the sub-contractor under section 4 in respect of his liability to the workman, and brought an action in the High Court to enforce the indemnity. The sub-contractor contended that the indemnity could only be enforced by means of an arbitration under the Act.—*Held*, that, as the amount of the weekly payment to the workman had been settled by agreement, and there had been no arbitration proceedings to settle the amount, the action was maintainable. *Evans v. Cook*, [1905] 1 K.B. 53; 53 W. R. 81; 21 T. L. R. 42—C.A.

"Compensation paid under this Act"—Indemnity—Proceeding—Notice of Claim.]—By section 6 of the Workmen's Compensation Act, 1897, a workman may under certain circumstances "proceed" either against his employer for compensation or against a third person for damages, and "if compensation be paid under this Act" the employer is entitled to be indemnified by the third person.—*Held*, that compensation may be "paid under this Act" within the meaning of section 6, although it is paid under an agreement between the workman and his employer, and not under an award in an arbitration. *Thompson v. North-Eastern Marine Engineering Co.*, 72 L. J. K.B. 222; [1903] 1 K.B. 428; 88 L. T. 239—Kennedy, J.

Semble, a workman "proceeds" against his employer within the meaning of section 6 when he gives notice of claim under section 2, sub-section 1 of the Act. *Ib.*

Memorandum of Agreement—Registration.]

In an application to the sheriff for special warrant to register a memorandum of agreement under the Act, the applicant admitted that he had resumed work and was earning higher wages than before the accident, and that nothing was due to him in name of compensation at the date of the application; but he averred that in consequence of his injuries he was liable to be incapacitated for work from time to time, and he claimed to be entitled, in view of probable future claims against his employers, to have the memorandum registered. The employers admitted that they and the applicant had come to an agreement as to compensation under the Act, but claimed that the memorandum ought not to be registered as the agreement was at an end owing to the applicant's recovery.—*Held*, that the terms of the agreement being admitted, the memorandum should be registered, it being open to the employers to have their future liability fixed by applying for a review of the weekly payment under section 12 of the First Schedule to the Act. *Cammick v. Glasgow Iron and Steel Co.*, 4 F. 198—Ct. of Sess.

In answer to a petition by a workman for a special warrant to register a memorandum of a verbal agreement to pay compensation at the rate of 16s. a week under the Workmen's Compensation Act, 1897, the employers, while not denying the agreement, objected that it had been made under essential error as to the rights of the parties under the Act, and that the sum agreed to be paid was more than half the workman's average weekly earnings.—*Held*, that the employers' objections were irrelevant as answers to the petition for warrant to register an agreement which was not denied. *Macdonald v. Fairfield Shipbuilding and Engineering Co.*, 8 F. 8—Ct. of Sess.

As to what is the proper course if a memorandum is presented proceeding upon a written agreement to pay a sum beyond the maximum amount which in any view of the facts could be awarded under the Act, *quære. Ib.*

—Application for Arbitration—Review of Weekly Payments.]—A workman who had been injured on October 12, 1904, received weekly compensation from his employers under an agreement between them and him until January 26, 1905, when the employers stopped the payments. The workman thereupon applied for a warrant to record a memorandum of the agreement, and the memorandum was ultimately recorded. Pending this application the employers applied to the arbitrator to find that their liability to compensate the workman came to an end on January 25, 1905, and to grant an order declaring his right to compensation to have ended at that date, or alternatively to ascertain and fix such weekly payments as might be due to the workman under the Act, and to make an award finding him entitled to such weekly payments, beginning the first payment on February 1, 1905, for the preceding week.—*Held*, that the employers' application was incompetent in respect—first, that, as an original application for arbitration, it was excluded by the agreement of which a memorandum had been recorded; and secondly, that, as framed, it could not be treated as an application for

review of the weekly payments under the agreement. *Lochgelly Iron and Coal Co. v. Sinclair*, [1907] S.C. 1071—Ct. of Sess.

— **Finality.**—The decision of a sheriff granting, or refusing to grant, a warrant to record a memorandum of agreement under the Workmen's Compensation Act is final. *Lochgelly Iron and Coal Co. v. Sinclair*, [1907] S.C. 3—Ct. of Sess.

— **"Genuineness"—Registration—Time for Registering.**—There is no limit of time fixed by the Workmen's Compensation Act, 1897, within which the parties may apply to register a memorandum of agreement for compensation under Schedule II, clause 8. *Blake v. Midland Railway*, 73 L. J. K.B. 179; [1904] 1 K.B. 503; 90 L. T. 433; 68 J. P. 215; 20 T. L. R. 191—D.

The genuineness of the memorandum of the agreement is not affected by the fact that at the date of the application to register the memorandum, the agreement itself is, owing to altered circumstances, no longer applicable. *Ib.*

Record of Memorandum by Registrar—Dispute as to Genuineness of Memorandum—Reference to Judge—Appeal.—In proceedings under the Workmen's Compensation Act, 1897, where there is a dispute as to the genuineness of a memorandum of agreement with regard to the amount of compensation payable to the workman, and the memorandum is not recorded by the Registrar, but the matter is referred to the Judge, if the latter hears evidence and as a result orders the memorandum to be recorded, he is acting in a judicial capacity and not merely as adviser to his Registrar, and consequently an appeal will lie from his decision upon a point of law under section 120 of the County Courts Act, 1888. *Johnston v. Mew, Langton & Co.*, 97 L. T. 308; 23 T. L. R. 607—D. Affirmed in C.A., 24 T. L. R. 175.

Order for Registration of Memorandum of Agreement—Ministerial Act.—The order of the sheriff for the registration of a memorandum of agreement for compensation is a purely administrative act. *Hughes v. Thistle Chemical Co.*, [1907] S.C. 607—Ct. of Sess.

Per LORD SALVESSEN.—Wherever there is a *bona fide* dispute as to whether a verbal agreement in terms of the memorandum presented for registration has been in fact entered into, the sheriff should decline to order the memorandum to be recorded. *Ib.*

Warrant to Register Memorandum of Agreement—Whether Order Granting or Refusing Warrant is Appealable.—The granting or refusing to grant a warrant by a sheriff (whose functions correspond to those of a County Court Judge) authorising the registration of a memorandum of an agreement, whose genuineness has been disputed, is a ministerial act and cannot be appealed from. *Binning v. Easton*, 8 F. 407—Ct. of Sess.

Unregistered Agreement to Pay Compensation During Incapacity—Stoppage of Payments by Employer on Ground that Incapacity had Ceased—Arbitration Proceedings by Workman.—In August, 1903, the employers, who ad-

mitted their liability to pay compensation under the Act to A, one of their workmen, agreed to pay him at the rate of 12s. 5d. a week "during the period of his incapacity." The agreement was not recorded under the Act. The employers made payments in terms of the agreement down to December 14, 1903. They then ceased to make payments, alleging that A's incapacity had ceased, and offering him work at full wages, which he declined. In March, 1905, A instituted arbitration proceedings, in which he asked for an order that the employers should pay him compensation under the Act at the rate of 12s. 5d. a week as from December 14, 1903, until further orders of the Court. The sheriff, as arbitrator, found that A's incapacity had ceased by December 14, 1903, but ordered the employers to make payment to A at the rate of 12s. 5d. a week as from December 14, 1903, to July 12, 1905—the date of the award; and held that the employers were not liable for any future compensation. In an appeal by the employers, — *Held*, that the sheriff, as arbitrator, had wrongly awarded compensation as from December 14, 1903, to the date of his award in respect that—first, if A's application for compensation was made under the agreement, the sheriff, as arbitrator, had under the Act no power to enforce the agreement as to arrears of compensation due under it; and secondly, if the application was for the purpose of settling compensation by arbitration, A was not entitled to the compensation awarded, the sheriff having found in fact that A's incapacity had ceased by December 14, 1903. *Colville v. Tigue*, 8 F. 179—Ct. of Sess.

Whether an unrecorded agreement to pay compensation under the Act remains in force until formally terminated or modified in terms of the Act, *quære*. *Semble* (*per* LORD LOW) that it does not. *Ib.*

Rectification of Register.—*Baird v. Stevenson*, [1907] S.C. 1259—Ct. of Sess.

(18) Arbitration.

(i.) Powers of Arbitrator.

Condition Precedent to Jurisdiction of Arbitrator—Question as to Liability to Pay Compensation or as to Amount or Duration of Compensation—Question Settled by Agreement.—A workman having been incapacitated from work in consequence of personal injury caused by an accident arising out of and in the course of his employment, his employers paid him regularly after the second week from the accident a weekly sum of one-half the amount of his average weekly earnings. About five months after the accident a letter was written to the employers by a solicitor on behalf of the workman, giving them notice of the accident and of the workman's claim for compensation, and in reply the employers wrote asking what sum would be accepted in lieu of further weekly payments. In the course of the correspondence the employers wrote that they would arrange for a medical examination of the workman, and would continue the weekly payments during his incapacity for work. The workman was accordingly examined by a medical man on behalf of the employers. The negotiations for

payment of a lump sum in settlement having proved unsuccessful, the workman commenced arbitration proceedings in the County Court. At the hearing before the County Court Judge the employers contended that at the date of the filing of the request for arbitration no question had arisen as to the liability to pay compensation under the Workmen's Compensation Act, 1897, or as to the amount or duration of compensation, and, in the alternative, that all questions between the parties had been settled by agreement prior to the request being filed. The County Court Judge made an award in favour of the workman for a weekly payment of one-half his average weekly earnings during incapacity. Upon appeal by the employers,—*Held*, that the County Court Judge had no jurisdiction to make the award, for upon the true construction of section 1, subsection 3 of the Workmen's Compensation Act, 1897, it is a condition precedent to the jurisdiction of the County Court Judge to entertain arbitration proceedings under the Act, that a question has arisen as to the liability to pay compensation under the Act or as to the amount or duration of compensation, and that no such question had arisen between the parties. *Field v. Longden*, 71 L. J. K.B. 120; [1902] 1 K.B. 47; 85 L. T. 571; 50 W. R. 212; 66 J. P. 291—C.A.

Per CURIAM.—The County Court Judge ought upon the evidence to have found as a fact that there was an agreement between the parties. *Ib.*

Per COLLINS, M.R.—The proper course for the workman under the circumstances, if he was in doubt as to his position, was to propose to the employers to have a memorandum filed in the County Court in accordance with clause 8 of the Second Schedule to the Act. *Ib.*

Application for Arbitration before Dispute—Competency.]—A workman who had been injured filed his application for arbitration two days prior to the date at which he would become entitled to compensation under the Act.—*Held*, that as at the date when the application was filed no dispute had arisen between the parties as to compensation, and as the compensation was not in arrears, the conditions precedent to an arbitration under the Act were wanting, and accordingly that the application must be dismissed. *Caledon Shipbuilding and Engineering Co. v. Kennedy*, 8 F. 960—Ct. of Sess.

Medical Examination of Workman.]—An arbitrator has no power to make it a condition of an order that a workman shall submit himself for examination by a duly qualified medical practitioner that the employer shall pay the expense of the attendance at such examination of a medical practitioner on the workman's behalf. *Osborn v. Vicars, Son & Maxim*, 69 L. J. Q.B. 606; [1900] 2 Q.B. 91; 82 L. T. 491—C.A.

Application while Payments being Regularly Made—Competency.]—A workman who was injured on September 5, 1905, was regularly paid by his employers the maximum weekly compensation due to him under the Act, on the footing of total incapacity, from a fortnight

after the date of his injury until January 23, 1906. The employers having on several occasions when making the weekly payments intimated to the workman that, in their opinion and if that of their medical adviser, he had recovered, and that the weekly payments would in a short time be stopped, the workman, on January 30, 1906, prior to the payment of the weekly sum due on that day, presented a petition for arbitration under the Act. There was no agreement between the parties as to compensation which could have been recorded. The employers objected to the competency of the petition, but the sheriff, holding that a question had arisen as to the continuance of the workman's incapacity, repelled the objection, and after a proof awarded compensation:—*Held*, that the petition was incompetent and must be dismissed in respect (a) that at the date when it was presented no question had arisen between the parties as to the duration of the compensation within the meaning of section 1, subsection 3 of the Act, and (b) that the mere fact that there was no agreement between the parties capable of registration did not shew that a question had arisen between them so as to entitle the workman to present the petition. *Gourlay v. Sweeney*, 8 F. 965—Ct. of Sess.

Allowance on Basis of Total Incapacity—Subsequent Earning Capacity of Workman—Discretion of Arbitrator as to Reducing Amount of Allowance.]—In fixing the amount of compensation under the Workmen's Compensation Act, 1897, in cases of partial incapacity, the arbitrator must on the facts of each case exercise his discretion on the question whether or not he will award the maximum sum allowed by the Act; he cannot lay down and act upon a hard-and-fast rule that, unless grounds are shewn for varying the same, he will award the maximum in all cases. *Webster v. Sharp & Co.*, 73 L. J. K.B. 141; [1904] 1 K.B. 218; 89 L. T. 627; 52 W. R. 275; 68 J. P. 140; 20 T. L. R. 121—C.A.

Nominal Award of One Penny per Week—Competency.]—In an application by an employer to have a weekly payment to an injured workman reviewed and ended,—*Held*, that it is incompetent for the arbitrator, if either party objects, to postpone the determination of the question of compensation by making an interim nominal award of one penny per week. *Clelland v. Singer Manufacturing Co.*, 7 F. 975—Ct. of Sess.

Average Weekly Earnings.]—*Semble*, that while the Act requires an arbitrator in fixing the amount of a weekly payment to have regard to the average weekly earnings of the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity. *Ib.*

Partial Incapacity—Discretion of Arbitrator.]—A workman who had been totally incapacitated by an accident, and whose average weekly earnings were 36s. 8d., was awarded under the Act a weekly payment of 18s. 4d., being 50 per cent. of his previous wages. His incapacity having partially ceased, he was taken back into his employers' service at a wage of 17s. per week, and his employers, in view of that change of

circumstance, applied to the arbitrator to review the weekly payment of 18s. 4d. The arbitrator, in these circumstances, declined to diminish the existing payment. On appeal, the Court held that the arbitrator's award was not disconform to the Statute. *Bryson v. Dunn & Stephen*, 8 F. 226—Ct. of Sess.

Semble (per LORD M'LAREN), an arbitrator may not award such a sum as would, when added to the wages being earned, give the workman a larger weekly income than he was earning before the accident. *Ib.*

— In awarding compensation under the Workmen's Compensation Act, 1897, for the partial incapacity of a workman, the arbitrator cannot lay down any general rule as to the amount to be awarded, but must decide each case on its merits. Decision of the COURT OF APPEAL (73 L. J. K.B. 141; [1904] 1 K.B. 218) affirmed by consent upon terms. *Webster v. Sharp & Co.*, 74 L. J. K.B. 776; [1905] A.C. 284; 92 L. T. 373—H.L. (E.)

Review of Weekly Payment—Date from which Payment may be Ended, Diminished, or Increased.—When an application under Schedule 1 (12) of the Workmen's Compensation Act, 1897, to review a weekly payment under the Act, is brought before an arbitrator, he is bound to treat the agreement for, or award of, the weekly payment, as enforceable up to the date of his decision in the application, and can end, diminish, or increase the payment as from that date only (*dissentiente* the LORD JUSTICE-CLERK). *Morton v. Woodward* (71 L. J. K.B. 736; [1902] 2 K.B. 276) disapproved. *Steel v. Oakbank Oil Co.*, 5 F. 244—Ct. of Sess.

— On an application under Schedule I. (12) of the Act to review a weekly payment, the arbitrator is bound to treat the agreement for, or award of, the weekly payment as enforceable up to the date of his decision (LORD M'LAREN dissenting). *Steel v. Oakbank Oil Co.* (5 F. 244) approved. *Morton v. Woodward* (71 L. J. K.B. 736; [1902] 2 K.B. 276) disapproved. *Pumpherson Oil Co. v. Cavaney*, 5 F. 963—Ct. of Sess.

In an application under paragraph 12 of the First Schedule to the Workmen's Compensation Act, 1897, to review a weekly payment under the Act, the arbitrator has power to end, diminish, or increase the payments only as from the date of his decision in the application. *Steel v. Oakbank Oil Co.* (5 F. 244) and *Pumpherson Oil Co. v. Cavaney* (5 F. 963) followed. *Baird v. Stevenson*, [1907] S. C. 1259—Ct. of Sess.

— In an application to have compensation, payable to an injured workman, ended or diminished, the arbitrator made a remit to a medical referee, who, on February 26, 1906, reported that the workman's wage-earning capacity would be fully restored by March 31. The arbitrator on February 27 ordered compensation to be continued till March 31 and to end at that date.—*Held*, that the arbitrator had no power to make such an order, in respect that his duty in assessing compensation was to have regard to the workman's present state, and that he was not entitled to pronounce an order the validity of which would depend on the workman's condition at a future date. *Allan v. Spowart*, 8 F. 811—Ct. of Sess.

Rights of Dependants—Allotment of Compensation-money.—When compensation is awarded under the Workmen's Compensation Act, 1897, to the dependants of a deceased workman, the arbitrator must make a definite allotment of the money for the benefit of each dependant, except so far as any dependant being of age and capable of making an agreement may agree to give up his or her share for the benefit of the other dependants. *Manchester v. Carlton Iron Co.*, 89 L. T. 730; 52 W. R. 291; 68 J. P. 209; 20 T. L. R. 155—C.A.

Action against Employer, Failure of—Assessment of Compensation by the Judge—Estoppel.—Where, upon the dismissal of an action brought by a workman under age, by his next friend, against his employers, to recover damages in respect of personal injuries occasioned to the plaintiff by an accident arising out of and in the course of his employment, an application was made to the Judge who tried the action to assess compensation to the plaintiff under the Workmen's Compensation Act, 1897, s. 1, sub-s. 4, and the Judge accordingly awarded such compensation,—*Held*, that the plaintiff was estopped by the election to take such compensation and the award thereupon made from proceeding further with the action, and therefore a subsequent application by him for judgment or a new trial in the action could not be entertained. *Isaacson v. New Grand, Lim.* (72 L. J. K.B. 227; [1903] 1 K.B. 539), discussed. *Neale v. Electric and Ordnance Accessories Co.*, 75 L. J. K.B. 974; [1906] 2 K.B. 558; 95 L. T. 592; 22 T. L. R. 782—C.A.

Application to State Case—Question of Law—Painting Work—Construction.—In an arbitration under the Act the sheriff found in fact that the employers were the contractors for the painting work on a building over thirty feet in height in course of construction, and that the workman had been injured while engaged in this painting work, and awarded compensation. The sheriff refused to state a Case on the question, "Whether the work on which the deceased had been engaged at the time of the accident was construction of the building in question in terms of section 7, sub-section 1 of the Workmen's Compensation Act, 1897?" on the ground that it was solely a question of fact.—*Held*, that he should state a Case on this question, as it was, or might involve, a question of law. *Hobbs & Samuels v. Bradley*, 2 F. 744—Ct. of Sess.

Refusal to State Case—Law or Fact.—A sheriff-substitute having held that on the facts proved, in proceedings before him as arbitrator under the Act, the injury received by a workman was not attributable to his "serious and wilful misconduct," refused to state a Case. The Court refused to order the sheriff-substitute to state a Case, inasmuch as, according to the facts as found by him, no question of law on the construction of the statute was raised. *Glasgow and South-Western Railway v. Laidlaw*, 2 F. 703—Ct. of Sess.

Arbitration before County Court Judge—Application for New Trial.—A County Court Judge has no power to entertain an application for a new trial of an arbitration under the Workmen's Compensation Act, 1897. *Moun-*

tain v. Parr, 68 L. J. Q.B. 447; [1899] 1 Q.B. 805; 80 L. T. 342; 47 W. R. 353—C.A.

(ii.) *Award.*

Memorandum of—"Enforceable as a County Court judgment"—Judgment Summons—Committal Order.—Where an amount of compensation under the Workmen's Compensation Act, 1897, has been ascertained under the Act by an arbitrator, and a memorandum thereof has been recorded under clause 8 of Schedule II. of the Act, the memorandum is enforceable by judgment summons and committal order under section 5 of the Debtors Act, 1869. *Bailey v. Plant*, 70 L. J. K.B. 63; [1901] 1 K.B. 31; 83 L. T. 459; 49 W. R. 103; 65 J. P. 52—C.A.

Right to Nominal Award to Preserve Claim.—A lad of seventeen, who had been temporarily incapacitated by the loss of the third finger of his left hand in consequence of an injury sustained in his employers' factory, received from his employers, for a number of weeks, eight shillings weekly, that being the full sum he would have earned had he been working. The employers then offered to receive him back, and as he did not return ceased making the payments. He then took work from a new employer, and thereafter claimed compensation under the Act from his former employers, in which proceedings he admitted he was then able to do all his old work:—*Held*, that the applicant was not entitled to such a declaration of the liability of his former employers as would preserve his rights in the event of supervening incapacity. *Husband v. Campbell*, 5 F. 1146—Ct. of Sess.

Award by Arbitrator Appointed by a County Court Judge—Appeal to Court of Appeal.—No appeal lies direct to the Court of Appeal from the award of an arbitrator appointed by a County Court Judge to assess a claim for compensation under the Workmen's Compensation Act, 1897. *Gibson v. Wormald & Walker*, 73 L. J. K.B. 491; [1904] 2 K.B. 40; 91 L. T. 7; 52 W. R. 661; 68 J. P. 382; 20 T. L. R. 452—C.A.

Reviewing Award—"Incapacity for work."—A gasworks coal porter in the employment of a gas company was, in December, 1899, injured by an accident which resulted in the loss of four fingers of his left hand. His weekly wages were 41s. 9d., and the company agreed to pay him 1l. a week compensation under the Workmen's Compensation Act, 1897. In January, 1901, the company offered him employment as a gateman and timekeeper at weekly wages of 27s., which he refused. In April, 1901, at the instance of the company, the County Court Judge made an award reducing the weekly amount of compensation to 14s. 9d. Subsequently the workman accepted the employment which he had previously refused, but in consequence of his refusing to note down the times of arrival of the workmen he was dismissed. The workman thereupon made an application to the County Court Judge to increase the weekly payment of 14s. 9d., which was refused. More than a year later a further application was made to increase the weekly payment, when the Judge found that the workman had not since the accident been capable of

earning wages as a gasworks porter, that he was capable of earning wages as a gatekeeper, timekeeper, watchman, or in any similar work, and that he had made reasonable efforts, but had been unable to get such employment. The Judge accordingly held that the workman was entitled to have the 1l. weekly compensation restored:—*Held*, that the County Court Judge was entitled to find that the workman's opportunity of finding employment had been narrowed in consequence of the accident, and that the weekly payment of 1l. should be restored. *Clark v. Gas Light and Coke Co.*, 21 T. L. R. 184—C.A.

—Application—Change in Circumstances since Date of Award.—Clause 12 of the First Schedule to the Workmen's Compensation Act, 1897, which provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased," subject to a maximum provided in the Act, only applies to cases where there has been a change in the circumstances since the date when the award for payment of a weekly sum to the workman has been made. (*VAUGHAN WILLIAMS, L.J., hesitante.*) *Crossfield v. Tanian*, 69 L. J. Q.B. 790; [1900] 2 Q.B. 629; 82 L. T. 818; 48 W. R. 609—C.A.

(19) *Agreement to Scheme Certified by Registrar of Friendly Societies.*

Assent of Workman—Right to Proceed Independently of Act.—Where a workman contracts with his employer under section 3, sub-section 1 of the Workmen's Compensation Act, 1897, that the provisions of a scheme certified in accordance with that sub-section by the Registrar of Friendly Societies shall be substituted for the provisions of the Act, and afterwards receives injury arising out of and in the course of his employment, he cannot maintain an action against the employer under the Employers' Liability Act, 1880, to recover damages in respect of the injury. *Taylor v. Hamstead Colliery Co.*, 73 L. J. K.B. 469; [1904] 1 K.B. 838; 90 L. T. 363; 52 W. R. 417; 68 J. P. 300; 20 T. L. R. 338—C.A.

Receipt by Workman under Agreement of Maximum Compensation under Workmen's Compensation Act, 1897—Subsequent Action for Wages—Estoppel.—Where a workman has, by agreement between himself and his employer, received the maximum compensation under the Workmen's Compensation Act, 1897, during incapacity for work resulting from injury by accident arising out of his employment, he is not entitled in addition to sue the employer for wages under his contract of employment in respect of a period which is subsequent to the accident, and in respect of which he has received the compensation. *Elliott v. Liggins*, 71 L. J. K.B. 483; [1902] 2 K.B. 84; 87 L. T. 29; 50 W. R. 524—D.

Expiry by Effluxion of Time—Renewal Scheme Certified by Registrar.—A scheme of compensation was certified in November, 1898, by the Registrar of Friendly Societies under section 3 of the Workmen's Compensation Act, 1897, as applicable to the defendants' workmen, and the

plaintiff, who was a workman in the defendants' employment, agreed to come in under the scheme. The scheme expired at the end of 1903, and in December, 1903, a renewal scheme was certified by the Registrar, and the defendants posted up a notice that workmen might enrol under the scheme. The course adopted at the defendants' works was that a month's notice should be given if a workman wished to withdraw from the scheme. The workman had not given notice of withdrawal, but he did not enrol under the renewal scheme. The defendants deducted a certain sum from his wages as his contribution under the renewal scheme, upon the ground that the workman was bound by the renewal scheme until he gave notice that he would not be bound by it:—*Held*, that, the original scheme having expired, the workman was not bound by the renewal scheme unless the defendants proved that the workman had agreed to accept the new scheme. *Wilson v. Ocean Coal Co.; Treharne v. Ocean Coal Co.*, 21 T. L. R. 621—C.A.

(20) Dependants.

Father of Workman in Workhouse.]—The meaning of the words "dependent upon the earnings of the workman at the time of his death," in section 7, sub-section 2 of the Workmen's Compensation Act, 1897, is confined to actual dependence in fact upon the earnings of the workman. Consequently, the father of a workman who at the time of the death of the workman was being maintained in a workhouse, at the sole expense of guardians of the poor, is not within the meaning of the words. *Rees v. Penrhyber Navigation Colliery Co.*, 72 L. J. K.B. 85; [1903] 1 K.B. 259; 87 L. T. 661; 51 W. R. 247; 67 J. P. 231; 1 L. G. R. 173—C.A.

Weekly Payments—Workman Returning to Work—Subsequent Death Resulting from Accident—Abandonment of Right—Independent Rights of Dependents.]—The right of dependants to compensation under the Workmen's Compensation Act, 1897, where death ultimately results from the injury, is a separate and independent right and cannot be released by the workman; but, *semble*, in case of redemption of future weekly payments by the employer under Schedule I. clause 13, the amount so paid by way of redemption would properly be deducted from the maximum sum payable to dependants if death afterwards resulted from the injury. *Williams v. Vauxhall Colliery Co.*, 76 L. J. K.B. 854; [1907] 2 K.B. 433; 97 L. T. 559; 23 T. L. R. 591—C.A.

Action for Damages by Person Found not Entitled to Compensation.]—A claimant who had been refused compensation under the Workmen's Compensation Act, 1897, as not being a dependant of the deceased workman, is not thereby barred from suing the deceased's employer at common law or under the Employers' Liability Act, 1880. *McDonald v. Dunlop & Co.*, 7 F. 533—Ct. of Sess.

"Wholly or in part dependent."]—The question whether the members of the family of a workman who has been killed by an accident were "wholly or in part dependent" upon the workman's earnings at the time of his death is one

of evidence for the arbitrator, whose award will not be disturbed in respect of amount, if the Court is satisfied that there was such evidence. The actual income of the person killed and the actual expenditure of the family are the basis for decision in each case, and no general standard can be applied. *Main Colliery Co. v. Davies*, 69 L. J. Q.B. 755; [1900] A.C. 358; 83 L. T. 83; 65 J. P. 20—H.L. (E.)

The respondent's son, who was killed by an accident, had been earning at the time of his death 8s. a week on an average of one hundred and fifteen weeks. His earnings went into the family fund, which was administered for the common benefit. The County Court Judge, whose decision was affirmed by the Court of Appeal, found that the father was partly dependent upon the son's earnings, and made an award in his favour. *Ib.*

Per LORD SHAND (approving *Simmons v. White Brothers*, 68 L. J. Q.B. 507; [1899] 1 Q.B. 1005), "dependent" in the Act means dependent for the ordinary necessities of life, or for maintenance of himself and his family by a person in that class and position in life. The mere fact that the father receives and spends the money is not, without regard to such position, sufficient to establish a claim under the Act. *Ib.*

— A workman having by accident arising out of and in the course of his employment sustained injury resulting in death, his parents, with whom he resided, and to whom he gave his wages, claimed compensation under the Workmen's Compensation Act, 1897. At the hearing of the claim the father, who was thirty-four years of age and in receipt of full wages, stated that the earnings of the workman were a help to maintain his family. The County Court Judge having found that the parents were in part dependent upon the earnings of the workman within the meaning of section 7, sub-section 2 of the Act,—*Held*, that the words "dependent upon the earnings" in that sub-section meant dependent thereon in the proper sense of the term for the ordinary necessities of life, having regard to the class and position of the parties; and that, as it appeared that the County Court Judge had adopted this construction, the Court could not interfere with his finding upon the question of fact whether the parents were so dependent. *Simmons v. White*, 68 L. J. Q.B. 507; [1899] 1 Q.B. 1005; 80 L. T. 844; 47 W. R. 513—C.A.

— The question whether a dependant of a deceased workman was wholly or only in part dependent upon his earnings within paragraph 1 (a) of the 1st schedule to the Workmen's Compensation Act, 1897, is to be determined with reference to the moment of time just before the workman's death; so that, in deciding this question, no consideration should be taken of any pecuniary benefit that may come to the dependant in consequence of, or after, the workman's death. *Pryce v. Penrhyber Colliery Co.*, 85 L. T. 477—C.A.

— **Maintenance of Household by Workman out of his Earnings Supplemented by Children's Wages—Claim of Widow.]**—A workman who met with a fatal accident in the course of

his employment, in addition to his own earnings, was at the date of his death receiving the wages of his three elder sons, whom he housed, fed, and clothed in return, making a balance of gain in so doing:—*Held*, that the widow and younger children were none the less "wholly dependent" on the workman's earnings within the meaning of the Workmen's Compensation Act, 1897, Sched. I. (1) (a) (i). *Senior v. Fountains & Burnley*, 76 L. J. K.B. 928; [1907] 2 K.B. 563; 97 L. T. 562; 23 T. L. R. 634—C.A. *And see infra*, WIFE.

"Wholly dependent upon (workman's) earnings at the time of his death"—**Property Possessed by Workman Passing to Dependant upon His Death.**—A dependant of a workman is none the less "wholly dependent upon his earnings at the time of his death" within the meaning of the First Schedule, clause (1) (a) (i) of the Workmen's Compensation Act, 1897, because upon the death of the workman his small personal estate, the result of his savings, which produced no income during his life, passes to the dependant. *Pryce v. Penrikyber Navigation Colliery Co.*, 71 L. J. K.B. 192; [1902] 1 K.B. 221; 50 W. R. 197; 66 J. P. 198—C.A.

—A workman, in respect of whose death compensation was claimed by his widow, had for the three years immediately preceding his death lived separate from his wife. His contribution to her support did not exceed 5l. per annum. The claimant had no regular means of livelihood. In addition to what she received from her husband she was supported by her earnings from occasional employment and by contributions from her relations:—*Held*, that she was, within the meaning of the Workmen's Compensation Act, 1897, First Schedule, s. (1) (a) (i), wholly dependent on her husband at the time of his death. *Cunningham v. M'Gregor*, 3 F. 775—Ct. of Sess.

Wife—Presumption of Dependency of—Non-rebuttal—Wife not Supported by Husband at Time of His Death—Child en Ventre sa Mère.—Dependency within the meaning of section 7, sub-section 2 of the Workmen's Compensation Act, 1897, must always be a mixed question of law and fact. There is a presumption in favour of the dependency of the wife upon her husband's earnings, which is not rebutted by proof that at the time of his death he was not in fact supporting her. *Williams v. Ocean Coal Co.*, 76 L. J. K.B. 1073; [1907] 2 K.B. 422; 97 L. T. 150; 23 T. L. R. 584—C.A.

The rule in *Villar v. Gilbey* (76 L. J. Ch. 339; [1907] A.C. 139) that a child *en ventre sa mère* shall be deemed to have been born, where it is for its benefit that it should be born, applies in the case of a posthumous child, and consequently such child is a dependant within the Act. *Ib.*

An applicant for compensation was the widow of a workman, to whom she had been married in March, 1903, and who was killed in April, 1906. The husband had not kept up a home for the wife, and had not since 1904 contributed to her support, she having in that year returned to her parents. The wife in January, 1906, went into domestic service, receiving 1l. a month and board wages, and was

in such service at the time of her husband's death. There was also a child *en ventre sa mère* at such time, who was born in September, 1906. The County Court Judge having decided that neither the widow nor the child were dependants within the Act, the COURT OF APPEAL, reversing his decision, *held*, that he was wrong—first, in ignoring the presumption of dependency in the case of the wife; and secondly, in treating as conclusive the fact that the wife was not receiving any part of her husband's earnings at his death; and, instead of sending the case back, the Court held that, as a matter of legal inference upon the facts in evidence, there was total dependency both in the case of the widow and of the posthumous child. Observations in *Queen v. Clarke* ([1906] 2 Ir. R. 135, 163) adopted. *Ib.*

Wife Deserted by Husband and Unable to Support Herself.—In July, 1901, a husband deserted his wife, and thereafter did not contribute anything to her support. She suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support. Her husband having, in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation from his employers:—*Held* (*dubitante* the LORD JUSTICE-CLERK), that the claimant was dependent on the earnings of her husband at the time of his death, and was entitled to compensation under the Act. *Sneddon v. Addie*, 6 F. 992—Ct. of Sess.

Wife Living Apart from and not Supported by Husband.—A woman had been living apart from her husband for fourteen years and was supported by her illegitimate son:—*Held*, that she was not wholly or in part dependent on the earnings of her husband so as to be entitled to compensation under the Act in respect of his death by accident. *Turners v. Whitefield*, 6 F. 322—Ct. of Sess.

Wife not Living with Husband and not Maintained by Him at the Time of His Death.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant, the widow of the injured workman, had been married to him for many years, and had been maintained by him up to a date about four months before his death. He was then out of work, and he left her, apparently to find work, and never afterwards contributed anything to her maintenance. During the time he was away she obtained casual work when she could, and received help from her friends. She said in her evidence that she expected him back every day to provide a home. He obtained employment three weeks before his death:—*Held*, that the County Court Judge was justified in holding that the applicant was dependent upon the earnings of the deceased at the time of his death. *Coulthard v. Consett Iron Co.*, 75 L. J. K.B. 60; [1905] 2 K.B. 869; 93 L. T. 756; 54 W. R. 139; 22 T. L. R. 25—C.A.

The applicant, the widow of a workman, was married on July 15, 1904, at Glasgow, both she and her husband being Scotch by domicile. She lived with her husband in Glasgow, and was supported by him till the end of October, 1904, when, being out of work, he went to

Dublin to seek employment. He obtained employment there from the respondent on January 9, 1905, and on January 17 he was accidentally killed in the course of his employment. From the time the husband left Glasgow until his death he did not contribute anything to the support of his wife, who went to reside with her father in Glasgow, and was supported by him. A posthumous child was born on April 15, 1905:—*Held* (Fitzgibbon, L.J., *diss.*), that the widow and the child were wholly dependent upon the earnings of the workman at the time of his death within the meaning of section 7, sub-section 2 (a) of the Act. *Queen v. Clarke*, [1906] 2 Ir. R. 135—C.A.

Wife in Asylum.—A workman who died as the result of an accident arising out of and in the course of his employment, and maintained his wife until her removal as a dangerous lunatic to a lunatic asylum, where she was detained by the asylum authorities under confinement, and where she was being maintained by them at the date of her husband's death:—*Held*, that these circumstances were insufficient to rebut the presumption of dependency, and that there was a total dependency of the wife on her husband's earnings. *Kelly v. Hopkins*, [1908] 2 Ir. R. 84—C.A.

Wife — Foreigner.—In December, 1903, a Pole came to Scotland, where in the course of his employment as a miner he was killed in August, 1904. During that period he remitted 1*l.* a week to his wife, who remained in Poland, and whose means of livelihood during her husband's absence consisted, in addition to the 1*l.* sent by her husband, of her earnings as an outdoor labourer at a wage of 9*d.* a day, and of contributions by her father:—*Held*, that the wife was a "dependant" within the meaning of section 7, sub-section 2 (b) of the Act; but that she was not wholly dependent upon her husband's earnings at the time of his death within the meaning of section 1 of the First Schedule of the Act. *Baird v. Birsztan*, 8 F. 438—Ct. of Sess.

Daughter.—A workman's daughter, who had previously been earning wages, remained at home after her mother's death to keep her father's house, getting from him board, lodging, and clothing, but no wages. The workman was killed by accident in the course of his employment:—*Held*, that the daughter was a dependant of the workman within the meaning of the Act. *Moyes v. Dixon*, 7 F. 386—Ct. of Sess.

Granddaughter.—A workman was killed in the course of his employment. For eight years he had supported A, a child of his deceased daughter. A's father had not been heard of during that time, and it was not known whether he was alive or dead. Nothing was known about A's paternal grandparents. The workman was survived by a son and daughter:—*Held*, that A was a dependant of the deceased workman within section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Cooper v. Fife Coal Co.*, [1907] S.C. 564—Ct. of Sess.

Partial Dependency—Mode of Assessing Compensation—"Proportionate to the injury to" the Dependants.—By Schedule I. clause 1

(a) (ii.) of the Workmen's Compensation Act, 1897, the amount of compensation under the Act, where death results from the injury and the workman leaves dependants in part dependent upon his earnings at the time of his death, shall be such sum, not exceeding the fixed sum payable under clause 1 (a) (i.) in cases of total dependency, as may be determined on arbitration under the Act "to be reasonable and proportionate to the injury to" the dependants. In an arbitration under the Act it was proved that the wages of a deceased workman were 19*s.* 10½*d.* a week, and, if he had left dependants wholly dependent upon his earnings, the sum payable under clause 1 (a) (i.) would have been 155*l.* 0*s.* 6*d.* He left a widow who was at the time of his death earning 1*s.* 11*d.* a week by laundry work, and was in part dependent upon his earnings at the time of his death, and the County Court Judge awarded her 150*l.* (including payments previously made). Upon appeal it was contended for the employers that the County Court Judge ought to have taken into account the cost of maintenance of the deceased workman:—*Held*, that the mode of calculating the amount of compensation in cases of partial dependency under Schedule I. clause 1 (a) (ii.) of the Act only differs from the mode of calculating it in cases of total dependency under clause 1 (a) (i.) by introducing into the calculation the other source or sources of income of the dependant, and that there was nothing to shew that the County Court Judge had misdirected himself as to the mode of assessing the compensation. *Osmond v. Campbell and Harrison, Lim.*, 75 L. J. K.B. 1: [1905] 2 K.B. 852; 93 L. T. 724; 54 W. R. 117; 22 T. L. R. 4—C.A.

— **Outlay in Medical and Funeral Expenses.**—In fixing compensation under the Act, the arbitrator, in a claim by partial dependants, may take into account the outlays which the claimants have incurred in medical and funeral expenses. *Bevan v. Crawshaw* (71 L. J. K.B. 49; [1902] 1 K.B. 25), followed. *Fagan v. Murdoch* (1 F. 1179) doubted, *per Lord McLaren*. *Hughes v. Summerlee and Mossend Iron and Steel Co.*, 5 F. 784—Ct. of Sess.

— **Boy helping Family.**—A boy who earned 8*s.* a week lived at home with his father and mother and five brothers and sisters. The father earned 25*s.* a week, and two sisters together earned 19*s.* a week. These earnings were all put together into a common fund:—*Held*, that there was evidence that the father and mother were "in part dependent" upon the earnings of the boy within section 7, sub-section 2 of the Workmen's Compensation Act, 1897. *Davies v. Main Colliery Co.*, 80 L. T. 674—C.A.

Award Including Funeral Expenses — Sum "reasonable and proportionate to the injury" to the Dependants.—Where a workman, to whom death has been caused in circumstances to which the Workmen's Compensation Act, 1897, applies, leaves dependants in part dependent upon his earnings, the funeral expenses of the workman may be taken into consideration in determining the sum "reasonable and proportionate to the injury" to the dependants directed by the First Schedule to the Act, clause 1 (a) (ii.), to be awarded to them as

compensation. *Bevan v. Crawshaw Brothers (Cyfartha), Lim.*, 71 L. J. K.B. 49; [1902] 1 K.B. 25; 85 L. T. 496; 50 W. R. 98—C.A.

Standard of Living.—The plaintiff claimed compensation, under the Workmen's Compensation Act, 1897, as being in part dependent upon the earnings of his deceased son, who was killed by accident in the employment of the defendants. The County Court Judge held that the plaintiff was not dependent upon the earnings of his son, and was not entitled to compensation because he was able to maintain himself and his family in his position of life without the assistance of the earnings of his son:—*Held*, that the County Court Judge was wrong in holding that the plaintiff was not a dependant because he was able to maintain himself and his family without the assistance of his son's earnings. *Howells v. Vivian*, 85 L. T. 529; 50 W. R. 163—C.A.

In an arbitration under the Act the sheriff found a father entitled to compensation for the death of his only son, on the ground that the father was in part dependent on the earnings of the son. The son's employers appealed on the ground that the father was dependent on the son only because the father supported a cripple brother who lived with him and his son. The Court affirmed the judgment of the sheriff, holding that there was nothing in the case for appeal to shew that the sheriff had committed an error in law. *Leggett v. Burke*, 4 F. 693—Ct. of Sess.

Earnings by Betting.—A father claimed compensation in respect of the death of his son, who died from injuries sustained in the course of his employment. The son's average weekly earnings from his employment were 1l. 4s. 1d., but he also practised a systematic course of betting which brought him a substantial profit. The father, who was a widower, fifty-four years of age, and without dependants, suffered from bronchitis and rheumatism, and his capacity for work was consequently precarious, but his average weekly earnings during a period of forty weeks were 1l. 4s. 11d. The son made payments to his father which averaged 10s. per week. Father and son did not live together:—*Held*, that the father was not in part dependent upon the earnings of his son within the meaning of the Act. *Arrol & Co. v. Kelly*, 7 F. 906—Ct. of Sess.

Apportionment of Compensation—Payment to Legal Personal Representative—Investment in Name of Registrar.—In an arbitration under the Workmen's Compensation Act, 1897, the County Court Judge awarded that a sum, payable by employers as compensation for injury to a workman resulting in death, should be apportioned between the widow, who was the legal personal representative of the workman, and the two infant sons, who were the other dependants of the workman, and that the employers should pay the sum apportioned to the sons to the Registrar of the Court, to be invested in his name in the Post-Office Savings Bank for their benefit:—*Held*, that on the true construction of clauses (4), (5), (6), and (7) of the First Schedule to the Act, the County Court Judge had jurisdiction to make the order, and was not bound by the first part of clause (4) to

order the payment of the full amount of the compensation to the legal personal representative of the workman. *Daniel v. Ocean Coal Co.*, 69 L. J. Q.B. 567; [1900] 2 Q.B. 250; 82 L. T. 523; 43 W. R. 467; 64 J. P. 436—C.A.

Death of Sole Dependant before Claim for Compensation.—The sole total dependant of a workman who was killed by an accident arising out of his employment died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. If she had lived and taken the necessary steps, it was admitted that she would have been entitled to 150l. compensation. The personal representative of the deceased workman subsequently took proceedings in the County Court to recover compensation to be applied for the benefit of the dependant and in payment of her debts:—*Held*, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount. *O'Donovan v. Cameron*, [1901] 2 Ir. R. 633—C.A.

(21) Costs.

Application, of—Taxation—Discretion of Arbitrator.—An application under Schedule I. clause 12 of the Workmen's Compensation Act, 1897, to vary weekly payments of compensation is not necessarily, for the purposes of taxation of costs, to be treated either as an original or as an interlocutory matter. *Rigby & Co. v. Cox (No. 2)*, 73 L. J. K.B. 690; [1904] 2 K.B. 208; 91 L. T. 72; 68 J. P. 385; 20 T. L. R. 461—D.

The arbitrator has a discretion in each case under Schedule II. clause 6, and has no power to lay down any general rule as to how such applications are to be treated for the purposes of taxation. *Id.*

Action under Employers' Liability Act Dismissed—Assessment of Compensation under Workmen's Compensation Act—Costs of Action and Arbitration.—Where an action brought under the Employers' Liability Act, 1880, is dismissed, and the County Court Judge determines that the defendant would be liable to pay compensation under the Workmen's Compensation Act, 1897, and proceeds under section 1, sub-section 4 of that Act to assess such compensation, the costs of the action, including the proceedings for the assessment of compensation, may be dealt with at the discretion of the County Court Judge. *Cattermole v. Atlantic Transport Co.*, 85 L. T. 513; 50 W. R. 129; 66 J. P. 4—C.A.

Admission of Liability—Duty of Widow to take out Letters of Administration—Subsequent Application to Court—Compensation Paid into Court.—A workman, who was accidentally killed in the course of his employment, died intestate, leaving a widow and children, who as his dependants were entitled to be paid compensation by his employers under the Workmen's Compensation Act, 1897. The amount of compensation was agreed upon between the widow and the employers, but the employers refused to pay this amount to her unless she first took out letters of administration. The widow refused this condition and commenced

proceedings against the employers to obtain compensation under the Act. The employers paid the agreed amount of compensation into Court. The County Court Judge ordered the employers to pay to the widow the costs of her application up to the date of the payment into Court. Against this order the employers appealed:—*Held*, that the employers were not entitled to insist on the widow taking over letters of administration before they paid over to her the agreed amount of compensation:—*Held*, also, that the proceedings for compensation having been rightly commenced, the County Court Judge had jurisdiction to order the employers to pay the widow the costs of her application up to the date of the payment into Court. *Clatworthy v. Green*, 86 L. T. 702; 50 W. R. 610; 66 J. P. 596—C.A.

Failure of Action to Recover Damages—Assessment of Compensation at Plaintiff's Request.—The effect of section 1, sub-section 4 of the Workmen's Compensation Act, 1897, which provides that, where an action brought against an employer for injury caused by an accident is dismissed and the Court upon the plaintiff's request proceeds to assess compensation, the Court "shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act," is to leave the Court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act. *Cattermole v. Atlantic Transport Co.*, 71 L. J. K.B. 173; [1902] 1 K.B. 204; 85 L. T. 513; 50 W. R. 129; 66 J. P. 4—C.A.

(22) Appeal.

Questions of Law.—The Court of Appeal has jurisdiction under the Workmen's Compensation Act, 1897, to entertain an appeal upon questions of law only. *Smith v. Lancashire and Yorkshire Railway*, 68 L. J. Q.B. 51; [1899] 1 Q.B. 141; 79 L. T. 633; 47 W. R. 146—C.A.

Deduction of Costs under Employers' Liability Act, 1880—Workmen's Compensation Act, 1897.—In an action under the Employers' Liability Act, 1880, the County Court Judge nonsuited the plaintiff, and his decision was affirmed by the Divisional Court. The County Court Judge, upon the application of the plaintiff, assessed compensation under the Workmen's Compensation Act, 1897, and deducted from the amount awarded the costs incurred by the defendants in the action under the Employers' Liability Act and in the appeal to the Divisional Court. The plaintiff appealed to the Divisional Court against the order as to the deduction of the costs:—*Held*, that the appeal lay to the Court of Appeal, under Schedule II. par. 4 to the Workmen's Compensation Act, 1897. *Williams v. Army and Navy Auxiliary Co-operative Society*, 23 T. L. R. 408—D.

Refusal of County Court Judge to Direct Payment of Amount into Post-Office Savings Bank
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by Insurers.—No appeal lies under the Second Schedule, clause 4 of the Workmen's Compensation Act, 1897, to the Court of Appeal against the refusal of a County Court Judge to direct payment by insurers of the compensation awarded to a workman into the Post-Office Savings Bank under the provisions of section 5, sub-section 1 of the Act. *Leech v. Life and Health Assurance Association*, 70 L. J. K.B. 544; [1901] 1 K.B. 707; 84 L. T. 414; 49 W. R. 482—C.A.

An appeal lies under section 120 of the County Courts Act, 1888, to the Divisional Court from an order by a County Court Judge under the provisions of section 5 of the Workmen's Compensation Act, 1897, directing payment by insurers of the compensation awarded to a workman into the Post-Office Savings Bank. *Morris v. Northern Employers' Mutual Indemnity Co.*, 71 L. J. K.B. 733; [1902] 2 K.B. 165; 86 L. T. 748; 50 W. R. 545; 66 J. P. 644—C.A.

Subrogation of Workman to Rights of Employer—Insurance.—The effect of section 5 of the Workmen's Compensation Act, 1897, is to subrogate the workman to the rights of the employer against his insurers; the workman has no larger rights against the insurers than the employer has. *Id.*

Refusal of County Court Judge to Review Taxation.—No appeal lies to the Court of Appeal from the refusal of a County Court Judge to direct a review of the taxation of the costs of an application to vary an agreement for a weekly payment to a workman registered under clause 12 of the First Schedule to the Workmen's Compensation Act, 1897. *Rigby v. Cox (No 1)*, 73 L. J. K.B. 80; [1904] 1 K.B. 358; 89 L. T. 717; 52 W. R. 195; 68 J. P. 195; 20 T. L. R. 186—C.A.

— An appeal will not lie to the Court of Appeal from the refusal of a County Court Judge to direct a review of the taxation of costs under an order made under section 1, sub-section 4 of the Workmen's Compensation Act, 1897. *Keane v. Nash*, 88 L. T. 790—C.A.

Order by County Court Judge for Payment of Compensation into Post-Office Savings Bank—Workmen's Compensation Act, 1897—"Direction in an action or matter."—An appeal lies to the Divisional Court from an order made by a County Court Judge, under section 5 of the Workmen's Compensation Act, 1897, directing payment by insurers of the compensation awarded to a workman into the Post-Office Savings Bank, such an order being a "direction in an action or matter" within the meaning of section 120 of the County Courts Act, 1888. *Kniveton v. Northern Employers' Mutual Indemnity Co.*, 71 L. J. K.B. 588; [1902] 1 K.B. 880; 86 L. T. 721; 50 W. R. 704—D.

Costs of.—Where an applicant under the Workmen's Compensation Act appeals unsuccessfully against the amount of compensation awarded him, the costs of appeal will be set off against his costs in the court below. *Case v. Colonial Wharves*, 53 W. R. 514—C.A.

— Security for Costs—Request for.]—Before

applying to the Court for security for the costs of an appeal under the Workmen's Compensation Act upon the ground of the appellant's poverty, the respondent ought first to apply to the appellant for security. *Stamland v. North-Eastern Steel Co.*, 23 T. L. R. 1—C.A.

— **When Ordered.**—An order for security for the costs of an appeal under the Workmen's Compensation Act, 1897, will be ordered in a proper case even if the County Court Judge has stayed execution with a view to an appeal. *Shea v. Drolenvaux*, 88 L. T. 679—C.A.

— **New Trial—Re-hearing.**—The rule that no security for costs is required on an application to the Court of Appeal under the Supreme Court of Judicature Act, 1890, for the new trial of an action in the King's Bench Division will not be extended to an appeal under the Workmen's Compensation Act, 1897, which, if successful, will practically result in a new trial of the case. *Harwood v. Abrahams*, 70 L. J. K.B. 746; [1901] 2 K.B. 304; 84 L. T. 857—C.A.

— **Poverty of Appellant.**—In an appeal from a County Court Judge to the Court of Appeal under the Workmen's Compensation Act, 1897, if it appears that the appellant will, if unsuccessful, be unable through poverty to pay the respondent's costs of the appeal, he will, in accordance with the ordinary practice of the Court of Appeal, be ordered to give security for such costs. *Hall v. Snowden, Hubbard & Co. (No. 1)*, 68 L. J. Q.B. 363; [1899] 1 Q.B. 598; 80 L. T. 256; 47 W. R. 322—C.A.

Motion to Find Compensation Due under Act—Action under Employers' Liability Act Dismissed.—An action by a widow for damages in respect of the death of her husband by accident on January 2, 1900, was raised within two months thereafter. The action was dismissed on June 16, 1900, and on appeal on November 29, 1900. On February 14, 1901, the pursuer, applied to the Court for a finding that compensation would have been due under the Workmen's Compensation Act, 1897, and to assess the same in terms of section 1, sub-section 4 thereof. THE COURT refused the application. *Baird v. Higginbotham*, 3 F. 673—Ct. of Sess.

12. SEDUCTION.

Action for—Girl Seduced while Living with her Father and Mother—Child Born after Death of Girl's Father—Action by Mother.—The plaintiff, a widow, brought an action for the seduction of her daughter S. The seduction took place in the lifetime of the plaintiff's husband, S.'s father, and while S. was living with her parents. After her father's death S. continued to reside with the plaintiff rendering her the ordinary household services. Two months after her father's death S. was delivered of a child, the result of the seduction.—*Held*, that the action was not maintainable by the plaintiff either at common law or by virtue of the Married Women's Property Acts. *Hamilton v. Long*, [1908] 2 Ir. 407—K.B. D. Affirmed, [1905] 2 Ir. R. 552—C.A.

Service at Time of Seduction—Servant in

Defendant's Service.—The plaintiff's daughter was seduced by the defendant while in his service as a barmaid and general assistant earning her board and lodging and eight shillings a week. On one day in the week she used to visit her father's house and help her mother in the household work and care of the children:—*Held*, that there was no evidence that the girl was in her father's service. *Dictum in Thompson v. Ross* (29 L. J. Ex. 1) approved. *Whitbourne v. Williams*, 70 L. J. K.B. 933; [1901] 2 K.B. 722; 85 L. T. 271—C.A.

— **Evidence of.**—Upon the death of a farmer, twenty-eight years prior to the commencement of the action, testate, but whose will was never proved, his widow and three children resided on the farm, which was managed by the widow until her death, which occurred eight years after that of her husband. Then her daughter, who was considerably older than the other two children (sons), and who was at that time the only adult member of the family, became manager, paid the rent, and got receipts in the names of her father's representatives. She also did the indoor servant's work, no servant being kept, and had charge of the domestic arrangements. Seven years later the elder of her two brothers attained twenty-one. From that time he worked on the farm, and was rated as the occupier. His sister continued to perform the duties of indoor servant, and to make things comfortable for her two brothers in the house. In an action by the eldest brother for the seduction of his sister, —*Held*, that there was evidence upon which the verdict of the jury in favour of the plaintiff could be sustained. (HOLMES, L.J., dissenting.) *Murray v. Fitzgerald*, [1906] 2 Ir. R. 254—C.A.

What is adequate evidence of service in such cases considered. *Ib.*

Action by Master—Damages—Loss of Service.—In an action by a master to recover damages for the seduction of his servant, the master not being the parent of, or related or *in loco parentis* to, the servant, the plaintiff can only recover out-of-pocket expenses owing to his being deprived of her services. *McKenzie v. Harding*, 23 T. L. R. 15—Sutton, J.

Bastardy Order Quashed.—*See ESTOPPEL.*

13. OTHER MATTERS.

Accident Occurring in England—Employer Resident in Scotland—Jurisdiction of County Court.—*Rea v. Owen*, 71 L. J. K.B. 770.

Conspiracy to Injure Master.—*See CONSPIRACY.*

Contract in Restraint of Trade.—*See CONTRACT*, col. 525.

Death of Servant Caused by Negligence—Right of Master.—*See NEGLIGENCE.*

Indemnity of Master—Delay in Notice to Company.—*See INSURANCE*, col. 1022.

Inducing Master to Break Contract—Action by Servant.—*See CONTRACT*, col. 537, and col. 1445.

Inducing Servant to Leave Employment—Receiver—Injunction.—See *MALICIOUS PROCEEDINGS*, col. 1445, and *Dixon v. Dixon*, 73 L. J. Ch. 103, *post*, PRACTICE.

Libel by Servant—Liability of Corporation for.—See CORPORATION.

Negligence of Servant—Liability of Guardians.—See *Tozeland v. West Ham Guardians*, 76 L. J. K.B. 514, *post*, POOR LAW.

MAXIMS.

"Volenti non fit injuria."—*Per* LORD KINNEAR: The defence embodied in the maxim *Volenti non fit injuria* is the same whether stated by a master against his servant or by a landlord against his tenant. *Cameron v. Young*, [1907] S. C. 475—Ct. of Sess. And see *Williams v. Birmingham Battery Co.*, 68 L. J. Q.B. 918.

"Quicquid plantatur solo, solo cedit."—See FIXTURES.

"Actio personalis moritur cum persona."—See *Duncan, In re*, 68 L. J. Ch. 253, *ante*, EXECUTOR. See also *Davies v. Hood*, PRACTICE; and *Formby v. Barker*, 72 L. J. Ch. 716, VENDOR AND PURCHASER.

"In pari delicto, potior est conditio possidentis."—See *Harse v. Pearl Life Assurance Co.*, 73 L. J. K.B. 373, PRACTICE AND PLEADING.

MAYOR'S COURT.

Costs—Action for Libel—Judgment for Damages not Exceeding 5*l.* and Costs—Jurisdiction to Allow Costs other than Court Fees and Witnesses' Allowances.—The true construction of rule 1 of the Mayor's Court of London Fees and Costs Rules, 1890, is that in every action or matter in the Court the costs shall be taxed according to the scales set out in the schedules, where a scale is provided, but where no scale is provided the jurisdiction of the Court to allow costs is left unfettered. *Hall v. Launspach*, 67 L. J. Q.B. 372; [1898] 1 Q.B. 513; 78 L. T. 243—C.A.

In an action for libel in the Mayor's Court the jury found a verdict for the plaintiff with 2*l.* 10*s.* damages, and judgment was entered for 2*l.* 10*s.* damages and costs. The Registrar, in taxing the costs, allowed the plaintiff costs beyond the Court fees and allowances to witnesses. The defendant applied for a writ of prohibition on the ground of want of jurisdiction, there being no scale in the schedules annexed to the Fees and Costs Rules, 1890, applicable to a case in which the amount recovered does not exceed 5*l.*:—*Held*, that the defendant, on whom the burden of proof lay, had failed to prove that the Court had no jurisdiction to allow such costs previously to the Fees and Costs Rules, 1890, the previous practice of the Court and section 11 of the Mayor's Court of London Procedure Act, 1890, affording a strong presumption in favour of the jurisdiction; and that the jurisdiction, if it existed, was not taken away by the Fees and Costs Rules, 1890, or by the Mayor's Court Rules, 1892. *Ib.*

Semble, the Mayor's Court has jurisdiction to allow costs in an action for libel in which a sum not exceeding 5*l.* is recovered, notwithstanding that the schedules to the Fees and Costs Rules, 1890, contain no scale applicable to the case. *Ib.*

Security for Costs of Appeal.—Section 8 of the Mayor's Court of London Procedure Act provides that in case of an appeal the party appealing shall give security within such time or times as the Court shall direct for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment if the party appealing be the defendant and the appeal be dismissed. On an appeal by an unsuccessful plaintiff in the Mayor's Court, the Judge directed that he should give security for the costs of the appeal and also for the costs of the defendant at the trial:—*Held*, that the learned Judge had no jurisdiction under the above section to direct the plaintiff to give security for the defendant's costs in the trial in addition to giving security for the costs of the appeal. *Green v. Isaacs*, 96 L. T. 122—D.

Stay of Proceedings.—The mere fact of a plaintiff giving security for the costs of appeal under the above section does not operate as a stay of proceedings. *Ib.* And see COURT.

MEASURES.

See WEIGHTS AND MEASURES.

MEAT.

See LOCAL GOVERNMENT and METROPOLIS, col. 1630.

MEDICINE AND MEDICAL PRACTITIONER.

Medical Men.—5 Edw. 7 c. 14 is the *Medical Act* (1886) *Amendment Act*, 1905.

Pharmacy.—61 & 62 Vict. c. 25 is the *Pharmacy Acts Amendment Act*, 1898.

Veterinary Surgeons.—63 & 64 Vict. c. 24 is the *Veterinary Surgeons Amendment Act*, 1900.

"Physician"—Title Adopted by L.S.A. London (1886).—A licentiate of the Society of Apothecaries of London, registered under the Medical Act, 1886, and qualified by the society's certificate to practise in medicine and surgery, as well as an apothecary, is not entitled to describe himself as a "physician"; but in order to support a conviction under section 40 of the Medical Act, 1886, such adoption must have been adopted "wilfully" as well as "falsely." *Hunter v. Clare*, 68 L. J. Q.B. 278; [1899] 1 Q.B. 635; 80 L. T. 197; 47 W. R. 394; 63 J. P. 308—D.

Dentist—Taking or Using the Name—Person—Company.—The word "person" in the Dentists Act, 1878, relates only to an individual, and does not embrace a corporation or com-

pany. A company by assuming a name which includes the words "surgeon-dentists" does not become liable to a prosecution under the Act for using a name, title, addition, or description implying that it is registered under the Act. *O'Duffy v. Jaffe*, [1904] 2 Ir. R. 27—K.B. D.

— **Company.**—Although the word "person" in section 3 of the Dentists Act, 1878, has been held not to include artificial person and not to apply to limited companies, a limited company is not at liberty to use the word "dentist" or its synonyms in such a way as to amount to a false representation calculated to induce the public to believe that the individuals whom it comprises or employs are qualified "dentists," and may be restrained from doing so by injunction at the suit of the Attorney-General. *Att.-Gen. v. Myddletons*, [1907] 1 Ir. R. 471—Barton, J.

— **Appropriation of Payments—Contract—Consideration.**—The Dentists Act, 1878, s. 5, prevents an unqualified person from recovering any fee or charge for dental operations or dental attendance or advice, but there is nothing in the Act which renders the contract to do such work illegal, and notwithstanding section 5 an unqualified person can recover in respect of mechanical work done or materials supplied in the course of such dental operations or attendance. Where, therefore, money has been paid to the unqualified person on general account of services partly within and partly without the scope of section 5, he may appropriate it to the payment of the fees and charges which he could not recover under that section, and maintain an action for the balance which is not within the scope of section 5. *Seymour v. Pickett*, 74 L. J. K.B. 413; [1905] 1 K.B. 715; 92 L. T. 519—C.A.

— **Registration under Companies Acts—Information by Attorney-General.**—Certain persons formed a company under the Companies Act with the title of "Mr. Appleton, Surgeon-Dentist, Limited," for the following objects (*inter alia*): To carry on, through competent persons, the business of dentists or dental surgeons in the United Kingdom, and, for that purpose, to employ suitable persons, and to purchase, hire, or procure suitable instruments, furniture, and fittings; and they carried on and advertised such business. None of the directors or other persons forming the company was a qualified dentist, registered under the Dentists Act. In an information by the Attorney-General, at the relation of the honorary secretary, Irish branch of the British Dental Association, alleging that the company was formed for the fraudulent purpose of deceiving the public, by falsely representing that the business was carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly registered under that Act, the company, the signatories to the memorandum of association, and certain directors named as special defendants, not delivering any defence, it being admitted that the company was in liquidation,—*Held*, that the Attorney-General, suing in the public interest to prevent an admitted fraudulent attempt to evade statutory provisions, was entitled to an injunction, and that the costs of the proceedings should be paid by the special

defendants. *Att.-Gen. v. Appleton*, [1907] 1 Ir. R. 252—M.R.

— **Unregistered Practitioner—Supply of False Teeth—Fitting Set in Patient's Mouth—Right to Recover Fee.**—"Dental operation, dental attendance, or advice."—A person who was carrying on the practice of a dentist, but who was not registered under the Dentists Act, 1878, made for the defendant and fitted to the defendant's mouth a set of false teeth, which were taken by the defendant and kept and used by him. The defendant having refused to pay for the same,—*Held*, that section 5 of the Dentists Act, 1878, which prevented an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same. *Hennan v. Duckworth*, 90 L. T. 546; 20 T. L. R. 436—D.

— **Predecessor's Name and Qualification Exhibited Outside Premises.**—The respondent, who was not registered either as a dentist or as a medical practitioner, purchased a dental practice from the representatives of S., a dentist, together with the right to keep affixed on the premises S.'s name and qualifications. The respondent's own name, without any letters after it, and his predecessor's name and qualifications as follows—"Mr. C. R. Stent, R.D.S. Eng., Surgeon-Dentist," were affixed to the premises. The magistrate dismissed an information taken out against the respondent under the Dentists Act, 1878, for improperly using the words "R.D.S. Eng., Surgeon-Dentist," on the ground that he had not taken or used such addition or description implying that he was registered or specially qualified to practise dentistry:—*Held*, that the decision of the magistrate, being on a question of fact, could not be interfered with. *Brown v. Whitlock*, 67 J. P. 451—D.

— **Using Title of Company.**—The appellant was the sole director and manager of "The West Central Dental Institute, Limited." He was not registered under the Dentists Act, nor was he a qualified medical practitioner. A summons having been taken out against him for using the description on the door-plate of the premises he occupied "German Dental Institute, West Central Dental Institute, Limited," which implied that he was a person specially qualified under the Dentists Act or registered thereunder, the magistrate convicted him:—*Held*, that the conviction was right. *Panhaus v. Brown*, 68 J. P. 435—D.

— **Name of Proposed Company involving False Representation—Refusal of Registrar to Register—Mandamus.**—The memorandum of association of a company proposed to be formed for the purpose of carrying on the business of teeth extracting and artificial-teeth making provided that the name of the company should be "S. G. Rowell, Dentist, Limited." None of the signatories to the memorandum (one of whom was S. G. Rowell) was registered as a dentist under the Dentists Act, 1878. The Registrar of Joint-Stock Companies having refused to register the memorandum of association under the Companies Act, 1862,—

Held, that a *mandamus* would not be granted to compel him to do so, since the use by the company of the proposed name would involve a false representation, tending to mislead the public. *Re v. Registrar of Joint-Stock Companies*, [1904] 2 Ir. R. 634—K.B. D.

Certified Midwife—Employing Uncertificated Person.—The Central Midwives Board, when enquiring into an offence alleged to have been committed by a certified midwife under the Midwives Act, 1902, acts in a judicial capacity. *Quere*, however, whether the Board is bound to act only upon the strict legal rules of evidence. *Feldmann, In re*, 97 L. T. 548; 71 J. P. 269; 5 L. G. R. 653; 23 T. L. R. 432—D.

The word "employ" in section 1, sub-section 4 of the Act—which provides that "no woman certified under this Act shall employ an uncertificated person as her substitute"—is not confined to employment for payment, but includes any employment by the midwife of an uncertificated person as her substitute. *Ib.*

Inquest—Post-mortem Examination—Fees—“Public hospital”—“Medical officer.”—By the proviso to section 22 of the Coroners Act, 1897, where an inquest is held on the body of a person who has died in a public hospital, the medical officer whose duty it may have been to attend the deceased as medical officer of the hospital shall not be entitled to fee or remuneration for making a *post-mortem* examination and attending to give evidence:—*Held*, first, that a children's and general hospital, supported by voluntary contributions, and founded for the free admission and relief of patients within a certain area upon production of a governor's letter, and of patients outside that area upon payment of a small weekly sum, was a public hospital within the proviso; and secondly, that a medical man, practising in the neighbourhood, who held the appointment of honorary medical officer to such hospital, for which he received no remuneration by way of fees or honorarium, was the medical officer of a public hospital, whose duty it was to attend the deceased, within the proviso. *Horner v. Lewis*, 67 L. J. Q.B. 524; 78 L. T. 792; 62 J. P. 345—D.

Infectious Disease—Statutory Notification of—Public Authorities Protection.—*Semble*, a medical practitioner in giving in respect of a private patient the statutory notification to the local medical officer of health that such patient is suffering from an infectious disease is acting in the execution of a statutory or public duty, and is therefore entitled to the benefit of the provisions of section 1 (a) of the Public Authorities Protection Act, 1893. *Salisbury v. Gould*, 68 J. P. 158—Grantham, J.

Breach of Confidence.—The question whether a breach of medical confidence is actionable depends on the character of the disclosure made. *A. B. v. C. D.*, 7 F. 72—Ct. of Sess.

Specific for Complaint Affecting Human Body—Gum Pastilles—Label on Box.—The words "Pure Gum Pastilles: Influenza: Delightfully soothing to singers and public speakers," printed on a label affixed to boxes of gum pastilles amount to a statement that such pastilles are

beneficial in the case of a complaint affecting the human body within the meaning of 52 Geo. 3, c. 150. Selling such labelled boxes without the medicine stamp is therefore an offence under that statute. *Ransom v. San-guinetti*, 67 J. P. 219—D.

Stamp Duty—Ammoniated Tincture of Quinine—Exemption—Packet, Box, or Bottle—Label—"Original or first vendor."—A duly qualified chemist sold without a stamp a bottle containing a tincture of well-known properties and in general use, and labelled "Ammoniated Tincture of Quinine, B.P., a well known and highly recommended remedy for Influenza and Colds":—*Held*, that he did not thereby make himself the "owner, proprietor, maker, compounder, original or first vendor" of the tincture; that the tincture came within the "special exemptions" in the schedule to the Medicine Stamp Act, 1812; and that the chemist was not liable to any penalty under section 2 of that Act. *Farmer v. Glyn-Jones*, 72 L. J. K.B. 523; [1903] 2 K.B. 6; 89 L. T. 64; 51 W. R. 524; 67 J. P. 240—D.

Poison—Restriction on Sale—Person having Conduct and Management of Sale—Poison Sold on Behalf of Manufacturers.—A florist and seedsman, at whose shop orders are received for a weed-killer (admitted to be a poison), recommended by him to his customers, and who transmits the orders to a chemical company, the manufacturers, receiving from them a commission on sale for his recommendation, is not a person acting in the conduct or management of the sale of poisons, nor liable to a penalty under section 15 of the Pharmacy Act, 1868. *Pharmaceutical Society v. White*, 69 L. J. Q.B. 289; [1900] 1 Q.B. 454; 81 L. T. 821; 48 W. R. 335; 64 J. P. 168—D.

Vermin-killer—Resolution of Pharmaceutical Society.—The Pharmaceutical Society of Great Britain has power, by resolution passed in pursuance of section 2 of the Pharmacy Act, 1868, to declare what articles shall be deemed to be poisons under Parts I. and II. respectively of Schedule A to the Act. *Brown v. Leggett*, 75 L. J. K.B. 193; [1906] 1 K.B. 330; 94 L. T. 200; 54 W. R. 362; 70 J. P. 109; 21 Cox C.C. 114; 22 T. L. R. 180—D.

Restriction on Sale—Canvasser for Orders with Authority to Receive Money—"Sell."—A shopkeeper who, acting as agent upon commission for the manufacturers of a poison within the meaning of the Pharmacy Act, 1868, receives at his shop orders for the poison and the purchase-money for it, and does not make any binding contract of sale with respect to it, but merely forwards the orders and the money to the manufacturers for them to deal with, does not "sell" the poison within the meaning of section 15 of the Act, and does not keep open shop for retailing poison within the meaning of that section. *Pharmaceutical Society v. White*, 70 L. J. K.B. 386; [1901] 1 K.B. 601; 84 L. T. 188; 49 W. R. 407; 65 J. P. 340—C.A.

Sale of Medical Practice.—*See COVENANT.*

Termination of Partnership—Professional Misconduct.—*See PARTNERSHIP.*

MERCHANDISE MARKS.*See* TRADE MARK.**MERCHANT SHIPPING.***See* SHIPPING.**MERGER.**

Intention.—A being entitled to an estate for life in the lands of B, subject to (among others) a first incumbrance for 900*l.*, and a charge for younger children, with power to mortgage, purchased the incumbrance, which was conveyed to a trustee for him. He mortgaged the lands subject to the charges. By his will he directed certain other lands to be sold for the purpose of paying off the charges and incumbrances on the lands of B; and he empowered his trustees, during the minority of his son (to whom he devised the lands of B, and bequeathed his residuary personal estate), to apply the surplus rents of all the lands, and also to sell his personal estate, and apply the proceeds thereof, for the same purpose. By a codicil he increased the amount of the charge for younger children:—*Held*, that the charge of 900*l.* merged. *Lloyd's Estate, In re*, [1903] 1 Ir. R. 144—Ross, J.

—The rule of equity that the question of merger must be decided by the intention of the parties applies to the merger of estates as well as of charges. *Capital and Counties Bank v. Rhodes*, 72 L. J. Ch. 386; [1903] 1 Ch. 631; 88 L. T. 255; 51 W. R. 470—C.A.

Lease—Mortgage by Sub-demise—Conveyance of Fee-simple to Lessee—Mortgage of Fee-simple—Intention to Preserve Term—Power of Re-entry—Right of Mortgagees of Freehold to Enforce after Foreclosure—Legal Estate.—In May, 1897, R., as beneficial owner, mortgaged his leasehold interest in certain property in a register county by sub-demise to F. & Co., and he declared himself a trustee of the outstanding day. R. purchased the freehold of the property, and it was conveyed to him, subject to but with the benefit of the lease, by deed of July 27, 1899. By deed of the same date he mortgaged the freehold and leasehold properties referred to in the deeds in the schedule to the plaintiffs; the schedule mentioned the freehold title-deeds and the counterpart lease, and the security when offered was described as "a freehold ground rent." On August 28, 1899, R. was registered under the Land Transfer Acts as proprietor of the land with a possessory title. On the same day he charged it with the money due from him to the plaintiffs, and by the same deed conveyed the land to them subject to redemption. The plaintiffs were registered as proprietors of the charge, the certificates of registration of both the title and the charge being dated September 18, 1899. F. & Co. took possession under their mortgage. The plaintiffs brought their action for foreclosure, a declaration that the term had not merged, and that they were entitled to re-enter under the power of re-entry in the lease:—*Held*, first, that neither on the sale to R. nor

on the mortgage by him to the plaintiffs would the beneficial interest in the term have been deemed to be merged or extinguished in equity, and the case came within sub-section 4 of section 25 of the Judicature Act, 1873, and there was no merger of the term. The law laid down in *Thorne v. Cann* (64 L. J. Ch. 1, 6; [1895] A.C. 11, 18, 19), *Chambers v. Kingham* (48 L. J. Ch. 169; 10 Ch. D. 743), and *Ingle v. Vaughan-Jenkins* (69 L. J. Ch. 618; [1900] 2 Ch. 368) applied. *Ib.*

Held, secondly, by ROMER, L.J., and COZENS-HARDY, L.J. (COLLINS, M.R., agreeing, though with doubt), that the legal estate was vested in the plaintiffs under the mortgage deed of August 28, 1899, and they had the legal right of re-entry for non-payment of rent under the lease. *Ib.*

Lease of Settled Estates—Lessee Becoming Legal Tenant for Life—Intention—Lessee's Benefit.—In determining questions of merger, the principle by which the Court is guided is the intention of the parties; and in the absence of the expression, either documentary or verbal, of any intention the Court looks to the benefit of the person in whom the two estates become vested. *Ingle v. Vaughan-Jenkins*, 69 L. J. Ch. 618; [1900] 2 Ch. 368; 83 L. T. 155; 48 W. R. 684—Farwell, J.

Where a tenant for life in remainder by building a house on part of the settled land entitles himself to specific performance of an agreement to grant a lease of the house and premises, and becomes legal tenant for life of the settled estates before the lease is granted, there will be no merger of the leasehold interest, for although no intention was expressed at the time of entering into the contract, the Court will have regard to the expenditure incurred, and will consider that it is for the benefit of the lessee that the term should be kept alive. *Ib.*

Real Estate—Sum Charged in Favour of Son—Fee-simple—Union in Single Owner—Intention.—The owner of the fee-simple of certain real estate created a term to secure the raising of certain sums charged in favour of two of his younger sons if and when they should respectively attain the age of twenty-one years, to be paid on their respectively attaining that age, or on the death of their father, whichever should happen last. By the same settlement he covenanted with the trustees that the annual value of his settled estate should never fall below a certain sum. One of the sums vested in one of the sons on his attaining twenty-one years, but he subsequently died intestate during the lifetime of his father, leaving his father his sole next-of-kin. The father did not take out administration to his son. The father subsequently died, having by his will devised the property out of which the charges were raisable, but without having made any mention of the existence of the charges:—*Held*, under the circumstances, that there was no indication of any intention on the part of the father to treat the portion coming to him as sole next-of-kin of his son as still subsisting; that it was for the benefit of the father that the portion should sink back into the fee-simple; and that it had so sunk back accordingly. *Compton (Lord) v.*

Owenden (2 Ves. 261) followed. *Radcliffe, In re*; *Radcliffe v. Bewes* (61 L. J. Ch. 186; [1892] 1 Ch. 227), distinguished. *French-Brewster, In re*; *Walters v. French-Brewster*, 73 L. J. Ch. 405; [1904] 1 Ch. 713; 90 L. T. 378; 52 W. R. 377—*Swinfen Eady, J.*

Equitable Owners—Acquisition of Legal Estate—Commensurate Interests.—The rule that where an owner of an equitable interest acquires a commensurate legal estate the equitable interest will merge in the legal estate, applies where two persons become entitled to commensurate legal and equitable interests. *Selous, In re*; *Thomson v. Selous*, 70 L. J. Ch. 402; [1901] 1 Ch. 921; 84 L. T. 818; 49 W. R. 440—*Farwell, J.*

The difference in value between a tenancy in common and a joint tenancy is so small and of so unsubstantial a character that it will not by itself prevent an equitable interest in common merging in a commensurate legal estate in joint tenancy. *Id.*

Equitable Interests—Lease—Mortgage by Sub-demise to Lessor—Conveyance of Fee-Simple by Lessor to Lessee Subject to Lease—Subsequent Purported Mortgage in Fee by Lessor—Estate or Interest Passing.—H., the owner in fee-simple of certain houses, by certain indentures in 1893 demised each of the houses for the term of ninety-nine years to W. at the rents and subject to the covenants therein contained, and thereupon W. sub-demised the houses to H. for the respective terms of ninety-nine years, less the last day thereof, by way of mortgage. In the same year, by deed, in which it was recited that H. had agreed to sell the houses subject to the leases to W., H., for the consideration therein mentioned, conveyed the houses together with the rents reserved by the leases, and the benefit of the covenants therein contained, to W. in fee-simple subject to the leases and the terms of years thereby respectively created. By deed also in 1893 W., for the consideration therein mentioned, conveyed the houses, together with the rents reserved by the leases and the benefit of the covenants therein contained, to the plaintiffs in fee-simple subject to the leases and the terms of years thereby respectively created. In 1894 H. by deed purported to convey all the houses to the defendant in fee-simple by way of mortgage. The defendant had no notice of the title of the plaintiffs to the houses:—*Held* (assuming, but without so deciding, that there was a merger at law of the terms of years, and that the existence of an intention on the part of H. and W. would not be sufficient to prevent such a merger), that H. and W. dealt with one another on the footing that the leases were or were to be deemed to be in existence, and that it would be inequitable to treat them as at an end, and that under the old law as it stood prior to the Judicature Act, 1873, H. had at the date of the mortgage to the defendant an equitable interest in the houses subject to the condition of accepting legal leases on the same terms as the old leases, and that under section 63 of the Conveyancing and Law of Property Act, 1881, such interest passed to the defendant by the mortgage subject to the like condition. *Brandon v. Brandon* (31 L. J. Ch. 47) discussed. *Theilsson v. Liddard*, 69 L. J. Ch. 673; [1900] 2 Ch. 635; 82 L. T. 753; 49 W. R. 10—*Stirling, J.*

Investment of Trust-moneys on Mortgage—Conveyance of Mortgaged Land to Cestui que Trust.—J. L. S., by his will dated March 23, 1849, after giving an annuity to his wife and certain specific legacies, gave all the residuum of his real and personal estate to trustees upon trust to pay the income thereof unto his daughter E. L. S. during her life, and after her decease to pay the income to his son-in-law J. L. A. S. during his life, and after the decease of the survivor of them upon trust for such one or more of the children or more remote issue of E. L. S. as the survivor of them (E. L. S. and J. L. A. S.) should by deed or will direct or appoint, and in default of such appointment upon trust for the child and all the children if more than one of E. L. S. living at the decease of the survivor of them (E. L. S. and J. L. A. S.), if more than one child equally between them as tenants in common. Provided nevertheless and the testator thereby declared it to be his will and mind that in case any child of his daughter should die in the lifetime of E. L. S. and J. L. A. S. or in the lifetime of the survivor of them leaving issue that then such issue should be entitled to the same share in the trust property as his, her, or their parent would have had if surviving the survivor of them (E. L. S. and J. L. A. S.). Provided always and the testator thereby declared it to be his will and mind and did thereby give and devise in case there should be no child or remoter issue of E. L. S. at the decease of the survivor of them (E. L. S. and J. L. A. S.) one third part of his said trust estate real and personal unto his niece M. A. S., one third part unto his brother C. T. S., and one third part unto the children of his brother J. S., equally between them as tenants in common. The testator J. L. S. died on May 11, 1849; his daughter E. L. S. died on October 3, 1851. E. L. S. had only one child—namely, E. J. S. On February 4, 1873, J. L. A. S., by two deeds poll of that date, exercised his power of appointment under the will in favour of E. J. S. E. J. S. died on October 22, 1901, predeceasing J. L. A. S.:—*Held*, nevertheless, that the appointment of February 4, 1873, stood, and was not defeated by the last recited proviso of the will. In 1864 J. L. A. S. purchased certain land in B., and on August 4, 1864, conveyed this land to the trustees of the will of the testator F. L. S. by way of mortgage. On September 7, 1893, by an indenture made between J. L. A. S. of the one part and E. J. S. of the other part, J. L. A. S. conveyed the said land in B. unto E. J. S. in fee-simple, subject to the payment of the principal moneys and interest secured by the indenture of mortgage of August 4, 1864. By another indenture of the same date, and made between the same parties, J. L. A. S. released unto E. J. S. his life estate and interest of the residuary estate of the testator J. L. S. Succession duty had not been paid by E. J. S.:—*Held*, that the mortgage debt of 400l. had not become merged in the said land in B., but passed by the residuary bequest of the personal estate of E. J. S. *Simmons, In re*; *Dennison v. Orman*, 87 L. T. 594—*Joyce, J.*

Covenant—Rate of Interest—Judgment.—A mortgage deed contained a covenant by the mortgagors for payment of the principal sum on a day named, with interest in the meantime at 5l. per cent. per annum, and also, if the

principal sum should not be then paid, that so long as the same, or any part thereof, should remain unpaid, the mortgagors would pay interest half-yearly at the same rate for the said principal sum, or so much thereof as should from time to time thereafter remain unpaid. The mortgagors having made default, the mortgagees recovered judgment against them for principal and interest on the covenant:—*Held*, that the covenant merged in the judgment, and that the mortgagees were therefore entitled only to 4l. per cent. interest on the judgment debt, and not to 5l. per cent. interest on the principal sum under the covenant. *Popple v. Sylvester* (52 L. J. Ch. 54; 22 Ch. D. 98); *Fewings, Ex parte* (53 L. J. Ch. 545; 25 Ch. D. 338), and *Lowry v. Williams* ([1895] 1 Ir. R. 274) discussed and applied. *Usborne v. Lime-rick Market Trustees*, [1900] 1 Ir. R. 85—C.A.

Priorities — Interest — Covenant — Judgment — Merger.—By local Acts of Parliament passed in 1852 and 1862 power was given to the trustees of a market to borrow money upon the security of the tolls, and the later Act provided that “the interest on the sum authorised to be borrowed under the Act of 1852, and the interest on the sum authorised to be borrowed under this Act, shall be a first charge on the tolls”:—*Held*, that the interest on a mortgage effected under the later Act took priority over the principal of a mortgage effected under the earlier Act, notwithstanding that the prior mortgagee had recovered judgment for the amount due for principal and interest, and had obtained the appointment of a receiver. Where a covenant for the payment of interest in a mortgage-deed is an independent covenant, and not merely ancillary to the covenant for the payment of the principal, it will not be merged in a judgment. A mortgage-deed contained a covenant “that so long as the principal sum or any part thereof should remain unpaid” the mortgagors would pay interest thereon at the rate of 5 per cent. The mortgagors made default, and the mortgagees recovered judgment against them for principal and interest:—*Held*, that the covenant did not merge in the judgment, and that the mortgagees were entitled to interest at the rate of 5 per cent. under the covenant, and not to 4 per cent. only on the judgment debt. *Economic Life Assurance Society v. Usborne*, 71 L. J. P.C. 84; [1902] A.C. 147; 85 L. T. 587—H.L. (Ir.)

Judgment by Consent against One Defendant.—See *McLeod v. Power*, *ante*, ESTOPPEL, col. 808.

Mortgage of Fund and Right to Balance—Assignment to Same Person.—See *Liquidation Estates Purchase Co. v. Willoughby*, 67 L. J. Ch. 251, *post*, MORTGAGE.

Reversionary Lease—Subsisting Term.—See *Lewis v. Baker*, 74 L. J. Ch. 39, *ante*, LANDLORD AND TENANT.

METROPOLIS.

1. *Statutes*, 1610.
2. *Officers*, 1610.
3. *By-laws*, 1611.

4. *Matters of Municipal Regulation*, 1611.

- (a) *Advertisements*, 1611.
- (b) *Betting*, 1613.
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 - (i.) *Generally*, 1613.
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- (k) *Sewers and Drains*, 1643.
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 - (i.) *Generally*, 1650.
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- (m) *Traffic*, 1665.
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5. *Rates and Rating*, 1666.

6. *Parish Property*, 1672.

7. *Thames*, 1673.

8. *Other Matters*, 1674.

1. STATUTES.

Canals—Dangerous Places on.—61 & 62 Vict. c. 16 is the *Canals Protection (London) Act*, 1898.

London Government.—62 & 63 Vict. c. 14 is the *London Government Act*, 1899.

Metropolis Management.—62 & 63 Vict. c. 15 is the *Metropolis Management Acts Amendment (By-laws) Act*, 1899.

Street Collections.—8 Edw. 7 c. 17 is the *Metropolitan Streets Act*, 1903.

2. OFFICERS.

Metropolitan Borough Council—“Existing officer”—**Additional Work—Remuneration—Power of Finance Committee to Remunerate for Temporary Assistance.**—The plaintiff, who at the time of the coming into operation of the London Government Act, 1899, was accountant to the Hackney Vestry, was transferred by that Act as an existing officer to the defendant council. The plaintiff did not enter into any new contract with the council, but continued to perform the duties attaching to his former office, and also, at the request, as he alleged, of the finance committee, did much additional work. He applied to the finance committee for remuneration for extra services, and the committee recommended to the council that he should be paid a sum of 50l.; but the council refused to adopt the recommendation. He sued the council on a *quantum meruit* in respect of the extra services for a sum of 112l. 10s.:—*Held*—first, that the plaintiff, not

having availed himself of the option given to him under section 30, sub-section 1 of the Act to relinquish his office on the ground that the duties he was required to perform were "not analogous" or "an unreasonable addition" to his then existing duties, must be taken to have done the additional work without reference to any implied contract that he should be remunerated for so doing; secondly, that the plaintiff's claim was inadmissible by reason of the provision in section 8, sub-section 3 of the London Government Act, 1899, that a liability exceeding 50% shall not be incurred by a Metropolitan borough council except upon a resolution of the council passed on an estimate submitted by the finance committee. *Gray v. Hackney Borough Council*, 2 L. G. R. 429—Buckley, J.

Transfer of Powers to Borough Council—Abolition of Office—Officer not Required to Devote Whole Time to Duties of Office—Compensation—Assessment—Deduction—Treasury "Rule"—Practice of Treasury—Failure of Council to Exercise Discretion—Mandamus—Appeal to Treasury—Adequate Alternative Remedy.]—A Metropolitan borough council, in assessing under section 120 of the Local Government Act, 1888, the compensation to be paid on the abolition of his office to an officer who had not been required to devote his whole time to the duties of the office, in accordance with what they ascertained to be the practice of the Treasury in assessing the compensation of Civil servants, calculated the compensation as if the officer's whole time had been required, and deducted 25 per cent. from the amount so arrived at:—*Held*, that the practice of the Treasury could not be regarded as a "rule" relating to the Civil Service within the meaning of sub-section (1) of the above section; that the council had not performed the duty imposed on them by sub-section (3) of assessing the just amount of the compensation; that the right of appeal to the Treasury given by sub-section (4) was not so adequate a remedy as *mandamus*; and that a *mandamus* ought therefore to issue to compel the council to perform their duty. *Rea v. Stepney Borough Council*, 71 L. J. K.B. 238; [1902] 1 K.B. 817; 86 L. T. 21; 50 W. R. 412; 66 J. P. 183—D.

Abolition of Office.]—See LOCAL GOVERNMENT, col. 1306.

3. BY-LAWS.

Validity—Notice to Person Complained Against.]—A by-law made by the London County Council under section 39 of the Public Health (London) Act, 1891, is unreasonable and void if it does not provide for notice to the person complained against before the commencement of proceedings. *Nokes v. Islington Borough Council*, 73 L. J. K.B. 100; [1904] 1 K. B. 610; 90 L. T. 22; 59 W. R. 399; 2 L. G. R. 334; 68 J. P. 95—D. And see next head.

4. MATTERS OF MUNICIPAL REGULATION.

(a) Advertisements.

Distribution of Print "by way of advertisement"—Handbill containing News.]—In order

that a print may be carried or distributed by way of advertisement within the meaning of section 9 of the Metropolitan Streets Act, 1867, the print itself must be an advertisement. Therefore where a print which is a publication of news, but is not in itself an advertisement, is, without the approval of the Commissioner of Police, distributed in such a way as to obtain the same consequences as if it were an advertisement, the distributor thereof is not liable to the penalty imposed by the section for distributing a print by way of advertisement, except in such form and manner as may be approved by the Commissioner of Police. *Gage v. Brealey*, 67 L. J. Q.B. 457; 46 W. R. 415—D.

Paper Scattered in Street—"Litter."—Paper advertising bills thrown in a thoroughfare may be litter within section 60, sub-section 3 of the Metropolitan Police Act, 1839. *Hills v. Davies*, 88 L. T. 464; 67 J. P. 198; 1 L. G. R. 499; 20 Cox C.C. 398—D.

Exhibition of—Licence Given by Local Authority.]—By section 30, sub-section 14 of the Baker Street and Waterloo Railway Act, 1900, the railway company were prohibited from exhibiting advertisements other than those relating to their undertaking upon premises acquired by them under the Act in a certain Metropolitan parish "unless the same shall have been approved" by the vestry or their successors. The defendant, being about to exhibit advertisements as the licensee of the railway company on a hoarding erected on land in the parish acquired by the company under the powers of the Act, applied to the plaintiff council, as successors of the vestry, for their permission. Correspondence ensued between the parties, in which the council intimated that they proposed to make a charge in respect of their permission. In an action brought by the plaintiffs against the defendant to recover a sum of 168*l.* 6*s.* 8*d.* under a contract alleged to be contained in the correspondence,—*Held*, first, that no contract was constituted by the letters; secondly, that under section 30, sub-section 14 of the Act the plaintiff council had no power to make any charge as consideration for their approval to the exhibition of advertisements; that the plaintiff council were required by the sub-section to act judicially, and that any such contract as was endeavoured to be set up would therefore, if entered into, be illegal. *Reg. v. Bowman* (67 L. J. Q.B. 463; [1898] 1 Q.B. 663) applied. *Southwark Borough Council v. Partington Advertising Co.*, 3 L. G. R. 505; 69 J. P. 183—Warrington, J.

Advertisement Hoarding on Boundary Wall—"Structure."—The respondents attached to the front walls of a shop belonging to them in the county of London certain advertisement-cases without having obtained the consent of the London County Council. The cases were constructed of sheet-iron supported by strong wrought-iron supports securely cut and pinned through the walls, though they might have been moved, with the exception of the iron supports, in a single day without injury to the building; their outer sides were covered with wooden frames carrying canvas or linen lined with advertisements, provision being made for illuminating the interior by electric light; they varied in width from two to five feet, and in

height from five to seven feet, stood out ten inches in front of the wall, that being less than the projection of the cornice over the shop, and projected ten inches beyond the building-line of the street:—*Held* (WILLS, J., dissenting), that the cases were not a "structure" within the meaning of section 22 of the London Building Act, 1894, or a bringing forward of a structure within the meaning of section 200, sub-section 3 of the Act; and that the respondents by erecting them without the consent of the Council had not acted in contravention of these sections. *Hull v. London County Council* (70 L. J. K.B. 364; [1901] 1 K.B. 580) commented on. *London County Council v. Illuminated Advertisements Co.*, 73 L. J. K.B. 1034; [1904] 2 K.B. 886; 91 L. T. 352; 53 W. R. 220; 68 J. P. 445; 2 L. G. R. 905; 20 T. L. R. 527—D.

(b) *Betting.*

By-law against.]—A by-law of the London County Council prohibiting any person from frequenting and using any street or other public place in the metropolis for bookmaking or betting is valid, and is not *ultra vires* as being repugnant to section 23 of the Metropolitan Streets Act, 1867. *White v. Morley*, 68 L. J. Q.B. 702; [1899] 2 Q.B. 34; 80 L. T. 761; 47 W. R. 583; 63 J. P. 550; 19 Cox C. C. 345—D.

— **Validity—Street Betting.]**—A by-law made by a county council under section 23 of the Municipal Corporations Act, 1882, and section 16 of the Local Government Act, 1888, prohibiting persons from frequenting and using the streets or other public places in the county for the purpose of bookmaking or betting or carrying out betting transactions, is a valid by-law "for the good rule and government" of the county, within the meaning of section 23 of the Act of 1882, and it is not too wide or unreasonable. *Thomas v. Sutters*, 69 L. J. Ch. 27; [1900] 1 Ch. 10; 81 L. T. 469; 48 W. R. 133; 19 Cox C.C. 418—C.A. s.r. *Hickey v. Hay*, 65 J. P. 232—D.

Neither is such a by-law repugnant to section 23 of the Metropolitan Streets Act, 1867 (an Act for the regulation of traffic), which provides that the assembling of three or more persons in a street for the purpose of betting is to be deemed to be an obstruction. *Thomas v. Sutters*, *supra*.

Burnett v. Berry (65 L. J. M.C. 118; [1896] 1 Q.B. 641) and *White v. Morley* (68 L. J. Q.B. 702; [1899] 2 Q.B. 34) approved. *Strickland v. Hayes* (65 L. J. M.C. 55; [1896] 1 Q.B. 290) distinguished. *Ib.* And see LOCAL GOVERNMENT, col. 1319.

(c) *Buildings.*

(i.) *Generally.*

General Line of—Appeal from Superintending Architect—Costs.]—Where the general building-line is to be defined and drawn within section 22 of the London Building Act, 1894, is a question of fact which ought to be decided with reference to the physical aspect of the street and build-

ings, &c. Therefore, on an appeal to the tribunal of appeal from the certificate of the superintending architect, that tribunal, in fixing the building-line, can take different points from which and to which they will define the general building-line from those which the superintending architect has chosen. *London County Council and London Building Act, 1894, In re*, 91 L. T. 501; 68 J. P. 490; 2 L. G. R. 1265—D.

The tribunal of appeal can award a lump sum for costs to a successful appellant instead of simply awarding costs. *Ib.*

Erection beyond General Line of Buildings —"Land lawfully occupied by building."]—

The London Building Act, 1894, s. 22, provides that no building shall, without the written consent of the County Council, be erected beyond the general line of buildings in any street, but that "this section shall not apply to any building or structure erected after the commencement of this Act, which, either at the commencement of this Act upon land, or at any time within seven years previously, has or shall have been lawfully occupied by a building or structure." Two adjoining houses abutting on, and standing more than fifty feet back from a street in the metropolis, had each a one-storey building upon the forecourt which extended to the side of the road. One of these buildings was erected, in 1858, contrary to the provisions of section 140 of 7 Geo. 4, c. cxlii., which provided that no building should be erected in this street within fifty feet of the side of the road. That section was repealed by section 75 of the Metropolitan Management Act, 1862, which provided, by section 108, that nothing therein contained should "in any way prejudice or affect any act, matter, or thing done or commenced prior to the passing of this Act." The other building was erected in 1876, under a licence from the Metropolitan Board of Works, which, under section 76 of the Act of 1862, was given subject to the condition that the erection should not be at any time in any way altered or raised without the consent of the board. The owner proposed to pull down and rebuild the whole premises and to erect, without the consent of the County Council, three-storey buildings upon the forecourts, which would be beyond the general line of buildings in the street:—*Held*, that the owner was not entitled to erect the proposed buildings upon the forecourts beyond the general line of buildings in the street without the consent of the County Council. *Scott v. Carritt*, 82 L. T. 67—C.A. And see *London County Council v. Coal Co-operative Society*, 72 J. P. 68—D.

Raising of Buildings—"Land lawfully occupied by building or structure."]—The appellant was the owner of two adjoining houses in the metropolis built back fifty feet from the road with forecourts in front abutting on the road, which forecourts had been occupied by one-storey shops. One of these shops had been erected without any licence and in contravention of the statutory provision then in force with regard to this road that no building should be erected within fifty feet from the road. This statutory provision was repealed, and the repealing Act, which had no provision dealing with acts done in contravention of the repealed Act, required that no new buildings should be

erected or raised beyond the general building line without the consent of the Metropolitan Board of Works. The second shop was built under this enactment, and with the necessary consent, but subject to the condition that the one-storey shop should not be raised without the like consent. The appellant proposed to rebuild the whole premises, including the shops, and to raise the shops and bring out the buildings to the line of frontage of the shops, which would have been in advance of the general building line as certified under section 22 of the London Building Act, 1894:—*Held*, that the land occupied by the shops was not land which at the commencement of the London Building Act, 1894, was "lawfully occupied by a building or structure" within the meaning of sub-section 2 of section 22 of that Act, so as to entitle the appellant to erect the proposed buildings beyond the general building line, and that the appellant was therefore not entitled to erect the proposed buildings without the consent of the County Council as required by sub-section 1 of that section. *Scott v. Carritt*, 81 L. T. 454; 63 J. P. 772—D.

Height—Measurement—“Front or nearest external wall”—Building of Varying Heights—Building Regarded as a Whole—New Street.—In order to ascertain whether the height of a building, which is of varying height, does or does not exceed the limit prescribed by section 49 of the London Building Act, 1894, the building must not be regarded as a whole, but each part must be regarded separately to see if that particular part exceeds the prescribed height, and the measurement must be taken from the front wall of each part to the opposite side of the street. *Att.-Gen. v. Metcalf*, 76 L. J. Ch. 259; [1907] 2 Ch. 23; 96 L. T. 351; 71 J. P. 182; 23 T. L. R. 263—Kekewich, J.

Exemption—Vested in or in Occupation of Crown.—The exemption from the provisions of the London Building Act, 1894, given by section 202 of that statute to, among other structures, "any building structure or work vested in and in the occupation of any department of Her Majesty's Government," does not extend to buildings in respect of which Her Majesty's Commissioners of Works have an option for a lease when they are completed, even although such buildings are being constructed under the supervision of their surveyor. *Drury v. Rickard*, 63 J. P. 374—D.

Show-case—Structure.—The respondents, whose business premises were approached from the public footway by a flight of four stone steps and a stone landing at the top of the steps, erected, without the consent of the London County Council, upon those stone steps and landing a large show-case of wood and glass 7 feet 6 inches in length, 1 foot 10 inches in width, and 9 feet 3 inches in height above the street level. The show-case, which took the place of a shop front, projected 6 feet 3 inches beyond the general line of buildings in the street:—*Held*, that the show-case did not amount to a "structure" within the meaning of section 22 of the London Building Act, 1894. *London County Council v. Illuminated Advertisements Co.* (73 L. J. K.B. 1034; [1904] 2 K.B. 886) followed. *London County Council v. Hancock*, 76 L. J. K.B. 526; [1907] 2 K.B. 45; 96 L. T.

618; 71 J. P. 268; 5 L. G. R. 572; 23 T. L. R. 417—D.

Certificate of Superintending Architect—Railway Company—Claim of Exemption from Operation of Certificate—Appeal Therefrom to Tribunal of Appeal—Person Aggrieved.—Where a certificate fixing a building-line has been given by a superintending architect under section 22 of the London Building Act, 1894, an appeal therefrom by a railway company to the tribunal of appeal does not lie where their ground of appeal is that, by reason of the provisions of section 31 of the above Act, they are not bound by such certificate because it affects the exercise of the powers conferred upon them by their special Act for railway purposes. *South-Eastern and Chatham Railways v. London County Council*, 76 L. J. K.B. 528; [1907] 2 K.B. 91; 96 L. T. 676; 5 L. G. R. 626; 71 J. P. 260—D. And see *Lilley v. London County Council*, 98 L. T. 110; 6 L. G. R. 126; 72 J. P. 41—C.A.

Appeal to Tribunal of Appeal—Costs.

—Where, upon an appeal to the tribunal of appeal under the London Building Act, 1894, by parties interested, against a certificate of the superintending architect of Metropolitan buildings defining the general line of buildings in a street, the London County Council appear to support the certificate, the tribunal, if they reverse or vary the certificate, have power under section 183 of the Act to order costs to be paid by the Council to the appellants. *London County Council v. Metropolitan Railway*, 97 L. T. 136; 5 L. G. R. 814; 71 J. P. 372—D.

In 1893 a certificate was made by the superintendent architect of Metropolitan buildings, in which he fixed the line of buildings in a part of P. Street. No appeal was taken from that certificate. Since 1898 nothing had been done to change the frontage of the buildings in the particular part of the street:—*Held*, that the appeal tribunal under the London Building Act, 1894, could not fix another general building-line for the same part of the street. *Lilley & Skinner, In re*, 97 L. T. 306; 71 J. P. 437; 5 L. G. R. 1070—D.

Finding by Magistrate as a Question of Fact—Mandamus to State Case.—In proceedings against a theatre company for a contravention of the London Building Act, 1894, for erecting a structure beyond the general line of buildings without having obtained the written consent of the London County Council, it appeared that the construction which was said to be a "structure" consisted of a framework of wood which acted as a foundation for some plaster work, intended to represent or imitate stonework. It was a little over 13 feet in height and 7 feet 10 inches in width, and at the deepest part it extended 2 feet 2 inches beyond the defined line. The back of the structure was fastened by iron holdfasts to the wall of the theatre, and it could be removed without serious injury to the wall. It was not built into or fastened to the pavement, but stood upon the pavement lights. The centre of the front was composed of transparent material, and being hollow it contained lights which illuminated the advertisements printed on the transparent material. The magistrate found as

a fact that the erection was a "structure," and being of opinion that no question of law was involved, declined to state a Case. Upon an application for a *mandamus* requiring him to state a Case,—*Held*, that, in view of the magistrate's finding, and the fact that it could not be said that there was no evidence upon which he could arrive at it, the magistrate should not be ordered to state a Case. *Rea v. Denman*; *Palace Theatre Co., Ex parte*, 96 L. T. 672; 5 L. G. R. 649; 71 J. P. 279—D.

Failure to Give Notice of Objection—Allowing Work to Proceed.—Notice of objection by a district surveyor, under section 150 of the London Building Act, 1894, is not a condition precedent to proceedings under section 153 for a contravention of that Act in respect of which a notice of irregularity has been served on the builder under section 151. *Coggin v. Duff*, 96 L. T. 670; 5 L. G. R. 615; 71 J. P. 302—D.

Notice to Set Back Building—Forecourt.—Section 14 of the London Building Act, 1894, does not apply to all the offences created by section 13, sub-section 1, and where the external boundary of a "forecourt" is within the prescribed distance from the centre of a roadway, the County Council has no power under section 14 to serve a notice upon the owner or occupier requiring him to set back the forecourt so that every part of the external boundary thereof shall be at a distance from the centre of the roadway not less than the distance permitted by the Act. *London County Council v. Aylesbury Dairy Co.*, 67 L. J. Q.B. 24; [1898] 1 Q.B. 106; 77 L. T. 440; 61 J. P. 759—D.

New Building — Volunteers' Drill Hall — Drainage to Main Sewer.—A drill hall built for the exclusive use of a volunteer corps and vested in the commanding officer for military purposes is not exempt from the provisions of section 75 of the Metropolis Management Act, 1855, on the ground that it is Crown property. *St. Margaret's and St. John's Vestry v. Hoskins*, 68 L. J. Q.B. 840; [1899] 2 Q.B. 474; 81 L. T. 390; 47 W. R. 649; 63 J. P. 725—D.

Gas Company.—Where a gas company erect a building upon lands specified in the schedule to their private Act, they are subject to the sections of the London Building Acts, 1894 and 1898, relating to the position of new buildings with reference to streets. *London County Council v. Wandsworth and Putney Gas Co.*, 82 L. T. 562; 64 J. P. 500—D.

Construction of Buildings—Building Used in Part for Purposes of Trade and in Part as a Dwelling-house—Separation of Parts by Fire-resisting Divisions.—Upon the true construction of section 74, sub-section 2 of the London Building Act, 1894, a shopkeeper may live over his shop, and carry on his trade in the lower part of his house, without making fireproof divisions between the lower part of the building used for trade and the upper part used as a dwelling-house. But on appeal this judgment was reversed, upon the ground that the question intended to be raised by the Case stated by the magistrate was concluded by his findings of fact. *Dicksee v. Hoskins*, 70 L. J. K.B. 851; [1901] 2 K.B. 660; 85 L. T. 205; 49 W. R. 693; 65 J. P. 612—C.A.

Erection—Notice to Local Authority—Building Authorised by Special Act.—Notice to the local authority under section 76 of the Metropolis Management Act, 1855, need not be given before erecting pursuant to section 4 of the Surrey Commercial Dock Act, 1894, a building which is necessary in connection with the works thereby specially authorised, inasmuch as the control of the local authority under the earlier general enactment is inconsistent with the powers of the dock company under the later special enactment. *Surrey Commercial Dock Co. v. Bermondsey Borough*, 78 L. J. K.B. 293; [1904] 1 K.B. 474; 90 L. T. 123; 52 W. R. 446; 2 L. G. R. 356; 68 J. P. 155; 20 T. L. R. 208—D.

"Structure" — Advertisement - hoarding on Boundary-wall.—Whether an advertisement-hoarding placed on the top of a boundary-wall is a "structure" within the meaning of section 22 of the London Building Act, 1894, so as to require the consent of the London County Council to its erection, *quære*. *Tunmer v. Partington Advertising Co.*, 68 J. P. 318—Channell, J.

The respondents attached to the front walls of a shop belonging to them in the county of London certain advertisement-cases without having obtained the consent of the London County Council. The cases were constructed of sheet-iron supported by strong wrought-iron supports securely cut and pinned through the walls, though they might have been moved, with the exception of the iron supports, in a single day without injury to the building; their outer sides were covered with wooden frames carrying canvas or linen lined with advertisements, provision being made for illuminating the interior by electric light; they varied in width from two to five feet, and in height from five to seven feet, stood out ten inches in front of the wall, that being less than the projection of the cornice over the shop, and projected ten inches beyond the building-line of the street:—*Held* (WILLS, J., dissenting), that the cases were not a "structure" within the meaning of section 22 of the London Building Act, 1894, or a bringing forward of a structure within the meaning of section 200, sub-section 3 of the Act; and that the respondents by erecting them without the consent of the Council had not acted in contravention of these sections. *Hull v. London County Council* (70 L. J. K.B. 864; [1901] 1 K.B. 580) commented on. *London County Council v. Illuminated Advertisements Co.*, 73 L. J. K.B. 1034; [1904] 2 K.B. 886; 91 L. T. 352; 68 J. P. 445; 2 L. G. R. 905; 20 T. L. R. 527—D.

Stand for Viewing State Processions—Powers of Supervision and Inspection—Transfer of Power from London County Council to Borough Council.—The powers, duties, and liabilities of district surveyors with respect to the supervision or inspection of wooden structures falling within section 84 of the London Building Act, 1894, have not been transferred to the Westminster City Council by section 5, sub-section 1 of the London Government Act, 1899, and Schedule 2, Part I. of the Act, but the district surveyors have neither the right, power, nor obligation of performing any duties prescribed by a licence granted by the Westminster City unless by its terms it indicates

that they are the persons to fulfil the duties. *Westminster City Council v. Watson*, 71 L. J. K.B. 603; [1902] 2 K.B. 717; 87 L. T. 326—D.

Where matters are involved which impose upon a district surveyor the right of inspecting such a wooden structure under the terms of the Act, the district surveyor should have notice given to him under section 145 of the London Building Act, 1894. For example, questions might arise of dangerous structures or as to interference with some street or street-line. *Ib.*

The right to receive the fees specified by the London Building Act, 1894, for supervision and inspection of such wooden structures has not been transferred to the Westminster City Council and its officers, nor has it altogether lapsed. If in a proper case for good cause a surveyor on information he has received has the duty cast upon him to inspect the structure, or some question arises which properly gives him the right to inspect in order to see whether the provisions of the Act have been infringed, he would be entitled to his fees. *Ib.*

— **Power to License — Transfer of Power from London County Council to Borough Council.**]

—A stand of a temporary character constructed of wood, except the nails and some of the other fastenings and the cloth or other hangings placed upon it, erected for the purpose of enabling spectators to view a State procession is a "wooden structure" within the meaning of section 84 of the London Building Act, 1894, and is not a building or structure of a temporary character falling within the operation of sections 82 and 83; and consequently where such a stand is erected within one of the areas constituted a separate borough by the London Government Act, 1899, the power to license the setting up of the stand and the power to take proceedings for default in obtaining or observing the conditions of the licence are by section 5, sub-section 1 of the latter Act transferred from the London County Council to the council of the borough. *Westminster City Council v. London County Council*, 71 L. J. K.B. 244; [1902] 1 K.B. 326; 86 L. T. 53; 50 W. R. 429; 66 J. P. 199—D.

Wooden Structure "used for the purposes of or in connection with the traffic of" a Railway—Licence—Exemption.—A wooden structure erected by a coal merchant at his own expense with the permission of a railway company in their coal yard or depot, occupied by him rent free and without any agreement as to tenure, and used by him for the clerical work connected with the delivery to him by the company of coal consigned to him by their line, and the sale of it by him to his customers, is "used for the purposes of or in connection with the traffic of" a railway company within the meaning of section 86 of the London Building Act, 1894, and is consequently exempt from the operation of section 84, which provides that no person shall set up a wooden structure without having first obtained a licence from the London County Council. *Elliott v. London County Council*, 68 L. J. Q.B. 887; [1899] 2 Q.B. 277; 81 L. T. 155; 63 J. P. 645—D.

Wooden Structure Erected and Continued without Licence—Liability to Penalties.—A liability

to penalties for erecting a wooden structure without licence under section 13 of the Metropolitan Building Act, 1882, which existed on January 1, 1895, when the London Building Act, 1894, came into operation, is saved by section 215 of the latter Act; but proceedings which have been delayed for more than six months after January 1, 1895, cannot be taken for the recovery of such penalties owing to the operation of section 11 of the Summary Jurisdiction Act, 1848. *Reg. v. Cluer; London County Council, Ex parte*, 67 L. J. Q.B. 86; 71 L. T. 439—D.

Dangerous Structure—Service of Summons—Owner of Premises.]

—The rule to be observed in the service of a summons under section 107 of the London Building Act, 1894, is that where the owner of the premises can by reasonable and ordinary enquiry be discovered, the procedure must be under section 1 of the Summary Jurisdiction Act, 1848; but that where, after such enquiry, the owner cannot be ascertained, the procedure under section 188, sub-section 1 of the Act of 1894 is applicable, and the summons may be served by affixing a copy thereof on some conspicuous part of the building to which it relates. *Reg. v. Mead*, 66 L. J. Q.B. 874; [1898] 1 Q.B. 110; 77 L. T. 462; 46 W. R. 61; 61 J. P. 759; 18 Cox C.C. 670—D.

— **Safety Compulsorily Provided for by London County Council—Reinstatement of Pavement—Limit of Council's Liability.**]

—In compulsorily exercising the powers of restoring dangerous structures to a state of safety, vested in them by Part IX. of the London Building Act, 1894, the London County Council need not obtain a licence from the vestry or district authority for the erection of hoardings or for the removal of paving-stones from the pavement for the insertion of necessary props and shores; nor need they give notice to such authorities of their intention so to proceed. Having restored a dangerous structure to a state of safety, the obligation of the London County Council is at an end, and does not extend to the reinstatement of the pavement. *Crisp v. London County Council*, 68 L. J. Q.B. 499; [1899] 1 Q.B. 720; 80 L. T. 654; 63 J. P. 484—Wills, J.

— **Inspection of Party-wall—Fees of District Surveyor.**]

—A district surveyor in London is not entitled to more than one set of fees for his services in the inspection of a party-wall alleged to be a dangerous structure, notwithstanding that it separates premises belonging to different owners, and that it has been necessary for him to inspect both sides of the wall, and to enter upon different sets of premises for that purpose. *London County Council v. Sheinman*, 93 L. T. 505; 3 L. G. R. 977; 69 J. P. 395—D.

Music Hall Licensed before 1878—Danger from Fire—Compliance by Owners with Notice to Remedy Structural Defects—Subsequent Notice to the Same Effect.]

—Upon the true construction of section 11 of the Metropolis Management and Building Acts Amendment Act, 1878, where a notice to owners of a music hall, licensed before the Act, to remedy structural defects so as to avoid danger from fire has been once complied with, a subsequent notice by the London County Council (not rendered necessary by any new works done by the owner) requiring

further structural alterations for the same end is *ultra vires*. *St. James's Hall Co. v. London County Council*, 70 L. J. K.B. 510; [1901] 2 K.B. 251; 84 L. T. 568; 49 W. R. 572—Channell, J.

Building used in Part for Purposes of Trade—Public-house — Dwelling-house — Fire-resisting Materials.]—A public-house is not a building “used in part for purposes of trade . . . and in part as a dwelling-house” within the meaning of section 74, sub-section 2 of the London Building Act, 1894, and it is not therefore necessary that “the means of approach” to the living rooms should be constructed of fire-resisting materials. *Carritt v. Godson*, 68 L. J. Q.B. 799; [1899] 2 Q.B. 193; 80 L. T. 771; 63 J. P. 644; 19 Cox C.C. 355—D.

Portico or Shelter—Supported entirely from Porch—Projection over Pavement beyond Building Line.]—A glass and iron portico or shelter which projects beyond the general building line of the street, and which is dovetailed into the main structure of a building, if not erected by the consent of the London Council, is within section 22 of the London Building Act, 1894. *Coburg Hotel v. London County Council*, 81 L. T. 450; 63 J. P. 805—D.

Electric-lighting Boxes in Street—Notice to District Surveyor.]—An electric-lighting box of considerable size and substantial construction constructed in a street is a “building structure or work” within section 145 of the London Building Act, 1894, and the circumstance that the electric-lighting undertakers by whom the box is constructed are required by their Provisional Order to give notice of the construction of such boxes to the local authority and to the Postmaster-General, and to construct the boxes in accordance with plans approved by those authorities, does not relieve them from the obligation of giving notice to the district surveyor under section 145 of the Act of 1894. *Whitechapel Board of Works v. Crow* (84 L. T. 595), approved and followed. *Charing Cross and Strand Electric Supply Corporation v. Woodthorpe*, 88 L. T. 772; 1 L. G. R. 551; 67 J. P. 286—D.

Rain-water Pipe—Notice to Alter—Offence.]—The appellant vestry served a notice on the respondent requiring him to disconnect a rain-water pipe from a drain and cause it to discharge over a stoneware gully trap. The pipe had been put up prior to the passing of the Public Health (London) Act, 1891, and it was not alleged to be defective. The respondent, having failed to comply with the notice, was summoned at the instance of the appellants, but the magistrates dismissed the summons, holding that no offence had been committed:—*Held*, that the magistrates were right. *Hammersmith Vestry v. Ainsworth*, 62 J. P. 108—D.

Temporary Floorings put in Public Baths—Notice to District Surveyor before Commencement of Work.]—Temporary wooden flooring put in a public swimming-bath so as to convert same into a hall, where such flooring does not and is not likely to affect the building in which it is placed, does not constitute a “structure, or building or work” within the meaning of

section 145 of the London Building Act, 1894, so as to require the service of a building notice on the district surveyor before the commencement of the work. *Handover v. Meeson*, 67 J. P. 813—D.

Re-erection of Buildings on Site Formerly Occupied—Substitution of Factory for Dwelling-houses.]—The right reserved by section 13, sub-section 5 of the London Building Act, 1894, to re-erect buildings erected before that Act nearer to the centre of the roadway than is allowed by the section in the case of wholly new buildings extends to the erection of buildings differing wholly both in height and class from the previously existing buildings—e.g. to the erection of high factories in substitution for small dwelling-houses, the sub-section being concerned with identity of ground area only. *London County Council v. Patman & Fotheringham*, 1 L. G. R. 519; 67 J. P. 285—D.

“Uniting” of Buildings—Blocks of Flats Commenced as Separate Buildings but Finished as Single Building.]—Section 77, sub-section 1 of the London Building Act, 1894, which prohibits the “uniting” of buildings except where they are wholly in one occupation or are constructed or adapted to be so, applies only to the uniting of buildings completely erected, in the first instance, as separate structures, and does not apply to the uniting of separate buildings in the course of erection for the purpose of transforming them into and finishing them as a single separate structure:—*Seemle*, that pushing a covered way between two buildings is not “uniting” the buildings within the sub-section. *Goodchild v. Matthews*, 89 L. T. 369; 1 L. G. R. 523; 67 J. P. 296—D.

Buildings Wholly in one Occupation or so Constructed or Adapted to be so.]—No offence is committed under section 77, sub-section 1 of the London Building Act, 1894, by the making of an opening between two buildings by means of which they are united, if such buildings, though not wholly in one occupation, are in fact united by an opening previously made, even although such prior opening was made without proper authority. The words in that sub-section, “originally constructed or adapted to be so,” mean either buildings originally constructed to be in one occupation or buildings which, not originally so constructed, have been subsequently adapted to be in one occupation. *Woodthorpe v. Spencer*, 63 J. P. 246—D.

Notice to Remedy Structural Defects—Action to Restrain Proceedings.]—In 1885 the board served a notice on the defendants, under section 11 of the Metropolitan Management Act, 1878, requiring them to make certain structural alterations in the premises, and the defendants complied with the requirements of that notice. In May, 1890, the London County Council served another notice upon the defendants under section 11, requiring certain alterations in the same premises. The defendants gave notice of appeal under protest, and commenced this action for a declaration that the defendants had no power to give a second notice under section 11, and for an injunction restraining them from taking any proceedings upon the

notice:—*Held*, that an interlocutory injunction might properly be granted restraining the defendants, until the trial, from taking any proceedings in the arbitration upon the plaintiffs' appeal against the notice. *St. James's Hall, Lim. v. London County Council*, 83 L. T. 98—C.A.

Building—Building and Adjoining Owners—Party Wall—Difference—Reference to Surveyors—Claim for Compensation for Loss of Trade—Jurisdiction of Surveyors.—Where a difference has arisen between a building owner and an adjoining owner with regard to the raising of a party wall, and such dispute has been referred to three surveyors for settlement under section 91 of the London Building Act, 1894, the surveyors have no power to award compensation for loss of trade caused to the adjoining owner by the execution of the work. *Adams v. Marylebone Borough Council*, 77 L. J. K.B. 1; [1907] 2 K.B. 822; 71 J. P. 465; 97 L. T. 593; 23 T. L. R. 702—C.A.

Surveyor's Fees—Recovery of from Owner—Proceedings before Justices—Time within which to Bring.—Where default is made by a builder in payment of the fees due from him to the district surveyor under section 154 of the London Building Act, 1894, they may, under sub-section 2 of section 157 of the Act, be recovered from the owner within six calendar months from the delivery to him of a proper bill specifying the amount of the fees, inasmuch as until that time the "matter of complaint" within the meaning of section 11 of the Summary Jurisdiction Act, 1848, does not arise. *Corbett v. Badger*, 70 L. J. K.B. 640; [1901] 2 K.B. 278; 84 L. T. 602; 49 W. R. 539; 65 J. P. 552—D.

Land of School Board.—By section 21 of the London Building Act, 1894, any building to be erected upon any lands belonging at the time of the coming into operation of the Act to the London School Board may be erected in accordance with the provision of any Act in force immediately before the passing of the Act:—*Held*, that the fees payable to the district surveyor were also regulated by such earlier Act. *Marsland v. Wallis*, 83 L. T. 761; 65 J. P. 166—D.

Buildings—Escape in Case of Fire.—*See* MASTER AND SERVANT.

Dwelling-house.—*See* DWELLINGS, *infra*, col. 1627.

(ii.) Party Walls.

Notice by Building Owner—Sufficiency.—A notice given by a building owner under section 90, sub-section 1 of the London Building Act, 1894, in respect of a party structure should be so clear and intelligible that the adjoining owner may see what counter-notice he may require to give under section 90, sub-sections 5 and 6. *Hobbs, Hart & Co. v. Grover*, 68 L. J. Ch. 84; [1899] 1 Ch. 11; 79 L. T. 454—C.A.

Sufficiency—"Particulars of proposed work."—A party-wall notice given by a build-

ing owner to an adjoining owner under section 90 of the London Building Act, 1894, ought to be so clear and intelligible that the adjoining owner may be able to see whether he ought to give a counter-notice, and what the nature of any such notice should be. *Hobbs v. Grover*, [1899] 1 Ch. 11; 79 L. T. 454—C.A.

Validity—Limit of Time for Commencing Work—Settlement of Difference by Arbitration.

—The provision of section 90, sub-section 4 of the London Building Act, 1894, that a party-wall notice shall not be available for the exercise of any right unless the work to which the notice relates is begun within six months after the service thereof and is prosecuted with due diligence, does not apply where a difference has arisen between the building owner and the adjoining owner, and is being settled by arbitration under section 91 of the Act, notwithstanding that the work has not been begun within six months after the service of the notice. *Lead-bitter v. Marylebone Borough Council* (No. 2), 74 L. J. K.B. 507; [1905] 1 K.B. 661; 92 L. T. 819; 53 W. R. 470; 69 J. P. 201; 21 T. L. R. 377—C.A.

Notice by Building Owner—"Adjoining owner"—Successive Owners.—The party-structure notice to be served under section 90 of the London Building Act, 1894, by a building owner on the "adjoining owner" must be served on every person in possession of or in receipt of rents or profits arising from the adjoining premises or in occupation of the same otherwise than as tenant from year to year, or for any less time, or as a tenant at will. *Semble*, however, that where a particular interest in adjoining premises is owned by a number of persons together, as in the case of a tenancy in common or joint tenancy, then it is sufficient to serve one of these persons only. *List v. Tharp* (66 L. J. Ch. 175; [1897] 1 Ch. 260) applied. *Crosby v. Alhambra Co.*, 76 L. J. Ch. 176; [1907] 1 Ch. 295—Neville, J.

"Owner"—"Building owner"—Tenant at Will until Lease Granted—London County Council Conditions of Letting.—At a sale by auction the plaintiff was declared the lessee of certain property belonging to the London County Council subject to certain of the Council's conditions as to letting. One of these conditions provided that until the granting of the lease the lessee should be deemed tenant at will of the Council at the rent to be reserved thereby, and that he should pay the rent and perform the covenants and conditions to be reserved and contained in such lease when granted as if such lease had been actually granted. Under the Council's "building conditions" the plaintiff was to be at liberty to remove such earth, &c., as should be necessary to enable him to erect his buildings. Before the plaintiff became entitled to have a lease granted to him he built a party-wall, partly on his own property and partly on that of the defendant, the adjoining owner. On an application to restrain the defendant from interfering with the party-wall until he had paid his share of the costs of its erection,—*Held*, that the plaintiff, having agreed to become tenant at will of the Council until the granting of the lease, was not an "owner" within the definition of that term in section 5, sub-section 29 of the London Building Act,

1894, and therefore had not the rights of a building owner within section 87 of that Act. *Orf v. Payton*, 3 L. G. R. 126; 62 J. P. 103; 24 T. L. R. 90—Swinfen Eady, J.

Jurisdiction of Surveyors—Award that Adjoining Owner should be Entitled to Raise the Party-wall at any Time as he thought fit—Operations by Adjoining Owner without giving Building Owner's Notice.]—In 1902 the tenant to the plaintiffs, the freeholders of one of two adjoining houses in the Metropolis, being desirous of pulling down and rebuilding the house, gave to the defendants, the owners in fee of the adjoining house, a notice under section 90, sub-section 1 of the London Building Act, 1894, for the purpose of enabling him to exercise a building owner's rights in relation to the party-wall. Thereupon the defendants, as adjoining owners, gave to the tenant a notice, under section 89, sub-section 1, making certain requisitions as to works to be executed for their convenience. A difference having arisen upon the notice between the tenant as building owner, and the defendants as adjoining owners, it was referred to surveyors, under section 91 of the Act. The surveyors, by their award, provided, amongst other things, that the defendants should be entitled to raise the wall at any time as they might desire. The works proposed by the tenant were completed in 1902. In 1904 the defendants commenced to raise the party-wall without serving upon the plaintiffs, to whom in the meantime the tenant had surrendered his lease, a building owner's notice under the Act. The plaintiffs brought an action to restrain the defendants from building upon the party-wall without first serving upon the plaintiffs a building owner's notice:—*Held*, that the jurisdiction of the surveyors was limited to differences as to matters to which the notices under the Act related, and that they therefore had no jurisdiction to award that the defendants should be entitled to raise the party-wall at any time as they might desire, that the defendants consequently had no right to build upon the wall without first serving a building owner's notice upon the plaintiffs as adjoining owners, and that the plaintiffs were entitled to an injunction. *Leadbitter v. Marylebone Borough Council*, 73 L. J. K.B. 1013; [1904] 2 K.B. 893; 91 L. T. 639; 53 W. R. 118; 68 J. P. 566; 20 T. L. R. 778—C.A.

Demolition of Buildings—Rights and Liabilities of Adjoining Owners—Notice—Railway Company—Acquisition of Land by Agreement—Station Purposes.]—A railway company's special Act provided that any buildings erected on any land acquired by agreement for an extraordinary purpose mentioned in the Railways Clauses Consolidation Act, 1845, "except such buildings or parts of buildings as may be used for the purposes of a station," should be subject to the provisions of the Acts relating to buildings in the Metropolis:—*Held*, that the company were not exempt in regard to the site of a house, which they had acquired by agreement and were demolishing for the purposes of the construction of a station from the obligations of Part 8 of the London Building Act, 1894, requiring notice to be given by the owner of a building separated from another by a party-wall who does or is desirous of doing a work affecting

the party-wall. *Lewis & Solome v. Charing Cross, Euston, and Hampstead Railway*, 75 L. J. Ch. 282; [1906] 1 Ch. 508; 94 L. T. 732; 54 W. R. 435; 70 J. P. 221; 4 L. G. R. 432; 22 T. L. R. 282—Warrington, J.

Raised by Building Owner—Demise of House to Lessee—Subsequent Building Operations by Adjoining Owner—Use of Party-wall by Adjoining Owner beyond Use Thereof before Alteration—Claim by Lessee to Proportion of Expenses of Raising Party-wall.]—The lessee of a house in the Metropolis, whose lessors before the demise to him have at their own expense raised the party-wall between the demised and the adjoining house, is not entitled, where the owner of the adjoining house subsequently makes use of the party-wall beyond the use made of it by him before the alteration, to recover from the latter under the provisions of section 95, sub-section 2 of the London Building Act, 1894, any proportion of the expenses originally incurred by his lessors in raising the party-wall. *Stone and Hastie, In re*, 72 L. J. K.B. 846; [1903] 2 K.B. 463; 89 L. T. 353; 52 W. R. 130; 68 J. P. 44—C.A.

Jurisdiction of Surveyors to Entertain Claim by Lessee to Proportion of Original Expenses.]—Surveyors appointed under section 91 of the Act to settle a difference arising between a building and adjoining owner have no jurisdiction to entertain such a claim. *Id.*

(iii.) Projecting and Overhanging Matter.

"Structure"—Projection—Iron Framework Filled in with Glass.]—The respondent erected over the doorway of his premises a large iron framework filled in on the front and sides with leaded glass and covered over on the top with zinc. On the glass were the words "Russian Vapour Baths," which words were made visible at night by means of electric lights. The structure was beyond the general line of buildings and was erected without the appellant's consent:—*Held*, that the framework so erected was not a "structure" within the meaning of section 22, sub-section 1 of the London Building Act, 1894, and, on the authority of *Hull v. London County Council* (70 L. J. K.B. 364; [1901] 1 K.B. 580), that it was not a "projection" within section 73, sub-section 8 of the Act. *Hull v. London County Council* (*supra*) commented on. *London County Council v. Schwezick*, 74 L. J. K.B. 959; [1905] 2 K.B. 695; 93 L. T. 550; 54 W. R. 168; 69 J. P. 409; 3 L. G. R. 1159; 21 T. L. R. 731—D.

Electric Advertising Sign—Extension beyond General Line of Buildings.]—In order to constitute a projection within the meaning of section 73, sub-section 8 of the London Building Act, 1894, there must be a part of a building projecting or jutting out; the word "projection" in the sub-section means a prominence extending from the building in the sense of coming out from the building as part of the building. Therefore where an electric advertisement sign consisting of a wooden case with a glass front is, without the consent of the London County Council, affixed by iron brackets to the external wall of premises and does not project over the highway, an information will

not lie under the sub-section for extending a projection from a building beyond the general line of buildings. *Hull v. London County Council*, 70 L. J. K.B. 364; [1901] 1 K.B. 580; 84 L. T. 160; 49 W. R. 396; 65 J. P. 309; 19 Cox C.C. 635—D.

Continuing Offence.—Assuming that an offence is, under such circumstances, committed, it is complete when the sign is completely affixed to the premises, and is not a continuing offence. *Ib.*

Absence of Power to Control Position of Sign without Trespass.—A person cannot escape liability for an offence under the sub-section upon the ground that by an agreement he has demised the part of the premises upon which the projection is extended, and therefore has no power to control or alter the position of the projection without trespass. *London County Council v. Cross* (61 L. J. M.C. 160) followed. *Ib.*

Portico or Shelter—Supported entirely from Porch.—A glass and iron portico or shelter which projects beyond the general building-line of the street, and which is dovetailed into the main structure of a building, if not erected by the consent of the London County Council, is within section 22 of the London Building Act, 1894. *Coburg Hotel v. London County Council*, 81 L. T. 450; 63 J. P. 805; 19 Cox C.C. 411—D.

Exposing Article for Sale upon Carriage-way or Footway—Who may Lay Information.—Any person may lay an information for the offence of exposing goods for sale upon or so as to hang over any carriage-way or footway so as to cause an annoyance or obstruction in any thoroughfare, which is created by section 60, sub-section 7 of the Metropolitan Police Act, 1839. *Allman v. Hardcastle*, 89 L. T. 553; 67 J. P. 440; 2 L. G. R. 13; 20 Cox C.C. 567—D.

Meat or Offal, or "other matter or thing" whatsoever Overhanging Pavement—Reflector Lights.—Reflector lights for increasing light in dimly lighted rooms, fixed by staples to the brickwork of the front of a house and supported at the angle by chains so as to overhang the pavement of the street, are not within the prohibition in section 65 of the Metropolitan Paving Act, 1817 (Michael Angelo Taylor's Act), against the hanging-out or exposing of meat or offal or "other matter or thing whatsoever" over the pavement. *Winsborrow v. London Joint-Stock Bank*, 88 L. T. 803; 1 L. G. R. 531; 67 J. P. 289; 20 Cox C.C. 478—D. *And see* LOCAL GOVERNMENT.

(d) *Dwelling-house.*

"To be inhabited or adapted to be inhabited by persons of the working class."—By section 13, sub-section 5 of the London Building Act, 1894, a building may, without the consent of the London County Council, be re-erected on the site of buildings existing at the passing of the Act, though such site is within the prescribed distance of the centre of the roadway,

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subject to the proviso that, if such new building be a "dwelling-house to be inhabited or adapted to be inhabited by persons of the working class," it shall not exceed in height the distance of its front wall from the opposite side of the street:—*Held*, that "to be inhabited" here means intended when erected to be so inhabited, and "adapted to be inhabited" means structurally adapted to be inhabited. *Held, further*, that a public building in the nature of a hotel for poor men is not a dwelling-house within the proviso. *Held, further*, that, though a building is a "public building" within the definition of section 5, sub-section 27, it may also be a "dwelling-house" within section 13, sub-section 5. *Per CHANNELL, J.*: By "working class" in this section is meant that class of persons who ordinarily live in such a condition of life that overcrowding is likely to take place. *Per CHANNELL, J.*: *Quare*, whether in section 13, sub-section 5, where height of dwelling-houses is regulated by the distance of their front wall from the opposite side of the street, "street" does not mean a roadway on the opposite side of which buildings are or may possibly be erected. *London County Council v. Davis*, 77 L. T. 693; 62 J. P. 68—D.

The words "to be inhabited" in section 13, sub-section 5 of the London Building Act, 1894, as amended by section 4 of the London Building Act, 1894 (Amendment) Act, 1898, mean "intended to be inhabited," and that, with regard to such intention, the proper test to apply is: If the builder constructs the houses in such a way that it is practically certain that when constructed they would ultimately be inhabited by persons of the working class, and that their ultimate destination would be to become working-class tenements, although they might be in the hands of intermediate tenants, then they are "dwelling-houses to be inhabited by the working class"; and the mere fact that the builder had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by any one who might take them, does not prevent them from being "dwelling-houses to be inhabited by the working class." *Crow v. Davis*, 89 L. T. 407; 67 J. P. 319—D.

With regard to the question of adaptation, the proper test as to whether the houses are "adapted to be inhabited" by persons of the working class is not whether the houses are specially adapted for habitation by persons of the working class only, but whether they are, by reason of their structure, substantially adapted for habitation by persons who live in the same way as the working class live—that is, in small flats or separate tenements in the same house—and who would be liable to the same danger of overcrowding. *London County Council v. Davis* (77 L. T. 693) distinguished. *Ib.*

Where houses are constructed in such a way that it is practically certain that when constructed—meaning at the time of construction or building, and not ultimately—they will be inhabited by persons of the working class, the fact that the builder intends them for occupation by any one who will take them—meaning thereby any person who might come

along, and who might be willing to take a particular house and not occupy or underlet it for the purposes of persons of the working class—is not sufficient to prevent the houses being houses intended “to be inhabited . . . by persons of the working class” within section 13, sub-section 5 of the London Building Act, 1894. *Crow v. Davis*, 91 L. T. 88; 68 J. P. 447; 2 L. G. R. 1034—D.

The words “to be inhabited” or “adapted to be inhabited” in section 13, sub-section 5, constitute two distinct conditions. The first means “intended to be inhabited,” and the second means in some respects “having features of construction which point to the use of the houses by persons of the working class as their natural use.” *Ib.*

Artizans' Dwellings—Houses Let in Lodgings—By-laws—Powers of Sanitary Authority.—A block of artisans' dwellings where the landlord does not reside, and which is divided into tenements each of which is occupied by one family, is not a house “let in lodgings or occupied by members of more than one family” within the meaning of section 94 of the Public Health (London) Act, 1891, and a sanitary authority has therefore no power to make by-laws for the regulation of such a building. *Weatheritt v. Cantlay*, 70 L. J. K.B. 799; [1901] 2 K.B. 285; 84 L. T. 768; 49 W. R. 568; 65 J. P. 644; 20 Cox C.C. 1—D.

“Public building” — Dwelling-house — Home for Children of Defective Intellect.—The appellant, a builder, was engaged by the Metropolitan Asylums Board to carry out certain alterations in a dwelling-house which they had purchased as a home for children of defective intellect. The house was acquired by the Board under a scheme for purchasing houses in London adjacent to schools specially provided by the London School Board for the education of children of that class. The appellant having neglected to comply with certain notices served upon him by the district surveyor under the London Building Act, 1894, *Held*, that the house was not a “public building” within the meaning of section 5, sub-section 27 of the Act, and that the appellant was therefore not bound to comply with the notices served upon him. *Moses v. Marsland*, 70 L. J. K.B. 261; [1901] 1 K.B. 668; 83 L. T. 740; 49 W. R. 217; 65 J. P. 188—D.

Domestic Building on Old Site—Certified Plans—Deviation—Sanction of London County Council.—A person intending to erect a domestic building on the site of a domestic building existing at the commencement of the London Building Act, 1894, is not entitled to deviate in the height nor in any other respect from the plans certified by the district surveyor, without having previously obtained the sanction of the London County Council to such deviations under section 43, sub-section 2 of the Act. *Paynter v. Watson*, 67 L. J. Q.B. 640; [1898] 2 Q.B. 31; 46 W. R. 655; 62 J. P. 467—D.

(dd) *Fire.*

Fire Hydrants.—See **WATER.**

(e) *Food.*

Unsound Food—Condemnation—Functions of Magistrate—Right to Consider whether Article Intended for Food of Man.—Before condemning an article seized and brought before him under section 47 of the Public Health (London) Act, 1891, a magistrate is not entitled to consider whether it was intended for the food of man or was sold or exposed for sale or deposited in any place for the purpose of sale, but only whether it is unsound or unwholesome or unfit for the food of man. *Thomas v. Van Os*, 69 L. J. Q.B. 665; [1900] 2 Q.B. 448; 82 L. T. 845; 49 W. R. 57; 64 J. P. 582; 19 Cox C.C. 542—D.

— Summary Proceedings for Fine—Information by Sanitary Inspector—No Express Direction from Sanitary Authority.—Summary proceedings for a fine under section 47, sub-section 2 of the Public Health (London) Act, 1891, against a person to whom unsound food had been sold or exposed for sale or deposited in any place for the purpose of sale, but only whether it is unsound or unwholesome or unfit for the food of man. *Thomas v. Van Os*, 69 L. J. Q.B. 665; [1900] 2 Q.B. 448; 82 L. T. 845; 49 W. R. 57; 64 J. P. 582; 19 Cox C.C. 542—D.

— Information Purporting to be “on behalf of” Sanitary Authority—Validity.—Where such information purports, contrary to the fact, to have been laid “on behalf of” the sanitary authority, these words may be disregarded. *Allman v. Hardcastle* (89 L. T. 558; 2 L. G. R. 13) followed. *Ib.*

Margarine—Penalty—Notification.—It is not a condition precedent to the right of a purchaser for consumption to take proceedings for a penalty under section 6 of the Margarine Act, 1887, that he should have given the seller the notification required by section 14 of the Sale of Food and Drugs Act, 1875. *Buckler v. Wilson*, 65 L. J. M.C. 18; [1896] 1 Q. B. 88; 78 L. T. 580; 44 W. R. 220; 60 J. P. 118—D.

Fruit unfit for Food of Man—Sale by Broker—Contract with Purchaser to destroy Bad Fruit—Sale or Exposure for Sale—“Liable to be seized”—Rejection of Evidence.—A person cannot be convicted of the offence created by section 47, sub-section 3 of the Public Health (London) Act, 1891, unless at the time the articles are found in the possession of his purchaser they are intended for the food of man, and are sold or exposed for sale or deposited in some place for the purpose of sale or of preparation for sale, and are “liable to be seized” under sub-section 1. (Mathew, J., dissenting). *Reg. v. Dennis*, 10 R. 316; [1894] 2 Q. B. 458; 63 L. J. M.C. 153; 71 L. T. 436; 42 W. R. 586; 58 J. P. 622—C. C. R.

The terms of the contract of sale may be evidence to go to the jury to show that the articles sold are not intended for the food of man (Mathew and Cave, JJ., dissenting). *Ib.*

Article in Possession of Purchaser not Intended for Food of Man—Liability of Seller—

Article "liable to be seized."]—An article of food is "liable to be seized" within the meaning of section 47, sub-section 3 of the Public Health (London) Act, 1891, if it is in fact unsound or unfit for the food of man, whether or not it is at the time of seizure intended for the food of man or exposed for sale. *Grivell v. Malpas*, 75 L. J. K.B. 647; [1906] 2 K.B. 32; 95 L. T. 123; 70 J. P. 334; 4 L. G. R. 668; 21 Cox C.C. 220; 22 T. L. R. 514—D.

Consequently, on the hearing of an information under that sub-section against the seller of an article which has been seized as unsound in the possession of the purchaser, the magistrate is not justified in stopping the case and dismissing the information as soon as it has been proved that at the time of seizure the article was not intended for the food of man or exposed for sale, and before he has heard evidence on the questions whether the article purchased from the seller for the food of man, whether when so purchased it was in such a condition as to be liable to be seized, and whether the seller at the time he sold it or not know, and had no reason to believe, that it was in such condition. *Reg. v. Dennis*, 75 L. J. M.C. 153; [1894] 2 Q.B. 458) considered and distinguished. *Ib.*

by **Milkshop—Infectious Disease—Outbreak in Buildings or Premises.**—A three-storeyed building or block of tenements or flats adapted for separate occupation is a building within regulation 29 of the Dairies, Cowsheds, and Milkshops Order, 1885; and a purveyor of milk who occupies the ground floor as a milkshop and the second floor as his residence, the first floor being in a separate occupation, and the two floors being connected by one central staircase, must cease to sell milk immediately upon the outbreak of an infectious or contagious disease occurring in his family on the second floor. *London County Council v. Edwards*, 67 L. J. Q.B. 648; [1898] 2 Q.B. 75; 78 L. T. 558; 62 J. P. 377; 19 Cox C.C. 65—D. And see LOCAL GOVERNMENT, col. 1356.

(f) Improvements.

Improvements.—4 Edw. 7 c. 2 is the *Metro-politan Improvements (Funds) Act*, 1904.

Charge—"Improvement area"—"Lands, all or any part of which abut" on a Street.—Under an Act of Parliament the London County Council were empowered to make an "improvement charge" on lands "all or any part of which front or abut" on a certain road. A music hall fronted on another street, where the principal entrance was, but it had also a side entrance from a house in that road to the pit and gallery. The plaintiffs were owners or lessees of all the land on which the hall stood, including the house through which there was the side entrance:—*Held*, that, as the whole of the property was occupied for one purpose, it could not be said that only that house abutted on the road; and that, consequently, the power of the London County Council to place an improvement charge on the music hall was not limited to that house. *Oxford, Lim. v. London County Council*, 67 L. J. Ch. 655; [1898] 2 Ch. 491; 79 L. T. 22; 47 W. R. 297—North, J.

Betterment—"Initial valuation"—Public-house—Takings and Payments—"Tied" House—"Free" House—Value of "Tying" Covenant.—In making the "initial valuation" of a public-house under section 36 of the London County Council (Tower Bridge Southern Approach) Act, 1895, evidence of the takings and payments of the house is not admissible either for the purposes of the valuation or for the purpose of testing the expert evidence relating thereto; nor is the fact of the existence or non-existence of a "tying" covenant in the lease of the house to be taken into consideration in assessing the value of "the site apart from that of any existing building thereon." But in valuing "the site and buildings as a whole," and also in separately valuing "the interest of the owner of the site and buildings and the interest of any lessee thereof for twenty-one years unexpired," the fact of the existence of such a covenant may be taken into consideration, though, as regards "the site and buildings as a whole," the valuation would presumably be the same whether its existence were considered or not. *London County Council and City of London Brewery Co., In re*, 67 L. J. Q.B. 382; [1898] 1 Q.B. 387; 77 L. T. 463; 46 W. R. 172; 61 J. P. 808—D.

(g) Lighting.

Electric Lighting.—4 Edw. 7 c. 13 is the *London Electric Lighting Areas Act*, 1904.

Electric-Lighting Boxes in Street—Notice to District Surveyor.—Where a local authority within the meaning of the Electric Lighting Acts, 1882 and 1888, in pursuance of those Acts, has been granted a provisional order confirmed by a statute, and under the provisions of that order has constructed in a street boxes for the purposes in connection with the supply of electric energy, such boxes are buildings, structures, or works, within section 145 of the London Building Act, 1894, and a notice under that section must be served on the district surveyor before they are commenced. *Whitechapel Board of Works v. Crow*, 84 L. T. 595; 65 J. P. 549; 19 Cox C.C. 700—D.

Statutory Powers—Obstruction—Rights of Adjoining Owners.—The owner of premises abutting on a highway has, as a private right, a right of access to the highway, and any obstruction which interferes with the exercise by him of that right is an infringement of his private right. His right, however, as regards the user of the highway itself is one which he enjoys in common with the rest of the public, and is not a private right. *Att.-Gen. v. Thames Conservators* (1, H. & M. 1), *Lyon v. Fishmongers Co.* (46 L. J. Ch. 68; 1 App. Cas. 662), and *Fritz v. Hobson* (49 L. J. Ch. 321; 14 Ch. D. 542) followed. *Chaplin v. Westminster Borough*, 70 L. J. Ch. 679; [1901] 2 Ch. 329; 85 L. T. 88; 49 W. R. 586; 65 J. P. 661—Buckley, J.

The defendants, a public authority, in the exercise of their statutory obligation to light streets, erected a lamp-post on a highway in a place which it was proved was most convenient for the public. The plaintiffs, the owners of premises abutting on the highway, complained that the lamp-post interfered with

the carrying on by them of their business:—*Held*, that the plaintiffs had no right to restrain the defendants from exercising their statutory authority to obstruct the highway by the erection of lamp-posts where they thought it necessary. *Id.*

(h) *Nuisance.*

Black Smoke—No Evidence of Nuisance to Particular Person—Smoke sent forth on Repeated Occasions.]—Ten several complaints were preferred against the appellants under the Public Health (London) Act, 1891, each of which charged that at premises occupied by the appellants a nuisance existed after notice thereof had been served upon them—namely, that a chimney (not being a chimney of a private dwelling-house) did on a specified and several day send forth black smoke in such quantity as to be a nuisance within the meaning of section 24, sub-section (b) of the Act. It was proved that on the days in question black smoke issued from the chimney, which was 180 feet high, from one to six times a day for from six to seventy-five minutes at a time, sixteen minutes in all being the shortest time for which it had issued on any one day; but there was no evidence that it was a nuisance to any particular person. The magistrate found that the black smoke on each of the days amounted to a nuisance, and convicted the appellants on each complaint:—*Held*, that there was evidence upon which he could properly convict the appellants on each complaint. *South London Electric Supply Corporation v. Perrin*, 70 L. J. K.B. 648; [1901] 2 K.B. 186; 84 L. T. 630; 49 W. R. 539; 65 J. P. 627; 19 Cox C.C. 717—D.

Chimney of Club—"Private dwelling-house."]—A London club-house contained five bedrooms for the use of members, and other bedrooms for the use of the staff. In the basement there were several covered-in cooking ranges and a vertical boiler with furnace attached. The smoke from these discharged into one flue, and caused black smoke to issue from the chimney. A magistrate having dismissed a summons against the secretary of the club for failing to comply with a notice requiring him to abate the nuisance,—*Held*, that the chimney was not the chimney of a "private dwelling-house" so as to come within the exemption contained in section 24 (b) of the Public Health (London) Act, 1891, and that the magistrate ought to have convicted the respondent. *McNair v. Baker*, 73 L. J. K.B. 120; [1904] 1 K.B. 208; 90 L. T. 24; 68 J. P. 66; 2 L. G. R. 143; 20 T. L. R. 95—D.

"Chimney"—Funnel of Steam-tug.]—Section 24 (b) of the Public Health (London) Act, 1891, which provides that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily, applies to the funnel of a steam-tug. *Tough v. Hopkins*, 73 L. J. K.B. 628; [1904] 1 K.B. 804; 90 L. T. 672; 52 W. R. 605; 68 J. P. 274; 2 L. G. R. 1213; 20 Cox C.C. 650; 9 Asp. M. C. 562; 20 T. L. R. 323—D.

— Notice to Abate—Recurrence of Nuisance

—Summary Jurisdiction—Limitation of Time.]—On March 18, 1904, the occupier of certain premises in London was required by notice under section 4 of the Public Health (London) Act, 1891, forthwith to abate a nuisance consisting in a chimney sending forth black smoke. From that date to January 5, 1906, no further nuisance due to the chimney was observed; but on the latter date the chimney again sent forth black smoke, whereupon the occupier was summoned for an alleged breach of the notice of 1904. The magistrate dismissed the summons subject to a Case in which he stated that as the notice required the abatement of the nuisance forthwith, and no further nuisance occurred until January 5, 1906, it must be assumed that immediately upon receipt of the notice the nuisance was abated, and that he had dismissed the summons on the ground that it was out of time under section 11 of the Summary Jurisdiction Act, 1848:—*Held*, without deciding whether section 11 of the Summary Jurisdiction Act, 1848, had any application to the case, that no connection between the nuisance of March, 1904, and that of January, 1906, was established, and on that ground that the decision of the magistrate could not be reversed. *Battersea Borough Council v. Goerg*, 5 L. G. R. 62; 71 J. P. 11—D.

Exposing Article for Sale upon Carriage-way or Footway—Who may Lay Information.]—Any person may lay an information for the offence of exposing goods for sale upon or so as to hang over any carriage-way or footway so as to cause an annoyance or obstruction in any thoroughfare, which is created by section 60, sub-section 7 of the Metropolitan Police Act, 1839. *Altman v. Hardcastle*, 89 L. T. 553; 67 J. P. 440—D.

"Leaking drain"—Defective Drain.]—On a summons taken out under the Public Health (London) Act, 1891, against the owner of premises for failure to comply with a notice to abate a nuisance alleged to arise from a defective drain, the magistrate found that the drain in question was "a leaking drain," and made an order on the owner to abate the nuisance:—*Held*, that the magistrate's finding amounted to a finding of fact that the drain in question was a nuisance, and that his order was therefore right. Whether a defective drain is *per se* a nuisance, *quare*. *Farmèr v. Long*, 72 J. P. 91—D.

Litter in Streets.]—A by-law made by the London County Council under section 23 of the Municipal Corporations Act, 1882, and section 16 of the Local Government Act, 1888, providing that no person shall "sweep or otherwise remove from any shop, house, or vehicle into any street, any waste paper, shavings or other refuse," is good, notwithstanding that by section 60, sub-section 3 of the Metropolitan Police Act, 1839, which applies throughout their county, a penalty is imposed on any person "who in any thoroughfare shall throw or lay . . . any litter or rubbish." *Batchelor v. Sturley*, 93 L. T. 539; 3 L. G. R. 1056; 69 J. P. 398; 21 Cox C.C. 35—D.

Offensive Business—Where Gut is Cleansed, Scraped, or Dealt with—Scraped Gut Sorted—Business within Prohibition.]—The respondents

purchased from gut scrapers the intestines of sheep which have been previously cleansed and scraped by such gut scrapers, as sausage casings, and their business consisted of sorting these cases into different sizes and lengths. They then repack them, and supply them to sausage makers:—*Held*, that this was not a business within the order made in pursuance of section 3 of the Slaughter-houses Act, 1874, as preserved by the Public Health (London) Act, 1891. *London County Council v. Hirsch*, 81 L. T. 447; 63 J. P. 822; 19 Cox C.C. 405—D.

Refuse from Hotel—House Refuse or Trade Refuse—Right of Appeal—Special Case.—The decision of a petty sessional Court under section 33, sub-section 2 of the Public Health (London) Act, 1891, as to whether certain refuse is to be considered "trade refuse" or otherwise is final, and cannot be appealed from by way of Special Case or in any other way. *Reg. v. Bridge* (59 L. J. M.C. 49; 24 Q.B. D. 609) distinguished. *Westminster City Council v. Gordon Hotels*, 76 L. J. K.B. 482; [1907] 1 K.B. 910; 96 L. T. 535; 71 J. P. 200; 5 L. G. R. 545; 23 T. L. R. 387—C.A.

"Sewer"—"Drain"—Drainage of Adjoining Houses in Groups by Combined Operation—Subsequent Unauthorized Variation in Grouping of the Same Houses.—In 1855 an order was made by the Metropolitan Commissioners of Sewers for draining contiguous houses in a street by combined operation in groups or blocks of four houses each. A system of drainage was thereupon constructed before January 1, 1856, according to which a group of five of these houses, of which three belonged to one of the groups of four houses, and two to a contiguous group of four houses, were drained together by combined operation:—*Held*, that the pipe by which the houses were drained was not a "drain," but a "sewer" within section 250 of the Metropolitan Management Act, 1855, as amended by section 112 of the Metropolitan Management Amendment Act, 1862, and consequently that the owner of the house under which it passed was not liable to abate a nuisance arising from its non-repair. *Bullock v. Reeve*, 70 L. J. K.B. 42; 84 L. T. 55; 49 W. R. 93; 65 J. P. 164—D.

Water Supply—Absence of—Sub-demise of Part of House—"Owner."—The tenant of a house in London sub-let the top floor in breach of a covenant not to sub-let without his landlord's consent. The house was provided with a supply of water which was sufficient so long as the house was occupied as a whole by a single tenant. But the supply was not such as to be sufficient for the purposes of the top floor if that floor was separately occupied:—*Held*, that the landlords could not be required under sections 4 and 48 of the Public Health (London) Act, 1891, to provide a supply of water sufficient for the needs of the top floor as separately occupied. If the house was regarded as a whole, the supply was sufficient for the house as let by them. If the top floor alone was looked to, the landlords were not the statutory "owners," inasmuch as, though in receipt of the rack-rent of the house as a whole, they were not, within the meaning of section 141 of the Act, in receipt of the rack-rent of the top floor. *Field v. Southwark Borough Council*, 96 L. T. 646; 5 L. G. R. 567; 71 J. P. 240—D.

Abatement Notice—Compliance with Notice by Person not Legally Liable—Liability of Sanitary Authority to Recoup Expenses of Abatement.—Section 4, sub-section 1 of the Public Health (London) Act, 1891, casts upon the person *prima facie* liable the duty of abating any nuisance specified in a notice of the sanitary authority, and his non-compliance with an abatement notice, irrespective of any order to be subsequently made upon it, renders him liable to the penalty imposed by sub-section 4 of that section. Where, under the above section, an abatement notice has been served, in consequence of which, and without waiting for an order to be made on it, the person *prima facie* liable to abate the nuisance has executed the work required, and it is afterwards discovered that he was not legally liable to do so, but that the sanitary authority were, he is entitled at common law to be recouped the expenses he has been put to through their default, and also by virtue of section 11, sub-section 1 of the Act to recover from the sanitary authority the costs and expenses of carrying the notice into effect as if such an order had been made. *Gebhardt v. Saunders* ([1892] 2 Q.B. 452) followed. *Andrew v. St. Olave's Board of Works*, 67 L. J. Q.B. 592; [1898] 1 Q.B. 775; 78 L. T. 504; 46 W. R. 424; 62 J. P. 328—D.

Intimation to Owner of Premises by Officer of Sanitary Authority—No Notice by Sanitary Authority—Liability of Owner to Abate Nuisance.—An owner of premises who has been served with an intimation by the officer of a sanitary authority under section 3 of the Public Health (London) Act, 1891, bringing to his notice a nuisance thereon, but not with a notice by the sanitary authority under section 4 requiring him to abate the nuisance, is under no legal obligation to do or pay for the work of abating the nuisance. *Andrew v. St. Olave's Board of Works* (67 L. J. Q.B. 592; [1898] 1 Q.B. 775) distinguished. *Harris v. Hickman*, 73 L. J. K.B. 31; [1904] 1 K.B. 13; 89 L. T. 722; 68 J. P. 65; 2 L. G. R. 1; 20 T. L. R. 18—Wright, J.

Compliance with "Intimation" without Statutory Notice—Right of Owner to Recover Expenses as for Work done under Compulsion.—An owner of premises received a written intimation under section 3 of the Public Health (London) Act, 1891, duly signed by the officer of the sanitary authority, making known to him the existence of a nuisance at his premises, and requesting him to abate the same within seven days, otherwise the sanitary authority would commence proceedings against him by the service of a statutory notice. The owner, without waiting for the service of the statutory notice under section 4 of the Act requiring him to abate the nuisance, did the necessary works to abate the nuisance, in the course of which he discovered that the work was a sewer and not a drain, but without communicating with the sanitary authority he completed the work, and brought an action against the sanitary authority to recover the expenses as for work done by him under compulsion which the sanitary authority were legally compellable to do:—*Held*, but only on the authority of *Thompson & Norris Manufacturing Co. v. Hawes* (59 J. P. 580), that work done under an "intimation" given under section 3 is not work

done under compulsion, and that as the owner had not waited for the statutory notice under section 4, but had done the work under the "intimation" notice, the work was not done by him under compulsion, and he was not entitled to recover the expenses of the work. *Quære*, whether, if an owner wrongfully converts that which is properly a drain, for the repair of which he would be liable, into a sewer, he could recover from the sanitary authority the expenses of work done by him to the sewer under compulsion of the sanitary authority. *Oliver v. Camberwell Borough Council*, 90 L. T. 285; 52 W. R. 511; 68 J. P. 165; 2 L. G. R. 617—D. And see *Wilson's Music Printing Co. v. Finsbury Borough Council*, 77 L. J. K.B. 471; [1908] 1 K.B. 563; 72 J. P. 37—Channell, J.

Prohibition Order—Order not Specifying Works to be Executed—Validity.]—The law laid down in *Millard v. Rastall* (67 L. J. Q.B. 277; [1898] 1 Q.B. 342) with reference to sections 94 and 96 of the Public Health Act, 1875—that a notice to abate a nuisance caused by quantities of black smoke issuing from a factory chimney need not necessarily specify the works required to be done in order to abate the nuisance—has not been substantially altered by section 5, sub-section 5 of the Public Health (London) Act, 1891, which requires that a prohibition order shall, if the person on whom the order is made so requires, specify the works to be done. *Central London Railway v. Hammer-smith Borough Council*, 73 L. J. K.B. 623; 90 L. T. 645; 68 J. P. 217; 2 L. G. R. 446; 20 Cox C.C. 632—D.

Upon the hearing of a summons under section 5 of the Public Health (London) Act, 1891, in respect of a nuisance arising from the emission of black smoke from a chimney belonging to the appellants, the existence of the nuisance was proved, but no evidence was given as to the works required to prevent the issue of black smoke. After the respondents' case had been closed the appellants gave evidence that the nuisance might have been due to two furnace doors being open at one time, and required under section 5, sub-section 5, that the order should specify the works to be executed by them. They objected, however, to any further evidence being given on the part of the respondents, on the ground that their case was closed. The magistrate, without hearing further evidence, made a prohibition order directing the appellants to fit up apparatus to prevent the doors being left open simultaneously, and to adopt all other means necessary to prevent the emission of black smoke in such quantities as to be a nuisance:—*Held*, that the order was good, and that it was not necessary, under the circumstances, that it should specify the works to be executed for the purpose of preventing the recurrence of the nuisance. *Ib.*

A prohibition order made under section 5 of the Act is not invalid because it does not specify the works to be executed by the defendant for the purpose of abating or preventing the recurrence of the nuisance, notwithstanding that the defendant may have required them to be specified. *Central London Railway v. Hammer-smith Borough Council* (*supra*) followed. *Tough v. Hopkins*, 73 L. J. K.B. 623; [1904] 1 K.B. 804; 90 L. T. 672; 52 W. R. 605; 68 J. P. 274—D.

Cost of Abatement—Contribution—Defective Drain—Easement—Duty of Dominant Owner to Repair—"Person through whose act or default the nuisance was caused."]—The occupier of a dominant tenement had a right by implied grant to send sewage through a drain running under and also carrying the drainage of the servient tenement. Through a defect in the drain a nuisance arose upon the servient tenement, the occupier whereof was ordered by a Court of summary jurisdiction to abate, and did abate, the nuisance. In proceedings under section 120 of the Public Health (London) Act, 1891, by the occupier of the servient tenement to recover a proportionate part of the cost of abating the nuisance from the occupier of the dominant tenement,—*Held*, that the occupier of the dominant tenement was not merely, as such, a person through whose act or default the nuisance was caused within the meaning of section 120, and therefore that he was not liable to contribute. *Nathan v. Rouse*, 74 L. J. K.B. 285; [1905] 1 K.B. 527; 92 L. T. 321; 69 J. P. 135; 3 L. G. R. 854; 21 T. L. R. 222—D.

Abatement of Nuisance—Liability of Tenant.]—See *Foulger v. Arding*, 71 L. J. K.B. 499, LANDLORD AND TENANT.

(i) Open Spaces.

Statute.]—6 Edw. 7 c. 25 is the *Open Spaces Act*, 1906.

Disused Burial-ground—Erection of Screen to Prevent Acquisition of Easement.]—A local authority acting under statutory powers is entitled by a screen or other suitable means to prevent anything which may interfere with the free use by the public of an open space of which it is the trustee, and to prevent thereby the acquisition of an easement of light or other adverse right over such space by an adjoining owner. *Paddington Borough Council v. Atkinson*, 75 L. J. Ch. 4; [1906] A.C. 1; 93 L. T. 673; 54 W. R. 317; 70 J. P. 41; 4 L. G. R. 19; 22 T. L. R. 55—H.L. (H.)

— Erection of Screen to Prevent Acquisition of Easement—Action by Adjoining Owner to Restrain Erection—Joining Attorney-General—"Building."]—A local authority who have under the provisions of the Metropolis Open Spaces Act, 1881, and the Open Spaces Act, 1887, the management and control of a disused burial-ground, must hold and administer it for certain limited purposes only—namely, in trust to allow the enjoyment of it by the public in an open condition, and for no other purpose. The erection of a screen or hoarding on the ground to prevent the owner of adjoining land from acquiring a right of light over it is not one of the purposes authorised, and the local authority have no right to use the open space for such a purpose. *Boyce v. Paddington Borough Council*, 72 L. J. Ch. 695; [1903] 2 Ch. 556; 89 L. T. 383; 52 W. R. 114; 1 L. G. R. 696; 68 J. P. 49—C.A.

Semble,—An action to restrain a local authority from using a disused burial-ground for purposes other than those authorised by the Open Spaces Acts should be brought in the

name of the Attorney-General at the relation of the plaintiff. *Ib.*

(j) *Sanitary Arrangements.*

Right of Sanitary Inspector to Enter Premises—Reasonable Grounds—Warrant.]—A sanitary inspector who applies for a warrant under section 115 of the Public Health (London) Act, 1891, authorising him to enter premises to which he has been refused admission, must shew to the magistrate some reasonable ground for such entry. Merely to shew that in seeking admission to premises he was acting honestly with a view to the discharge of his duties will not suffice. *Vines v. North London Collegiate School*, 63 J. P. 244—D.

By-law—Absence of Provision for Notice to Owner—Validity—Water-closets.]—A by-law made by the London County Council under section 39 of the Public Health (London) Act, 1891, is unreasonable and void if it does not provide for notice to the person complained against before the commencement of proceedings. *Nokes v. Islington Borough Council*, 73 L. J. K.B. 100; [1904] 1 K.B. 610; 90 L. T. 22; 52 W. R. 399; 2 L. G. R. 334; 68 J. P. 95; 20 T. L. R. 95—D.

Lodging-house—Cleansing.]—A by-law made by a Metropolitan borough council under section 94 of the Public Health (London) Act, 1891, provided that the landlord of a lodging-house should in the first week of April in every year cause every part of the premises to be cleansed:—*Held*, that the by-law was unreasonable and void, inasmuch as it did not provide for notice to be given to the landlord before the commencement of proceedings. *Stiles v. Galinski*, 73 L. J. K.B. 485; [1904] 1 K.B. 615; 90 L. T. 437; 52 W. R. 462; 68 J. P. 183; 2 L. G. R. 341; 20 T. L. R. 219—D.

Held, also (WILLS, J., dissenting), that the by-law was not rendered invalid by reason of the requirement that the work should be done in the first week in April. *Ib.*

House Refuse or Trade Refuse—Refuse from Hotel—Removal by Sanitary Authority.]—Refuse resulting from and incidental to the supply of warmth, food, and other refreshment to the guests at an hotel is not "trade refuse" within the meaning of sections 30 and 33 of the Public Health (London) Act, 1891, and therefore the sanitary authority within whose district the hotel is situated are not entitled to be paid for its removal. *St. Martin's Vestry v. Gordon* (60 L. J. M.C. 37; [1891] 1 K.B. 61) followed. *Westminster City Council v. Gordon Hotels, Lim.*, 75 L. J. K.B. 438; [1906] 2 K.B. 39; 94 L. T. 521; 4 L. G. R. 538; 70 J. P. 258; 22 T. L. R. 439—D.

— Removal of—By-law Empowering Sanitary Authorities to Require Occupier to Deposit Refuse on Kerbstone, or in Conveniently Accessible Position on Premises—Notice by Sanitary Authority Requiring Occupiers in Particular Area to Deposit Refuse on Kerbstone—Refusal of Sanitary Authority to Remove Refuse from Conveniently Accessible Position on Premises—Failure "without reasonable cause" to Remove

Refuse.]—A by-law of the London County Council provided that where a sanitary authority arranged for the daily removal of house refuse in their district, or in any part thereof, each occupier of premises should "deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises, as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle" containing the house refuse. The appellant sanitary authority, under the powers of this by-law, gave written notice to each occupier in a particular area requiring him to "deposit on the kerbstone or edge of the footpath immediately in front of the house a movable receptacle," in which should be placed the house refuse. The respondent, who had a reasonably accessible position on his premises on which he was willing to place the receptacle containing his house refuse, refused to comply with the sanitary authority's notice. The appellants having declined to remove the refuse unless it was placed on the kerbstone or edge of the footpath, the respondent served a written notice upon them, under section 30 of the Public Health (London) Act, 1891, requiring them to remove such refuse, and, as they still declined, preferred an information against them under sub-section 2 of section 30. The magistrate found as a fact that the respondent had a reasonably accessible position on his premises from which the appellants might have removed the house refuse, and he decided that the appellants had failed "without reasonable cause" to perform the duties cast upon them by section 30:—*Held*, that the conviction was right, as the notice given by the appellants, so far as regarded the respondent, went beyond what was contemplated by the by-law, inasmuch as it did not prescribe any conveniently accessible position on his premises upon which the refuse might be deposited, and that in the absence of such a prescription the respondent's only obligation was to deposit the refuse on some conveniently accessible position on the premises. *Wandsworth Borough Council v. Baines*, 75 L. J. K.B. 158; [1906] 1 K.B. 470; 94 L. T. 211; 54 W. R. 457; 70 J. P. 124; 4 L. G. R. 257; 22 T. L. R. 220—D.

Sanitary Conveniences—Street—Powers of Local Authority.]—It is within the powers conferred upon sanitary authorities by section 44 of the Public Health (London) Act, 1891, when constructing public sanitary conveniences underneath a street, to make approaches thereto by descending staircases to subways from either side of the street. The fact that the approaches may be used merely for the purpose of crossing the street is not sufficient to indicate that the sanitary authority were not acting *bona fide* in the exercise of their statutory powers. *London and North-Western Railway v. Westminster Corporation*, 71 L. J. Ch. 34; [1902] 1 Ch. 269; 85 L. T. 544; 50 W. R. 268; 66 J. P. 343—Joyce, J.

— Footway—Subsoil—Trespass—Right of Adjoining Owner—Obstruction—Mandatory Injunction.]—Where a sanitary authority has taken a portion of a footway to a street in order to construct an approach to public conveniences, this constitutes a trespass upon the property of the owner of an adjoining house, to whom (in

the absence of evidence to the contrary) the soil *usque ad medium filum viæ* belongs, by virtue of a legal presumption; and a mandatory injunction will be granted for the removal of that portion of the approach, inasmuch as the subsoil of the footway does not vest in the sanitary authority under section 44, sub-section 2 of the Public Health (London) Act, 1891. *Ib.*

— **Statutory Powers of Local Authority—**
Pass—Mandatory Injunction.]—A public body invested with statutory powers must take care not to exceed or abuse those powers, and must act in good faith within the limits of its authority. *Westminster Corporation v. London and North-Western Railway*, 74 L. J. Ch. 629; [1905] A.C. 426; 93 L. T. 143; 54 W. R. 129; 3 L. G. R. 1120; 69 J. P. 425; 21 T. L. R. 686—H.L. (E.)

Where a corporation under the Public Health (London) Act, 1891, constructs public conveniences, the mere provision in connection with such a convenience of a subway capable of being used as a thoroughfare under a crowded street is not evidence of bad faith or excess of authority. To establish such a case it would have to be shewn that the corporation constructed the subway as a means of crossing the street under colour of providing public conveniences. *Ib.*

— **“Workplace”—Persons Employed or in Attendance—Cab Proprietor's Yard.]**—A London cab proprietor's yard, where many cab-cleaners and horse-keepers are employed and many cab-drivers attend daily to hire horses and cabs, is a “workplace” within section 83 of the Public Health (London) Act, 1891, and must be provided with sufficient suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed or in attendance. The cab-drivers are none the less in attendance because they come as customers to hire horses and cabs. *Bennett v. Harding*, 69 L. J. Q.B. 701; [1900] 2 Q.B. 397; 83 L. T. 51; 48 W. R. 647; 64 J. P. 676—D.

— **Nuisance.]**—A statutory power to erect urinals in such situations as the sanitary authority think fit, does not entitle such sanitary authority to erect urinals where they constitute a private nuisance to individuals. *Parish v. London Corporation*, 67 J. P. 55—Joyce, J.

Lavatories in New Buildings—Provision as to Trapping of Waste Water-pipes.]—No. 10 of a series of by-laws as to drainage made by the London County Council under section 202 of the Metropolis Management Act, 1855, requires, *inter alia*, that a person who erects a new building shall cause every pipe in the building for carrying off waste water from every lavatory or sink (with certain exceptions) to a sewer to be constructed of certain materials, and to be trapped in a certain manner immediately beneath such lavatory or sink:—*Held* (assuming that each of a series of lavatory basins in a room is itself a lavatory within the by-law, as to which *quære*), that the by-law did not prohibit the carrying off of the waste water from a lavatory by means other than a pipe, and therefore that there was no infringement of the by-law where the waste water from each of a series of lavatory basins was discharged

by a short straight pipe into an open trough which in turn communicated with a pipe, properly trapped, leading to a sewer. *Treasure v. Bermondsey Borough Council*, 2 L. G. R. 488; 68 J. P. 206—D.

Privy—Emptying—“Street or public place.”]
 —Sub-section 4 of section 60 of the Metropolitan Police Act, 1839, which prohibits the emptying of privies within certain hours, is not limited by the words in the preamble to the section so as to be applicable only to the emptying of privies actually in a street or public place. The sub-section applies to acts done on premises not actually in a street or public place. *Howard v. Daniels*, 93 L. T. 669; 69 J. P. 439; 3 L. G. R. 1282—D.

Water-closets—“Construction of water-closet”
—Ventilation of Trap of Water-closet—Extension of By-laws to Existing Buildings.]—A series of by-laws were made by the London County Council under the provisions of section 202 of the Metropolis Management Act, 1855, giving power to make by-laws for regulating the dimensions, mode of construction, &c., of “the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith.” No. 17 of these by-laws provided that every person who should “construct any water-closet,” of which the soil-pipe fulfilled certain conditions, should cause the trap of the water-closet to be ventilated in a particular manner. No. 21 of the by-laws was as follows: “These by-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these by-laws, as if the same were being constructed in a building newly erected.” The appellants, who were the owners of a building erected before the confirmation of the by-laws, reconstructed and replaced the pans and traps of several water-closets in the building, which had been broken in the course of alterations they were carrying out in the drains connecting the soil-pipes of the closets with the sewer, or in the course of ordinary wear and tear. The soil-pipes of the water-closets were of the character contemplated by by-law 17:—*Held*, that the by-laws were neither *ultra vires* nor unreasonable, and that the work done by the appellants was not the construction of water-closets within by-law 17; and that by-law 21 did not impose on a person who constructed or reconstructed the pan or trap of a water-closet, but did not construct a water-closet, the obligation of complying with by-law 17 as to the ventilation of the trap. *Semble*, that a by-law imposing that obligation in such a case would be *intra vires*, and not unreasonable. *Metropolitan Industrial Dwellings Co. v. Long*, 2 L. G. R. 233; 68 J. P. 113; 20 T. L. R. 103—D.

Water-closet—Construction—By-law—Intention to Affix “Apparatus”—Notice to Sanitary Authority—By-law, whether Applicable to Water-closet already Existing—Reasonableness of By-law.]—A by-law which provides that “Every person who shall intend to construct any water-closet, earth-closet, or privy, or to fit or fix in or in connection with any water-

closet, earth-closet, or privy any apparatus," shall before executing any such works give notice to the sanitary authority, applies to a person intending to fit or fix apparatus in connection with a water-closet already existing at the coming into force of the by-law as well as in connection with one not yet constructed. *London and South-Western Railway v. Hills*, 75 L. J. K.B. 340; [1906] 1 K.B. 512; 94 L. T. 517; 70 J. P. 212; 4 L. G. R. 399—D.

A by-law which provides that every person who shall intend to fit or fix in connection with any water-closet "any apparatus, or any trap or soil-pipe" shall give notice to the sanitary authority is not unreasonable, inasmuch as the "apparatus" of which it requires notice to be given comprise only sanitary appliances of a like nature with those specified, and not such accessory or trivial matters as a handle or chain for the door. *Id.* And see LOCAL GOVERNMENT.

Sanitary Works—Expenses—Tenant for Life and Remainderman.]—See SETTLED LAND.

(k) *Sewers and Drains.*

General Regulations by Vestry—Size of Inspection Chambers—Validity of Regulations.]—The appellant having given notice under section 76 of the Metropolis Management Act, 1855, of his intention to make new drains, on a form supplied by the vestry upon which was indorsed "Notes from the regulations as to the drainage of new houses," the proposed drains and plans were approved by the respondents, who sent to the appellant a printed copy of their general regulations:—*Held*, that the respondents had exercised their discretion in this particular case, and that it was not necessary on each occasion to make fresh regulations, but that, having considered the drain proposed, there was nothing to prevent their general regulations being applied. *Frost v. Fulham Vestry*, 82 L. T. 720; 64 J. P. 629; 19 Cox C.C. 519—D.

Extension of Council's By-laws to Drains "in" Existing Building.]—No. 21 of the series of by-laws as to the construction, &c., of drains made by the London County Council under section 202 of the Metropolis Management Act, 1855, provides that the by-laws shall apply, so far as practicable, to any person who shall construct or reconstruct a drain, &c., "in" any existing building as if the same were being constructed "in" a new building:—*Held*, that the word "in" in this by-law does not mean "inside," but has the sense of "in connection with." *Kingsland v. Haben*, 90 L. T. 449; 2 L. G. R. 470; 68 J. P. 159—D.

Construction of Works—Order of Vestry—Sufficiency.]—The respondent having applied to the vestry for permission to lay a drain according to an annexed plan, received from the surveyor to the vestry the following communication: "I have considered your application . . . and have to inform you that, subject to the conditions mentioned below, and which I have placed upon your notice, the work can be proceeded with, and I shall report to that effect to my vestry. . . ." The vestry subse-

quently passed a resolution approving the report of the surveyor:—*Held*, that this was a sufficient "order" of the vestry within section 76 of the Metropolis Management Act, 1855. *Stokes v. Haydon*, 84 L. T. 531; 65 J. P. 756; 19 Cox C.C. 690—D.

Defective Drain—Works Specified in Detail—Notice of Order—Non-compliance.]—

S. being the owner of certain premises, the respondents on February 5 served a notice on him under the Public Health (London) Act, 1891, requiring him to abate a certain nuisance, being a defective drain. On February 19 another notice was served requiring him to abate the nuisance and re-lay the drain. On March 20 the public health committee of the respondents caused a notice to be served on him under the Metropolis Management Acts, 1855 and 1862, that the drain was defective, and requiring him to amend the same and to execute the works that the notice set out in detail. In April S. executed certain repairs to the drain, but not those in the notice of March 20. On June 18 the committee reported to the respondents that they had had the report of the inspector before them and had given directions for the statutory notices to be served on S., and they recommended that a notice be served on the appellant under the Act of 1855 requiring him to execute such works as were necessary to amend the drain which was in bad order, and that in the event of non-compliance proceedings should be taken. On June 18 the respondents by resolution adopted this recommendation, and on July 14 a notice was served on S. requiring him to amend the drain, and for that purpose to execute the works that this notice set out in detail:—*Held*, that the notice of July 14 was not a notice of an order, and that S. could not be convicted for non-compliance. *Swinburn v. Hammersmith Borough Council*, 88 L. T. 596; 67 J. P. 253; 2 L. G. R. 280—D.

Main Drainage—London County Council—Duty to Provide Sewers and Works—Duty to Keep Sewers so as not to be a Nuisance—Neglect of Duty—Mandamus.]—The Metropolis Management Act, 1855, by section 135, provides that the London County Council shall "make all such sewers and works and such diversions and alterations of any existing sewers or works as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis," and shall "cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health." Under this section, if works are in fact necessary for the effectual sewerage and drainage of any part of the metropolis, the Council is bound to execute works for that purpose, having a discretion only as to the kind of works which are to be executed, and that duty will be enforced by *mandamus*. If the sewage from any sewer vested in the Council escapes into any district so as to be a nuisance, a *mandamus* will be granted to compel the Council to keep that sewer so as not to be a nuisance. *Lee District Board v. London County Council*, 82 L. T. 306; 64 J. P. 20—C.A.

District Boundary running down Centre of Highway found to be a Street before 1856—New Street.]—An old highway, with many houses on one side built before 1856, but with few on the other until a more recent date, which,

taken as a whole, has been found by Justices to have been sufficiently built upon to be a "street" before 1856, is none the less a "street" because the boundary dividing two counties or districts runs down its centre; and a vestry or district board, having constructed a sewer for the drainage of the more recently built side of the street, cannot recover the expenses of construction from the owners of the houses on that side as for the drainage of a "new street." *Clerkenwell Vestry v. Edmondson*, 71 L. J. K.B. 198; [1902] 1 K.B. 336; 86 L. T. 137; 50 W. R. 345; 66 J. P. 324—C.A.

Combined Scheme of Drainage—Alteration of Course of Drain—Liability to Repair.—Where there has been an order of a vestry for the drainage of a block of houses by a combined operation under section 74 of the Metropolis Management Act, 1855, a deviation from the approved plan by altering the course of a pipe will not convert the pipe into a "sewer," provided that its character is not altered, and that it drains only the same group of houses as if the plan had been adhered to. *Greater London Property Co. v. Foot*, 68 L. J. Q.B. 628; [1899] 1 Q.B. 972; 80 L. T. 390; 47 W. R. 541; 63 J. P. 420—D.

Order of Local Authority—Alteration—Drain or Sewer.—Certain houses in B. Street in 1853 were drained by a combined scheme under the order of the local authority. In 1889 No. 85 B. Street was disconnected from No. 83 and connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers. In 1900 the owner of No. 85 erected a workshop on the garden, and the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by the respondents' officers, and, although a plan had been approved by the respondents, the work was not in fact carried out in accordance with that plan:—*Held*, that the drain of No. 87 did not become a sewer. *Gorringe v. Shoreditch Borough Council*, 86 L. T. 592; 66 J. P. 565—D.

Subsequent Deviation from Sanctioned Plan.—In 1876 a local authority sanctioned the drainage by a combined operation of Nos. 45, 47, 49, and 51 in R. Road, these houses to be drained by a drain under No. 49. In 1906 it was discovered that houses Nos. 47, 49, 51, 53, and 55 in the road in question were all drained by a drain passing under No. 51. There was no evidence that the alteration in the group of houses drained by one drain was ever sanctioned by the local authority:—*Held*, that the drain passing under No. 51 was a "sewer." *Harvey v. Jaye*, 97 L. T. 543; 71 J. P. 473; 5 L. G. R. 967—D.

Deviation from Plan Sanctioned by Local Authority—Alteration in Group of Houses—Innocent Purchaser.—A Metropolitan local authority sanctioned a plan for the combined drainage of a group of three houses by means of a drain leading into a sewer in E. Road; and shortly afterwards sanctioned a plan for the combined drainage of another group of four houses by means of the same drain. In fact, the three houses constituting the first group, together with one of the four houses constituting

the second group, were drained by means of a pipe leading into a sewer in R. Road, while the remaining three houses of the second group were drained by means of a pipe leading into the sewer in E. Road:—*Held*, that, as between the successors of the local authority and an innocent purchaser of one of the first group of houses, the pipe by means of which that group, together with the fourth house, were drained into the sewer in R. Road was a "sewer" and not a "drain" for the purposes of the Metropolis Management Acts, inasmuch as it could not be said to be laid under the order of the local authority. *Kershaw v. Taylor* (64 L. J. M.C. 245; [1895] 2 Q.B. 471) followed. *Harvey v. Busby*, 95 L. T. 91; 4 L. G. R. 693; 70 J. P. 301—D.

Order of Local Authority—Evidence—Approval by Surveyor only—Delegation of Powers by Local Authority to Surveyor.—A Metropolitan local authority cannot delegate to their officers their power under the Metropolis Management Acts of ordering the drainage of a group or block of houses by a combined operation. *High v. Billings*, 89 L. T. 550; 1 L. G. R. 723; 67 J. P. 338—D.

To prove that a pipe draining a group or block of houses in London is a drain, as having been laid pursuant to an order of the proper local authority for the drainage of the group or block by a combined operation, it is generally enough to produce from the records of that authority an application for their sanction to the laying of the pipe marked by the proper officer of the authority as approved, for the proper inference in such a case is that the application received the sanction of the authority. But it is otherwise if at the time of the application the authority had purported to delegate their power of sanctioning such applications to the officer in question, for then the proper inference is that the matter was dealt with by the officer himself, and not brought before the authority. *Ib.*

Sanctioned by Vestry—Evidence of Sanction.—A plan of a "combined system of drainage" initiated by the surveyor was found in the possession of the vestry. The drains had in fact been constructed in accordance with it:—*Held*, that such plan was sufficient evidence that the system of drainage had been constructed by order of the vestry. *Holland v. Lazarus* (66 L. J. Q.B. 285) followed. *Geen v. Newington Vestry*, 67 L. J. Q.B. 557; [1898] 2 Q.B. 1; 46 W. R. 624; 62 J. P. 564—D.

Connection not Shewn on Plan—Unauthorised Act.—A Metropolitan vestry passed a resolution adopting a plan for the combined drainage of two contiguous houses, Nos. 27 and 29, in a street. The plan merely shewed that the drains, which were represented by single lines, passed diagonally underneath the houses and united in front of them before entering the sewer in the street; it did not show in detail all the particular drains which were intended to be provided within the combined area. On the drains being constructed, a connection was made between the drain of No. 29 and a sink at the back of No. 27. It was found as a fact that this connection had been made with the approval of the vestry's surveyor:—*Held*, tha

the drain of No. 29 was a "drain" and not a "sewer" within section 250 of the Metropolis Management Act, 1855. *Heaver's Executors v. Fulham Borough Council*, 73 L. J. K.B. 715; [1904] 2 K.B. 383; 91 L. T. 31; 63 J. P. 278; 2 L. G. R. 672; 20 T. L. R. 333—Channell, J.

Pipe taking Rainwater from Roofs of two Houses.—*Semble*, that the passage of rainwater from the roofs of two contiguous houses down a stack-pipe fixed to the front wall of one of the houses, and thence by an open gully into a branch drain which enters the main drain of that house, does not make the stack-pipe or the branch drain a "sewer" within section 250 of the Metropolis Management Act, 1855. *Silles v. Fulham Borough Council* (72 L. J. K.B. 397; [1903] 1 K.B. 829) discussed. *Ib.*

Voluntary Purchase of Property—Estoppel of Purchaser.—*Semble*, that where the original owner of two contiguous houses in the Metropolis in respect of which an order for drainage by combined operation has been made has improperly made a connection not sanctioned by the order between the drain on one of the houses and a sink on the other, his immediate successor in title to both the houses under a voluntary conveyance is estopped as completely as he would himself have been from alleging that the connection converts that drain into a sewer repairable at the expense of the public. *Kershaw v. Taylor* (64 L. J. M.C. 245; [1895] 2 Q.B. 741) distinguished. *Ib.*

Notice to Alter Drain Improperly Made—Service on Successor of Person Offending—Validity.—Section 83 of the Metropolis Management Act, 1855, which provides that in case a person who has improperly made a drain does not within fourteen days after notice in writing by the local authority cause it to be altered, the local authority may cause the work to be done at the expense of such person, does not authorise the service of such a notice upon the successor in title of a former owner who has improperly made the drain. *Ib.*

"Drain" Serving Two Houses—Houses Held of Same Landlord—Leases Containing Covenant by Lessee to Contribute to Cost of Repairing Drain—Drain Repaired by one Lessee under Nuisance Order—Implied Contract—Contribution between Parties Responsible for Nuisance.—The fact that the lessees of two adjoining houses held of the same landlord, and drained by a common drain not vested in or repairable by the local authority, are each bound by the terms of his lease to contribute towards the expenses of repairing the drain, does not give rise to any implied contract between the lessees under which one of them who has been compelled under a nuisance order made pursuant to the Public Health (London) Act, 1891, to repair the drain can recover a contribution from the other. The rights of the parties in such a case under section 120 of the Act considered. *Nathan v. Rouse*, 2 L. G. R. 1304—D.

Unauthorised Connection with Another Drain.—Where a drain from one house is connected with the drain of another house without the knowledge of the owner of the second house or of the vestry, the drain of the second house becomes a sewer within the meaning of the

Metropolis Management Acts. *Geen v. Newington Vestry*, 67 L. J. Q.B. 557; [1898] 2 Q.B. 1; 46 W. R. 624; 62 J. P. 564—D.

Low-lying Land—"Admitting of being drained by gravitation"—"Existing sewer."—Land may be so situate as "to admit of being drained by gravitation into an existing sewer," within the meaning of section 122 of the London Building Act, 1894, notwithstanding that, owing to the construction or management of the sewer, drainage from the land cannot in time of flood find its way into the sewer. *Ellis v. London County Council*, 73 L. J. K.B. 151; [1904] 1 K.B. 283; 90 L. T. 206; 52 W. R. 381; 63 J. P. 99; 2 L. G. R. 147—D.

Recovery of Penalty—Time for Commencing Proceedings.—Proceedings may be brought under section 200 of the Act of 1894 to recover a penalty imposed by sub-section 9 thereof at any time within six months of the date of the completion of a house erected, without a licence, otherwise than in accordance with the provisions of Part XI. of the Act. *Ib.*

Disposal of Sewage—User of Sewer outside Area—Persons Outside Metropolitan Area—Public Body—Ultra Vires Agreement.—A parish outside the metropolitan area cannot send its sewage into any sewer of any parish within that area without the consent of such parish; but a parish within the area cannot make any binding agreement for any definite time to receive sewage from a parish without the area—they can only grant revocable licences for such a purpose. Decision of HALL, V.C., in *Metropolitan Board of Works v. London and North-Western Railway* (49 L. J. Ch. 355; 14 Ch. D. 521) on this point approved. *St. Mary, Islington, Vestry v. Hornsey Urban Council*, 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 580; 48 W. R. 401—C.A.

Drainage into London Sewer—Injunction.—The plaintiffs, a vestry in the county of London, brought an action against the Urban District Council of H., which is outside the county of London, for an injunction to restrain the defendants from permitting their drains and sewers to be connected with the plaintiffs' sewer; also an injunction to prevent any future connection:—*Held*, that the Court had no jurisdiction to compel the defendants to do their duty; further, if the Court were by injunction to compel the defendants to disconnect their drains and sewers from the plaintiffs' sewer, it would create a public nuisance. *St. Mary, Islington, Vestry v. Hornsey Urban Council*, 80 L. T. 746; 63 J. P. 488—Kekewich, J.

Sewage Passing into River Thames—Prevention—Liability of County Council to Construct Sewer.—By section 135 of the Metropolis Management Act, 1855, the main sewers then vested in two other public bodies were vested in the Metropolitan Board of Works, and it was provided that "such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the Metropolis from flowing or passing into the River Thames"; and by section 1 of the Metropolis Management Act Amendment Act, 1858, it was provided that the Board should cause to be commenced as soon as might be

after the passing of the Act, and to be completed with all convenient speed, "the necessary sewers and works for the improvement of the main drainage of the Metropolis, and for preventing, as far as may be practicable, the sewage of the Metropolis from passing into the River Thames within the Metropolis." In an action brought by the plaintiffs against the defendants claiming a declaration that the defendants (as successors of the Metropolitan Board) were liable to construct the necessary sewers for preventing, as far as practicable, the sewage of certain houses from passing into the River Thames,—*Held*, that under section 135 of the Act of 1855, the Metropolitan Board had a discretion to decide what sewers and works were necessary for preventing the flow of sewage into the Thames; that section 1 of the Act of 1858 did not take away from the Board the discretion conferred on them by the earlier enactment; and that the action was therefore not maintainable. *Westminster City Council v. London County Council*, 75 L. J. K.B. 549; [1906] 2 K.B. 379; 94 L. T. 791; 54 W. R. 616; 70 J. P. 390; 4 L. G. R. 655; 22 T. L. R. 593—Bray, J.

New Drainage — Removal of Old Disused Drains.—By-law or Regulation and Direction.]—By regulation 29 of the respondents all disused drains were to be broken up and destroyed, and the materials and foul earth removed and dry earth, ballast, or brick rubbish substituted. By section 83 of the Metropolis Management Act, 1855, a penalty is provided if any drain thereinbefore mentioned is found not to have been provided according to the directions or regulations of the respondents. The appellants constructed new drains, which were connected with the respondents' sewer. On the premises were old disused drains which were not physically joined or connected with the new drains. The old drains were not taken out:—*Held*, that the regulation was rightly made, and the appellants were properly convicted for constructing the new drain not in accordance with the directions of the respondents. *London School Board v. Fulham Borough Council*, 90 L. T. 116; 68 J. P. 117; 2 L. G. R. 409—D.

Trespass by Vestry in Laying New Drain.]—Where a metropolitan vestry, acting on the reports of its officers, had passed resolutions recorded on its minutes, and in accordance with such resolutions, but without obtaining the leave of the County Council, entered upon the plaintiff's premises and inserted a new system of drainage,—*Held*, that on the proper construction of the Metropolis Management Act, 1855, the vestry had committed a trespass and had done an illegal act for which they were liable in damages; but the plaintiff not having suffered injury, and having consented to the work, judgment was given for the vestry, the defendants, with costs. *Long v. Fulham Vestry*, 47 W. R. 56—Kekewich, J.

Rain-water Pipe of one House Connecting with Drain of adjoining House.]—A drain which carries sewage-matter from one house, and into which flows a rain-water pipe carrying from another house rain-water only—the two houses not being drained by a combined system of drainage sanctioned by the local authority—becomes, from the point where the rain-water

pipe discharges into it, a "sewer" within section 250 of the Metropolis Management Act, 1855. *Holland v. Lazarus* (66 L. J. Q.B. 285) approved and followed. *Silles v. Fulham Borough Council*, 72 L. J. K.B. 397; [1903] 1 K.B. 829; 88 L. T. 753; 51 W. R. 598; 67 J. P. 273; 1 L. G. R. 643—C.A.

Liability to Repair—Approval of Vestry and Metropolitan Board of Works.]—By section 69 of the Metropolis Management Act, 1855, no new sewer is to be made without the previous approval of the Metropolitan Board of Works. By section 250, the word "drain" is defined to include not only what is used for the drainage of one building, but "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." "Sewer" includes "sewers and drains of every description" except these. Such a "combined operation" must, in the absence of an order of a vestry or district board, even though there be no evidence of approval by the Metropolitan Board of Works, or such approval was not in fact obtained, be held to be a sewer vested in the vestry and repairable by them. *St. Matthew, Bethnal Green, Vestry v. London School Board*, 67 L. J. Q.B. 234; [1898] A.C. 190; 77 L. T. 635; 46 W. R. 353; 62 J. P. 116, 532—H.L. (E.)

"Reconstruction" of Drain — Reconstruction or Repair.]—The respondents took up a drain, by which their premises were connected with a sewer, except a short length at one end, in consequence of its defective condition. They laid a new concrete foundation for the drain and re-laid the drain on this foundation in its own line and at its old level. In doing so they used one of the old pipes and an old gully. Otherwise the drain as re-laid was of new materials:—*Held*, that the works amounted to the "reconstruction" of the drain within the meaning of certain by-laws as to drainage made by the London County Council, including a by-law containing a proviso that the by-law should not apply in the case of "any repair which does not involve the alteration or the entire reconstruction of any . . . drain." *Agar v. Nokes*, 93 L. T. 605; 3 L. G. R. 1168; 69 J. P. 374—D.

Liability of Tenant for Reconstruction of Drains.]—See LANDLORD AND TENANT.

(1) *Streets.*

(i.) *Generally.*

Compulsory Purchase—House—Notice to take Whole—Part only Required.]—Under the provisions of Michael Angelo Taylor's Act, 1817, a corporation is not entitled to take the whole of a house for the improvement of a street when part only is required for that purpose, unless it can be proved that the part left would be useless to the owner for the purposes of his business. *Aldis v. London Corporation*, 68 L. J. Ch. 576; [1899] 2 Ch. 169; 80 L. T. 683; 47 W. R. 514; 63 J. P. 376—Kekewich, J.

—Separable Part of House—House under Alteration—Effect of Alteration on Rights of Parties.]—The Act 57 Geo. 3, c. xxix. (known as Michael Angelo Taylor's Act) does not

authorise a local authority to take part of a house unless that part is separable—that is, can be removed without destroying the house as a house. *Gibbon v. Paddington Vestry* (69 L. J. Ch. 746; [1900] 2 Ch. 794) and the *dicta* in *Gordon v. St. Mary Abbott's Vestry* (63 L. J. M.C. 193, 196, 197; [1894] 2 Q.B. 742, 750, 751, 754) followed. *Thompson v. Hammersmith Borough Council*, 75 L. J. Ch. 129; [1906] 1 Ch. 299; 94 L. T. 135; 54 W. R. 279; 70 J. P. 100; 4 L. G. R. 331; 22 T. L. R. 179—Buckley, J.

The fact that at the date of the notice to treat the owner or occupier is intending to alter the house is immaterial and does not enlarge the rights of the local authority. At the most it is relevant only if the alterations will result in a new house, of which the part required by the local authority is not an essential part. *Ib.*

— **Power to Take Part of a House.**—A vestry is not entitled (under the provisions of section 82 of Michael Angelo Taylor's Act, relative to the compulsory taking of houses which obstruct the making of improvements) to take part only of a house, where what is taken is a substantial portion, so that the house and the use and the substantial enjoyment of the house can no longer be enjoyed as before. *Dicta* in *Gordon v. St. Mary Abbott's Vestry* (63 L. J. M.C. 193; [1894] 2 Q.B. 742) followed. *Gibbon v. Paddington Vestry*, 69 L. J. Ch. 746; [1900] 2 Ch. 794; 83 L. T. 136; 49 W. R. 8; 64 J. P. 727—Stirling, J.

A landowner does not by negotiating with a vestry for the sale of part only of a house necessarily lose his right, upon his terms being rejected by the vestry, to insist upon the whole house being taken, if originally so entitled. *Ib.*

— **Adjudication to Take Whole of House — Part only Required for Improvement — Previous Agreement to Sell Part not Required — Bona Fides.**—There is no rule that the owner of premises has an absolute right to restrain a local authority acting under the powers of Michael Angelo Taylor's Act, 1817, from taking more of his premises than they require for the purpose of widening a road. *Thomas v. Daw* (36 L. J. Ch. 201; L. R. 2 Ch. 1), *Teuliere v. St. Mary Abbott's Vestry* (55 L. J. Ch. 23; 30 Ch. D. 642), and *Gordon v. St. Mary Abbott's Vestry* (63 L. J. M.C. 193; [1894] 2 Q.B. 742) followed. *Pescod v. Westminster Corporation*, 74 L. J. Ch. 664; [1905] 2 Ch. 475; 93 L. T. 160; 54 W. R. 89; 69 J. P. 387; 3 L. G. R. 1272; 21 T. L. R. 743—Swinfen Eady, J.

A local authority adjudicated that the possession, occupation, and purchase of the plaintiff's premises were necessary to enable them to carry out the widening of a certain road. The premises had a depth of 64 feet from the road, and of this the defendants proposed to throw a strip 22 feet 6 inches wide into the roadway. Prior to the adjudication the local authority had entered into a contract to sell so much of the premises as they did not require for the purposes of their improvement to an hotel company. The plaintiff was willing to sell to the local authority a strip of 22 feet 6 inches, but objected to their taking the whole of his premises:—*Held*, that the adjudication was not either *ultra vires* on the ground that

the local authority were not proposing to throw the whole of the plaintiff's premises into the road, or *malà fide* by reason of the local authority having entered into a previous contract to sell so much of the premises as they did not require for the purposes of their improvement. *Ib.*

— **Bona Fide Intention to Widen—Adjudication.**—A Metropolitan borough council desiring to put in operation the powers of section 80 of the Metropolitan Paving Act, 1817 (Michael Angelo Taylor's Act), must *bona fide* come to the conclusion that it is expedient to widen the street in question, and, having come to that conclusion, must further *bona fide* adjudge that the land in question projects into and obstructs such widening and must therefore be acquired. *Parry v. Hammersmith Borough Council*, 92 L. T. 161; 3 L. G. R. 95; 69 J. P. 35; 21 T. L. R. 56—Warrington, J.

By an Act of 1902, the London County Council were empowered to construct an electric tramway along, amongst other streets, Q. Street. When the Bill was before Parliament, the borough council in whose borough Q. Street was opposed it. Subsequently an agreement was arrived at between the parties under which the borough council consented to withdraw their opposition, and the London County Council agreed that if they could obtain the necessary consents they would widen the street, the borough council on their part undertaking to assist them in obtaining such consents and to contribute one-third of the expense. The London County Council, being unable to obtain the necessary consents, requested the borough council to put in force their powers under the Act of 1817. Accordingly the borough council passed a resolution to that effect and served a notice to treat on the plaintiffs. The plaintiffs thereupon applied by motion for an injunction to restrain the borough council from proceeding under their compulsory powers:—*Held*, on the facts, that there had been a *bona fide* determination on the part of the borough council that it would be expedient to widen Q. Street, and none the less so that the occasion for it was the proposal of the London County Council to bring a tramway into the street and to make a contribution of two-thirds of the costs of the necessary widening. *Ib.*

— **Severance.**—A local authority, requiring part of two houses for the purpose of widening a street, adjudged under Michael Angelo Taylor's Act that it was necessary to acquire the whole, and accordingly gave notice to treat for the whole. They subsequently informed the owner that his right of pre-emption of the part not required would be reserved to him. It being proved that possession of the whole was necessary in order to effect the widening,—*Held*, that the local authority could take the whole. *Fernley v. Limehouse Board of Works*, 82 L. T. 524; 64 J. P. 323—Kekewich, J.

— **Exercise of Power at Request of Third Party.**—The power to take property for street improvement under 57 Geo. 3, c. xxix. (commonly called Michael Angelo Taylor's Act) is to be used *bona fide* for the statutory purpose and for none other. It is in its nature judicial,

and local authorities are bound to consider the facts and arrive at an honest decision whether the whole or any and what part of a property is required. If they do not accept that responsibility their decision is not binding. *Gard v. Commissioners of Sewers* (54 L. J. Ch. 698; 28 Ch. D. 486) and *Lynch v. Commissioners of Sewers* (55 L. J. Ch. 211, 409; 82 Ch. D. 72) followed. *Denman v. Westminster Corporation*, 75 L. J. Ch. 272; [1906] 1 Ch. 464; 94 L. T. 870; 54 W. R. 345; 70 J. P. 185; 4 L. G. R. 442; 22 T. L. R. 270—Buckley, J.

— **Part of House Required—Adjudication to Take the Whole—Prior Agreement to Sell Part—Ultra Vires.**—When part only of a house is required, the question whether what will be left can be called a house is one of fact and largely of degree. It cannot be answered by saying that the building will require some reconstruction to make it a house, especially if the owner is willing to do the work. Some regard must be had to his wishes, though not so far as to make them the measure of the power of the local authority. *Ib.*

Whether, where owners having different interests in a house hold different views, the local authority can acquire some only of the interests that make up the fee, *quære*. *Ib.*

— **Owner's Right of Pre-emption.**—A board of works contracted to sell to a purchaser such part of the land occupied by two houses as was not required to carry out a scheme for widening a street. A resolution was then passed by the board adjudging that it was necessary to acquire the whole of the two houses, and notice to treat for the same was given to the owner pursuant to 57 Geo. 3, c. xxix.:—*Held*, that the adjudication was wrong and *ultra vires*, as the board must have been influenced by the existence of the prior contract for sale, which deprived the owner of his right of pre-emption under section 96 of the Act; and a perpetual injunction must be granted to restrain them from proceeding with their notice to treat. *Fernley v. Limehouse Board of Works*, 68 L. J. Ch. 344; 80 L. T. 351; 63 J. P. 310—Kekewich, J.

Forming or Laying out of Street for Traffic—Adapting Street for Traffic—Private Road—Alteration of Fence in Front of Building-plot.—In 1870 a private road was laid out on an estate in London for the purpose of foot, horse, and carriage traffic to and from four residences that were at about the same time built on the estate. The road was thenceforth maintained as a private road and used for the traffic in question. In 1903 the purchaser of a plot of land on the estate, to which he had been granted a right of way over the road, took down the existing fence separating his plot from the road and replaced it with a permanent oak fence, and built a house on the plot fifty feet back from the road:—*Held*, that he had not by these acts commenced to form or lay out a street or to adapt a street for traffic within the meaning of sections 7, 8, and 10 of the London Building Act, 1894. *London County Council v. King*, 3 L. G. R. 1046; 69 J. P. 406—D.

— **for Foot Traffic—Market or Bazaar.**—A court in the Metropolis laid out on ground cleared of ancient buildings, with fifty-five

places of business on one side, with twenty-four independent shops on the other, and having six or seven means of access for persons on foot from the surrounding streets through the buildings, is a street intended for foot traffic within section 7 of the London Building Act, 1894, and requires the sanction of the London County Council to its formation, though the control of the entrances is retained by the owner, who closes the main gates at night and on certain days, and though the court with the places of business and shops is intended to form and does form as a whole a market or bazaar. *London County Council v. Davis*, 91 L. T. 555; 2 L. G. R. 1065; 68 J. P. 520—D.

— **Sanction of London County Council—Conditions—New Building on Either Side or upon Site Abutting upon Roadway.**—The respondent, the owner of a plot of land in London lying between two railway-lines and approached by means of a rough cart-track leading under one of the lines by means of a narrow tunnel, obtained the sanction of the London County Council to the formation of a new street across his land upon certain conditions. The proposed new street was to follow the line of the cart-track as far as it went, the tunnel under the last-mentioned railway-line being much widened, and was to be continued thence, crossing the other railway-line by a new bridge, to join a highway at the other side of the respondent's land. One of the conditions upon which the sanction of the County Council was given was that no new building should be erected "upon either side of" the roadway of the new street or "upon a site abutting upon such roadway" unless the roadway had been defined and thrown open throughout its entire length. The respondent was unable to make the arrangements with the railway company necessary to enable him to widen the tunnel as proposed or to make the proposed bridge. He, however, improved the cart-track already mentioned and erected a factory on his land on a site some 180 feet from the line of the proposed street, with access thereto from the cart-track:—*Held*, first, that the respondent had not commenced to form or lay out the street sanctioned by the London County Council; and secondly, that there had been in any case no breach of the conditions above referred to, inasmuch as the factory was at too great a distance from the line of the proposed street for it to be said that it was on either side of the roadway or upon a site abutting upon the roadway within the meaning of that condition. *London County Council v. Collins*, 93 L. T. 540; 3 L. G. R. 1103; 69 J. P. 401—D.

Commencing to Form or Lay Out—Entrance to Blocks of Flats—Sanction of County Council.—The appellant, without having obtained the sanction of the respondents, commenced to erect certain buildings upon a piece of land belonging to him. According to the plan the buildings were to consist of blocks of flats erected in a quadrangular form with an ornamental garden in the centre of the quadrangle formed by the blocks. The approach was to be by means of a carriage-way running round the garden. Upon each side of the carriage-way blocks were to be erected. Each of the blocks was to have a separate entrance from the carriage-way. The appellant did not propose

to dedicate any right of way over the land to the use of the public, but intended to erect gates at the entrance to the approach, and to keep a porter there to open the gates when necessary to allow persons going to or from the flats to pass, and the carriage-way was to be for the use of the tenants of the flats and of persons visiting them:—*Held*, that the appellant had commenced to form or lay out a "street" without having obtained the sanction of the County Council, contrary to the provisions of section 7 of the London Building Act, 1894, and was liable to be convicted under section 200, sub-section 1 (a) of the Act. *Wood v. London County Council* (64 L. J. M.C. 276) dissented from. *Armstrong v. London County Council*, 69 L. J. Q.B. 267; [1900] 1 Q.B. 416; 81 L. T. 638; 48 W. R. 367; 64 J. P. 197—D.

— **Sanction of County Council—Intention.**—The respondent, without having obtained the sanction of the County Council, commenced to erect six shops and houses on the side of a new street upon land purchased from the freeholder. A number of houses had previously been erected along the same side of the street, and the respondent left a space of forty feet for the width of a street for carriage traffic between the corner shop and the corner house of the houses previously erected. This space was the property of the freeholder. The respondent's corner shop had windows looking into the space and also a door opening into it, and the respondent had erected coach-houses and stables at the back of his premises, the only access to which for horses and carriages was by an entrance eighty feet down the space. Upon an information charging that the respondent had commenced to form a street for carriage traffic without having obtained the sanction of the Council, contrary to the provisions of section 7 of the London Building Act, 1894,—*Held*, that the respondent could not be convicted, as the circumstances were consistent with his having built the shops in the way he did "for some purpose other than that of forming or laying out a street" within the meaning of the proviso to section 8. *London County Council v. Dixon*, 68 L. J. Q.B. 526; [1899] 1 Q.B. 496; 80 L. T. 232; 47 W. R. 521; 63 J. P. 390—D.

Vesting of Road in Local Authority—Right to Subsoil.—A road ran over certain land which was vested in a company for the purpose of their undertaking. The road was by a private Act vested in the local authority, who gave no consideration therefor:—*Held*, that the local authority had acquired no rights in the subsoil of the road so as to prevent the company from tunnelling through same in such a way as should not interfere with the use of the road as a road. *Poplar Corporation v. Millwall Dock Co.*, 68 J. P. 339—Farwell, J.

Vesting of Subsoil—Wrongful Laying of Electric Wires—Mandatory Injunction—Continuing Trespass.—The subsoil of streets in the Metropolis is not vested in the local authority by the Metropolis Management Act, 1855, s. 95. Therefore an electric lighting company which has wrongfully and without authority broken the surface of a street and laid pipes and wires beneath it is not guilty of a continuing trespass against the local authority by allowing the pipes and wires to remain beneath the surface, and a

mandatory injunction will not be granted to compel the removal of the pipes and wires. *Tunbridge Wells Corporation v. Baird* (65 L. J. Q.B. 451; [1896] A.C. 434) followed. *St. Mary, Battersea, Vestry v. County of London and Brush Provincial Electric Lighting Co.*, 68 L. J. Ch. 238; [1899] 1 Ch. 474; 80 L. T. 31—C.A.

Widening Street—Agreement with House-owner as to Erection of Sign-post of Public-house.—The Corporation of a Metropolitan borough has power, for the purpose of widening and improving a street, to enter into an agreement with the owner of a public-house in the street, whereby he shall be permitted to erect a sign-post at the edge of the footpath. *Hoare v. Lewisham Corporation*, 87 L. T. 464; 67 J. P. 20—C.A.

Lowering Surface—Local Authority—District Board—Altering Position of Water-Pipes.—Under section 98 of the Metropolis Management Act, 1855, a district board is entitled to lower the surface of a street without making a corresponding alteration in the position of pipes of a water company which have been laid under the street. *Geddis v. Bann Reservoir Proprietors* (3 App. Cas. 430) distinguished. *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756—C.A.

Breaking up Streets to Lay Pipes—Gas Mains—Re-instatement of Streets—Expenses—Concrete Used where none Used before.—Where a Metropolitan borough council, acting under section 114 of the Metropolis Management Act, 1855, and section 82 of the Metropolis Management Amendment Act, 1862, re-instate the surface of a street that has been broken up by a gas company under statutory powers, the council are entitled to recover, as part of the expenses of re-instating the surface, the expenses of placing a course of concrete where there was previously no concrete, or of placing an extra thickness of concrete where there had previously been concrete, if the concrete or extra concrete was necessary in order that the surface should be made as good, and should remain as good, as it was before the excavation. *Commercial Gas Co. v. Poplar Borough Council*, 94 L. T. 222; 70 J. P. 178; 4 L. G. R. 267—D.

Footway—Reduction of Width—Powers of County Council.—See *Corsellis v. London County Council*, 77 L. J. Ch. 120; [1908] 1 Ch. 13; 71 J. P. 561; 6 L. G. R. 78—C.A.

New Street—Commencing to Form or Lay Out.—H. was the owner of land. On that land there was a way over which a few other persons had a right to go to premises abutting on the way. It was a well-defined private way, paved with granite, and had gates at the end. No physical act had been done to the way by H., but he had recently enlarged a building in his possession by extending it backwards along one side of the way:—*Held*, that the magistrate was right upon these facts in finding that H. had not commenced to lay out or form a new street under the London Building Act, 1894. *London County Council v. Heathman*, 69 J. P. 222; 3 L. G. R. 1016—D.

— "Direct communication between two

streets . . . formed and laid out for carriage traffic."—The question whether a proposed new street which is to be used as a carriage-way will, "at and from the time of forming and laying out the same, afford direct communication between two streets . . . formed and laid out for carriage traffic," within the meaning of sub-section 4 of section 9 of the London Building Act, 1894, is a question of fact for the determination of the London County Council, or, upon an appeal from their decision, of the tribunal of appeal appointed for that purpose; and the Court will not interfere with the determination of that tribunal unless it is one to which they could not reasonably have come. *Woodham v. London County Council*, 67 L. J. Q.B. 707; [1898] 1 Q.B. 863; 78 L. T. 553; 62 J. P. 342—D.

Where, therefore, a proposed new street communicated with two streets laid out for carriage traffic, but contained a right-angled turning, and the tribunal of appeal found that the communication afforded thereby was not reasonably direct, the Court held that the finding was right and ought not to be disturbed. *Ib.*

When Road becomes "New street."—In 1877 a vestry made up the carriageway of a road which they had taken over and which they undertook to keep in repair, nothing being done to the footways or to the channelling or kerbing, but, except for the omitted channelling and kerbing, the carriageway was made up in a permanent manner, and in the same mode and to the same extent as new streets with a similar amount of traffic were then dealt with. There were no houses upon the road until 1890, when houses were built upon one side, and in 1896 houses were built on the other side. In 1897 the vestry resolved to treat the road as a "new street" and to pave it under section 105 of the Metropolis Management Act, 1855, and to apportion the expenses upon the frontagers, and the estimates included the cost of wood-paving laid on a concrete foundation. A magistrate having found that the road became a "new street" for the first time after the erection of the houses therein, and that the frontagers were therefore liable for the cost of the paving, including the wood-paving,—*Held*, that the question as to when the road became a "new street" was a question of fact for the magistrate to decide; that he was right in holding that the road became a new street for the first time after the erection of the houses therein, and that the vestry were therefore entitled to pave the road as a new street under section 105, and charge the frontagers with the expenses, including the expenses of the wood-paving. *Allen v. Fulham Vestry*, 79 L. T. 190; 47 W. R. 9; 62 J. P. 548—D.

Subways—Right to Use—Reduced Charge.—A company constituted for the purpose of supplying hydraulic power, and not empowered to sell water, is not a "water company" within the meaning of the London County Council Subway Act, 1893, s. 5; such a company is therefore not entitled to claim to pay only on the reduced scale of charges applicable to "water companies" for the use of the London County Council's subways. *London County Council v. London Hydraulic Power Co.*, 62 J. P. 229—C.A.

(ii.) Paving Expenses.

"Street."—A highway, of which one side is covered with houses along its entire length, and the other consists of building land vacant, except for the existence thereon of a temporary iron school, is a "street" within the meaning of the Metropolis Management Act, 1855, and the Metropolis Management (Amendment) Act, 1862. *Simmonds v. Fulham Vestry*, 69 L. J. Q.B. 560; [1900] 2 Q.B. 188; 82 L. T. 497; 48 W. R. 574; 64 J. P. 548—D.

"New street"—Paving Done by Adjoining Owners—Delay of Vestry in Repaving—Right of Vestry to Pave at Expense of Owners.—Where at or before the time of a highway becoming a "new street" within the meaning of section 105 of the Metropolis Management Act, 1855, and section 77 of the Metropolis Management (Amendment) Act, 1862, the footway on one side of it has been paved for part of its length by the adjoining owners, and for the remainder by the local authority at the expense of the ratepayers, the only other works done on the street being temporary repairs done by the local authority as surveyors of highways, it cannot be inferred from a delay of sixteen years from that time on the part of the local authority in causing the street to be paved that they are satisfied with the existing paving, and therefore not entitled to proceed under these sections to pave the entire street at the expense of the adjoining owners. *Bonella v. Twickenham Local Board* (57 L. J. M.C. 1; 20 Q.B. D. 63) distinguished. *Ib.*

Permanent Paving of Part by Local Authority.—The fact that the local authority have, under section 98 of the Metropolis Management Act, 1855, permanently paved and channelled the footway before a number of houses fronting a country road will not estop them afterwards when that country road has, by having houses built continuously, or nearly continuously on both sides of it, become a new street, from exercising the powers given by section 105 of that Act by directing the footways on both sides to be permanently paved and channelled, and apportioning the estimated cost among the frontagers, including among these the owners of the houses before which the footpath was previously paved and channelled under section 98. "New street" within section 112 of the Metropolis Management Amendment Act, 1862, explained. *Crosse v. Wandsworth District Board of Works*, 79 L. T. 351; 62 J. P. 807—D.

"Owner"—Contract to Sell Premises.—Where the owner of the premises has entered into a contract to sell the premises, and by the terms of the contract he is entitled to the rents and liable to pay all outgoings until the date fixed for completion, he remains until that date the owner of the premises within the meaning of the interpretation clause in section 3 of the Metropolis Management Act, 1855. *Wise v. Rutson*, 68 L. J. Q.B. 298; [1899] 1 Q.B. 474; 80 L. T. 168—Bruce, J.

"Owners"—Land Used for Strengthening Bank of Navigable River.—A strip of land was vested in the Lee Conservancy Board, which they acquired and used solely for the purpose of

strengthening the bank of the Hackney Cut:—*Held*, that the Board were not “owners” of the strip of land within the meaning of section 250 of the Metropolis Management Act, 1855, so as to be liable for the expense of paving, &c., a new street on which the strip of land abutted. *Hackney Borough Council v. Lee Conservancy Board*, 67 J. P. 459—D.

— **Previous Abortive Proceedings for Making up Road.**—Mere lapse of time does not prevent a street from being a new street, nor does the fact that abortive proceedings have been taken to have the street made up as a new street prevent subsequent proceedings for that purpose being taken. *Id.*

— **Building Agreement.**—A building agreement provided that the intended lessee should erect houses on the land comprised therein; that until leases of the houses were granted he would pay to the intended lessor by way of rent 200l. a year; and that on the erection of any house the intended lessor would grant a lease thereof to the intended lessee. The agreement expressly provided that it was intended to operate as an agreement only, and not as an actual demise of the premises, or to give the intended lessee any legal interest therein until the leases should have been executed. The 200l. reserved as rent was not a rack-rent. No houses were built upon the land, nor had it been used by the appellant:—*Held*, that the intended lessor, and not the intended lessee, was the “owner” of the land within the meaning of section 250 of the Metropolis Management Act, 1855, and as such liable under the Metropolis Management Acts to contribute to the expenses of paving a new street upon which the land abutted. *Holland (Lady) v. Kensington Vestry* (36 L. J. M.C. 105; L. R. 2 C.P. 565) followed. *Driscoll v. Battersea Borough Council*, 72 L. J. K.B. 564; [1903] 1 K.B. 881; 88 L. T. 795; 67 J. P. 264; 1 L. G. R. 511—D.

— **Common Abutting on Street—Common Dedicated to Public Use—Of Land Capable of being Let at a Rack-rent.**—The London County Council, in whom a common is vested by statute as a public recreation ground, and on which no houses or other buildings may be erected except such as are necessary for its management or maintenance, are not, although they may receive certain annual sums in respect of the buildings on the common, and also in respect of grazing rights thereon—such sums being in the aggregate much below the amount expended by the Council in the maintenance of the common—the “owners” of the common within the meaning of section 250 of the Metropolis Management Act, 1855, so as to be liable for the paving expenses of a new street abutting thereon. *Fulham Vestry v. Minter* (70 L. J. K.B. 348; [1901] 1 K.B. 501) overruled. *London County Council v. Wandsworth Borough Council*, 72 L. J. K.B. 399; [1903] 1 K.B. 797; 88 L. T. 738; 51 W. R. 499; 67 J. P. 215; 1 L. G. R. 462—C.A.

— **“New street”—Road Taken Over and Repaired by Local Authority—Subsequent Erection of Houses in Road—Liability of Adjoining Owners.**—A road which had been constructed by a company through market-gardens was in 1877 taken over and made up, except as to the foot-paths thereof, by the local authority in the

same manner as new streets with a similar amount of traffic were made up at that time, and had ever since been repaired by them. In 1890 houses were for the first time built on one side of the road, and in 1895 and 1896 on the other. The local authority thereupon paved the road as a “new street” under the provisions of section 105 of the Metropolis Management Act, 1855, and apportioned the expenses thereof upon the adjoining owners. Summonses having been issued to recover the sums apportioned, the magistrate found that the road first became a new street when the houses were built along it:—*Held*, that the words “new street” in section 105 meant a street with buildings in it, and that the magistrate was therefore justified in finding that the local authority were entitled to treat this road as a “new street” when the houses were erected in it, and to charge the expenses of paving it on the adjoining owners. *Allen v. Fulham Vestry*, 68 L. J. Q.B. 450; [1899] 1 Q.B. 681; 80 L. T. 253; 47 W. R. 428; 63 J. P. 212—C.A.

— **Land Abutting on Street—Statutory Restrictions—Rack Rent—“Owner.”**—By a private Act it was provided that the defendants should acquire all the land of certain owners up to a road, and should leave a strip of land twenty feet wide along the whole length of the road, which was a new street, and plant and maintain the same with shrubs and trees to the satisfaction of the owners, and to the like satisfaction fence off the land from the road. The defendants acquired the land and left the strip, which they planted and fenced off in accordance with the provisions of the Act:—*Held*, that, although the land was at present *extra commercium*, the restrictions against profitable user could be released, and therefore the defendants were “owners” of the land within section 250 of the Metropolis Management Act, 1855, and liable under section 105 to contribute to the expenses of paving. *Wright v. Ingle* (55 L. J. M.C. 17; 16 Q.B. D. 379) followed. *Hampstead Borough Council v. Midland Railway*, 74 L. J. K.B. 431; [1905] 1 K.B. 538; 92 L. T. 252; 69 J. P. 133; 3 L. G. R. 455; 21 T. L. R. 272—C.A. Affirming, 53 W. R. 187—Bigham, J.

— **Paving Streets at Points of Intersection.**—The provisions of section 77 of the Metropolis Management Amendment Act, 1862, under which the expenses of paving a new street chargeable on the frontagers may include “the cost of paving at the points of intersection of streets,” are not confined to cases where two streets cross each other, but apply also where the new street in question joins another street and is not continued on the other side thereof. And where the borough council make up, at the cost of the frontagers, a new street so joining another street, they may, accordingly, charge on the frontagers the cost of paving a crossing at the junction of the two streets in the line of the foot-pavement of the latter street. *Bridgett v. Wandsworth Borough Council*, 93 L. T. 519; 3 L. G. R. 1186; 69 J. P. 394—D.

— **Old Street Widened by Addition on One Side.**—Where a strip of land is added to one side of an old highway and made into a street, such added strip and not the whole roadway constitutes a new street. The expenses of paving,

&c., such added strip are therefore apportionable among and recoverable from the frontagers on it, and not from the frontagers on both sides of the old roadway. *Property Exchange Co. v. Wandsworth District Board*, 84 L. T. 689; 65 J. P. 407—D.

— **Land Kept for the Recreation of the Public—Property Capable of Beneficial Occupation.**—Where land abutting upon a new street is of such a character that it is incapable of ever being used beneficially, it is *extra commercium*, and the owner is not liable under section 77 of the Metropolis Management Act, 1862, to contribute in respect of it to the expenses of paving the street. But where the owner may, consistently with the terms upon which he holds the land, derive some beneficial occupation from it, he is liable to contribute to such expenses, notwithstanding that the land is subject to a trust for the perpetual use by the public for purposes of recreation. *Fulham Vestry v. Minter*, 70 L. J. K.B. 348; [1901] 1 K.B. 501; 34 L. T. 49; 49 W. R. 415; 65 J. P. 180—D.

— **Cut of Navigable River Vested in Conservancy Board Abutting on Street—Strip of Land for Strengthening Bank—"Owner" of Land Capable of being Let at a Rack-rent.**—The Lee Conservancy Board purchased a strip of land about twenty-six feet wide at the base and from ten to fifteen wide at the top for the purpose of strengthening the bank of the Hackney Cut (which formed part of the Lee Navigation) and preserving the river in a navigable condition, and thus enabling the Board to earn the tolls which the statutes authorised them to charge. The strip of land was used solely for that purpose. The money necessary to enable the Board to perform their statutory duties was raised by mortgages, and the tolls were applicable to pay the interest on the mortgages. The Board had statutory power to construct new locks, docks, wharves, towing-paths, and other works, and there was nothing in the statutes to prevent the strip of land being utilised for such a purpose; the Board had also power to sell, convey, or otherwise dispose of any of the lands vested in them which were not required for any of the purposes of the undertaking, and there was nothing to preclude the Board substituting a retaining wall for the bank formed by the strip of land in question, and disposing of the portion of land no longer required:—*Held*, that the nature of the Board's undertaking and the conditions under which it was carried on did not place the strip of land *extra commercium* or render it incapable of being let at a rack-rent, and therefore that the Board were "owners" of the same within the meaning of section 250 of the Metropolis Management Act, 1855, and, as such, liable for paving expenses in respect of a new street on which the strip of land abutted. *Dictum* of LORD WATSON in *Great Eastern Railway v. Hackney Board of Works* (52 L. J. M.C. 105; 8 App. Cas. 687) considered. *Hackney Borough Council v. Lee Conservancy Board*, 73 L. J. K.B. 766; [1904] 2 K.B. 541; 91 L. T. 13; 68 J. P. 485; 2 L. G. R. 1144; 20 T. L. R. 146—C.A.

— **Present or Future Owner—Liability.**—By the joint operation of section 105 of the Metropolis Management Act, 1855, and section 77 of the Metropolis Management Act,

1862, successive owners of houses bounding on abutting on new streets are liable on demand to pay the amount of paving expenses apportioned or charged in respect of their houses. *Hampstead Corporation v. Caunt*, 72 L. J. K.B. 440; [1903] 2 K.B. 1; 88 L. T. 599; 51 W. R. 700; 1 L. G. R. 507; 67 J. P. 344—Wright, J.

Landlord and Tenant—Covenant by Tenant to Pay Charges Imposed on Frontages—Payment by Tenant to Local Authority of Rent Due to Landlord—Right of Landlord to Distrain.—The payment made by an occupier of premises to the local authority under section 96 of the Metropolis Management Act, 1862, is not a payment of rent, but a payment of a sum on account of the charges and expenses incurred by the local authority measured by the amount of rent due from the occupier to his landlord, and which the occupier is entitled to deduct from his rent, provided that he has entered into no contract with his landlord which prevents him from so doing; but if he has entered into an agreement with his landlord to pay such charges as those in question he is not entitled to make the deduction, and the rent remains due notwithstanding the payment to the local authority, and the landlord can distrain for it. *Skinner v. Hunt*, 73 L. J. K.B. 680; [1904] 2 K.B. 452; 91 L. T. 270; 68 J. P. 402; 2 L. G. R. 769; 20 T. L. R. 556—C.A.

Water Company—Opening of Street by—Repair by Local Authority—Employment of Contractor—Recovery of Expenses from Company—Expense of Superintendence of Contractor.—Where a Metropolitan local authority has employed a contractor to make good a street which has been broken up by a water company in the exercise of statutory powers, the local authority is entitled under section 114 of the Metropolis Management Act, 1855, to recover from the company not only the sum paid by them to the contractor for the work actually done by him, but also the expenses reasonably incurred by them in superintending the execution of the work by the contractor. *New River Co. v. Westminster City Council*, 73 L. J. K.B. 1009; 90 L. T. 792; 68 J. P. 358; 2 L. G. R. 1024; 20 T. L. R. 507—D.

Private Courtyard or Mews—Whether Owner can be Called upon to Re-pave.—Where a borough council in exercise of their powers under sections 99 and 100 of the Metropolis Management Act, 1855, have called upon the owner of a private courtyard or mews to pave the same in a particular manner, as, for instance, with macadam, they cannot afterwards require him to re-pave the same in some other manner, as, for instance, with asphalt on concrete. When once a pavement has been laid in compliance with a notice under these sections, the powers of the borough council are limited to calling upon the owner to repair and keep the pavement in repair. *Harrison v. New Street Mews (Owner)*, 75 L. J. K.B. 510; [1906] 1 K.B. 703; 95 L. T. 57; 70 J. P. 355; 4 L. G. R. 703—D.

Footpaths—Percentage for Supervision &c. by Salaried Officers of Local Authority.—A Metropolitan borough council, purporting to act under section 3 of the Metropolis Management Amendment Act, 1890, executed works on a road in

their borough, and apportioned a sum of about 431*l.*, as being the expenses of and incident to the works, on the frontagers. The 431*l.* included an item of about 10*l.* in respect of works to the footpaths, and an item of about 16*l.*, representing expenses of plans, estimates, supervision, &c., calculated at 4 per cent on the actual expenditure. On proceedings against one of the frontagers for the recovery of an apportioned share of the 431*l.*, the magistrate found as a fact that the "works executed, though very extensive, did not amount to paving as a new street, and that such works were not therefore works of construction or reconstruction, but necessary works of repair" within the section. The work in connection with the plans, estimates, supervision, &c., was, in fact, carried out by the salaried officials of the council, and occasioned no substantial extra expense to the council:—*Held*—first, that the frontagers were liable as regards the expenses of the works to the carriage-way, but could not be charged with the expense referable to the footpath; secondly, on the authority of *Metropolitan Water Board v. Westminster City Council* (75 L. J. K.B. 384; 4 L. G. R. 237), that the frontagers could not be charged with the 16*l.*; and thirdly, following *Reg. v. Marsham* (61 L. J. Q.B. 52; [1892] 1 Q.B. 371), that, as the apportionment included items not chargeable on the frontagers, the magistrate ought to have dismissed the summons, and could not make an order for payment of a reduced amount. *Ballard v. Wandsworth Borough Council*, 95 L. T. 118; 70 J. P. 331; 4 L. G. R. 708—D.

Street "leading into" Main Street.]—The London County Council under their Improvement Act, 1899, were required to maintain a public street along the boundary of particular premises "leading into the new central street":—*Held*, that this meant leading straight or directly into the new central street. *Metropolitan Electric Supply Co. v. London County Council*, 68 J. P. 501; 2 L. G. R. 1286—Kekewich, J.

Apportionment of—Notice of—Demand.]—A notice given to the owner of premises that the local authority has apportioned and charged him with the payment of a part of expenses of paving a new street, amounting to a specified sum, is a sufficient requirement of payment within section 96 of the Metropolis Management Amendment Act, 1862. *Wix v. Rutson*, 68 L. J. Q.B. 298; [1899] 1 Q.B. 474; 80 L. T. 168—Bruce, J.

— Owners of Land "Abutting" on New Street.]—Where an apportionment in respect of the paving expenses of a new street has been *bona fide* made by a borough council, acting under the powers of the Metropolis Management Acts, the Court, notwithstanding the decision in *Grand Junction Waterworks v. Hampton Urban Council* (67 L. J. Ch. 608; [1898] 2 Ch. 331, 345), will declare such apportionment invalid if a merely nominal sum has been therein apportioned in respect of an alleged strip of land down one side of the new street, and the Court finds in fact that there was no such strip, and that consequently the owners of the houses bounding or abutting on that side of the new street had no portion of the paving expenses apportioned upon them.

Elsdon v. Hampstead Borough Council, 75 L. J. Ch. 27; [1905] 2 Ch. 633; 93 L. T. 335; 54 W. R. 434; 69 J. P. 434; 3 L. G. R. 1199; 21 T. L. R. 772—Joyce, J.

— Dismissal of Summons on Ground of Street not being a New Street—Fresh Apportionment—Res Judicata.]—On November 9, 1899, the H. Vestry resolved that R. Street be paved as a new street, and apportioned the sum of 37*l.* 16*s.* 8*d.* on the respondent, which he refused to pay. On September 15, 1899, the H. Vestry summoned the respondent for that sum, but the summons was dismissed on the ground that R. Street was not a new street within the Metropolis Management Acts. On June 13, 1900, a resolution was passed by the H. Vestry rescinding the above apportionment, and on March 14, 1901, the H. Borough Council resolved that R. Street be paved as a new street, and apportioned on the respondent the sum of 32*l.* 16*s.* 1*d.*, which he refused to pay, and thereupon the present summons was issued. The magistrate held that the adjudication of September 15, 1899, was conclusive, and he dismissed the summons:—*Held*, on the authority of *Wakefield Corporation v. Cooke* (71 L. J. K.B. 257; [1902] 1 K.B. 1888), that the decision of September 15, 1899, was not conclusive, and the present case should be heard on its merits. *Scott v. Lowe*, 86 L. T. 421; 66 J. P. 520—D.

— Estimated Expenses by Temporary Surveyor.]—An officer of a Metropolitan borough council who, having been their assistant surveyor, was acting as interim surveyor, is their "surveyor for the time being" within the meaning of section 105 of the Metropolis Management Act, 1855, for the purpose of estimating the cost of paving a new street. *Lewis v. Weston-super-Mare Local Board* (58 L. J. Ch. 39; 40 Ch. D. 55) distinguished. *Kendal v. Lewisham Borough*, 67 J. P. 236; 1 L. G. R. 416—Kekewich, J. Order discharged by consent, 2 L. G. R. 31; 20 T. L. R. 21—C.A.

— Strip of Land Added to Old Highway.]—An old public highway for carriage traffic, sixteen feet in width, which prior to 1855 was a formed road and was constituted a street by the erection of houses on the south side, and since 1855 had been prepared by the board of works within whose district it was situate, was in 1898 widened on the north side by the addition of a strip, twenty-four feet in width, and houses, sufficient in number and position to constitute a street, were built upon that side. An apportionment of the estimated expenses of paving the added strip as a new street under the Metropolis Management Acts was made by the board upon the owners of the premises on the north side of the added strip:—*Held*, that the added strip was a new street within the meaning of section 105 of the Metropolis Management Act, 1855, and section 77 of the Metropolis Management Amendment Act, 1862, and that the apportionment was properly made on the owners of the premises on the north side of the added strip only. *Richards v. Kessick* (57 L. J. M.C. 48) and *White v. Fulham Vestry* (74 L. T. 425) approved. *Property Exchange (No. 1) v. Wandsworth Board of Works*, 71 L. J. K.B. 515; [1902] 2 K.B. 61; 86 L. T. 481; 66 J. P. 435—C.A.

— Power of Local Authority to Rescind

—**New Apportionment.**—Resolutions of a local authority as to the paving of the footpaths of a new street followed by a valid apportionment of expenses are not necessarily final and conclusive. They may, unless completely carried out, be rescinded by the local authority, under the powers conferred upon them by section 57 of the Metropolitan Management Act, 1855, and a second apportionment made in respect of the paving expenses of the same street. *Bishop v. Wandsworth Board of Works*, 69 L. J. Q. B. 632; 82 L. T. 766; 64 J. P. 630—D.

Road not Repairable by Borough Council—Necessary Works of Repair Executed by Council—Recovery of Expenses from Frontagers—“Court of competent jurisdiction.”—The expenses of necessary works of repair executed upon a road by a Metropolitan borough council under the provisions of section 3 of the Metropolitan Management Act, 1890, may be recovered from the frontagers by summary proceedings before a Metropolitan police magistrate. The expression “Court of competent jurisdiction” in that section is not limited to a Court competent to entertain an action of debt. *Rez v. Garrett*, 76 L. J. K. B. 353; [1907] 1 K. B. 881; 96 L. T. 407; 71 J. P. 171; 5 L. G. R. 358; 23 T. L. R. 309—C. A.

Intervening Strip.—At the time the defendant purchased a certain piece of land there was an intervening strip on which was an old fence between it and the new street. He had purchased the land in 1904 on the faith of an apportionment by the borough council of a nominal sum in respect of paving expenses on the land upon which the old fence stood forming the eastern boundary of the land he had purchased. Subsequently it was decided that the strip of land had been conveyed with the land on either side of it, and that the buildings erected on the land purchased by the defendant abutted on the new street; whereupon the plaintiffs rescinded the first, and made a fresh apportionment, including the houses erected by the defendant:—*Held*, that the defendant was liable to pay the amount apportioned on his houses in the second apportionment. *Hampstead Borough Council v. Western*, 71 J. P. 565—Darling, J. *And see* LOCAL GOVERNMENT.

Blocking up by County Council in Carrying out Improvements—Loss of Trade.—*See* *Martin v. London County Council*, 79 L. T. 170, *post*, STATUTE.

Reinstatement—Negligence.—*See* GAS COMPANY.

(m) Traffic.

Obstruction—Truck Placed Opposite House for Removing Dust—Legal Justification for Appropriation of Roadway.—Whether or not a person wilfully causes an obstruction in a thoroughfare within the meaning of section 54, sub-section 6 of the Metropolitan Police Act, 1839, is in each case a question of degree depending upon the particular facts. *Dunn v. Holt*, 73 L. J. K. B. 841; 90 L. T. 577; 68 J. P. 271; 2 L. G. R. 502; 20 Cox C. C. 625; 20 T. L. R. 297—D.

Where a truck two feet eight inches wide is placed opposite a house in a carriage-way

thirty feet wide for several hours during the day for the purpose of removing dust from the house, the purpose being in itself reasonable, the time selected for the operation also reasonable, and the time and space occupied by it not excessive, but the system of cleaning involved being not necessary to the ordinary comfort or exigency of life, and still in the experimental stage, and one which might, from noise and the collection of sightseers attracted by it, be productive of discomfort and inconvenience to occupants of houses and people using the streets, but sufficient width of carriage-way is left to enable vehicles to pass, and there is no evidence that any one is actually prevented from passing along the street or that any individual is incommoded; there is no evidence of a wilful obstruction within the meaning of the sub-section. *Id.*

—**Costermonger—Offence.**—Section 60, sub-section 7 of the Metropolitan Police Act, 1839, has not been impliedly repealed by section 1 of the Metropolitan Streets Act Amendment Act, 1867, in the case of costermongers; nor has it been superseded by the police regulations of December 28, 1869, made by the latter Act. *Wandsworth District Board of Works v. Pretty*, 68 L. J. Q. B. 193; [1899] 1 Q. B. 1; 47 W. R. 256; 63 J. P. 132—D.

Where a costermonger causes an annoyance or obstruction within the meaning of section 60, sub-section 7 of the Metropolitan Police Act, 1839, a private person who is aggrieved by such annoyance or obstruction may take proceedings against the costermonger by way of summons to recover the penalty imposed by the section. *Semble*, that the magistrate, in order to convict, must find that there is a real and substantial annoyance in fact. A merely technical annoyance, arising from the user of the street by the costermonger in a manner other than as a highway, is not sufficient to justify a conviction. *Wandsworth Board of Works v. Pretty (supra)* approved. *Reg. v. Francis*; *Walton, Ex parte*, 68 L. J. Q. B. 609; 63 J. P. 469—D.

Hackney Carriage—Liability of Proprietor for Driver's Negligence.—*See* HACKNEY CARRIAGE.

(n) Water Supply.

Opening of Street by Water Company—Repair by Local Authority—Employment of Contractor—Recovery of Expenses from Water Company—Expenses of Superintendence of Contractor.—Appeal against the decision of a Divisional Court on a case stated by a Metropolitan police magistrate, *sub nom. New River Co. v. Westminster City Council* (73 L. J. K. B. 1009) allowed on a further finding of fact by the magistrate. *Metropolitan Water Board v. Westminster City Council*, 75 L. J. K. B. 384; 70 J. P. 52; 4 L. G. R. 237; 22 T. L. R. 92—C. A. *And see* col. 1416 and WATER.

4. RATES AND RATING.

Valuation List—Hereditaments Exempt from Poor Rate, but Liable to other Rates—Duty of Assessment Committee—Appeal to Quarter Sessions—Mandamus.—Certain hereditaments in the City of London were exempt from poor

rate under a local Act, but were liable to certain other rates. The overseers of the parishes in which these hereditaments were situate inserted them in the valuation lists, but in each case, while stating the gross value, refrained from stating any rateable value for the hereditaments, merely entering in the column for rateable value a note that the hereditament was exempt from poor rate. And the assessment committee approved the list in this form. The Corporation of the City, who had power to levy certain rates from which the hereditaments were not exempt, and for the purposes of which the valuation list is, by the Valuation (Metropolis) Act, 1869, made conclusive, obtained from the Divisional Court a rule absolute for a *mandamus* requiring the assessment committee to insert the rateable values of the hereditaments in the valuation lists:—*Held*, that the rule must be discharged. The scheme of the Act of 1869 is that the valuation lists shall be corrigible only on appeal under that Act, and only at the instance of those to whom rights of appeal are given by that Act. Consequently, in no view ought the *mandamus* to issue. Further, the matter could have been raised by the Corporation on appeal, both under the provisions of section 32 of that Act, giving a rating authority an appeal against totals, and under the provisions of the same section giving such an authority an appeal if there is no approved valuation list for the parish. *Rev v. City of London Union; London Corporation, Ex parte*, 76 L. J. K.B. 1087; [1907] 2 K.B. 764; 97 L. T. 346; 5 L. G. R. 819; 71 J. P. 877; 23 T. L. R. 502—C.A.

Per VAUGHAN WILLIAMS, L.J., and FLETCHER MOUTON, L.J.—The rateable values ought to have been inserted; but *quære* whether the insertion of such values would have affected the amount of the contributions of the parish towards common charges payable out of poor rate. *Ib.*

— **Rateable Value—Deductions from Gross Value**—“Houses or buildings let out in separate tenements.”—A building let out in flats, each of which is entered in the parochial valuation list as a separate rateable hereditament, is a house or building “let out in separate tenements” within the footnote to the Third Schedule of the Valuation (Metropolis) Act, 1869. *Western v. Kensington Assessment Committee*, 77 L. J. K.B. 328; [1908] 1 K.B. 811; 72 J. P. 42; 6 L. G. R. 119—C.A.

But the question whether deductions beyond the *maxima* prescribed by the Third Schedule can be allowed in such a case depends upon the circumstances of the occupation. *Ib.*

Appeal to Sessions—Point not Expressly Raised in Notice of Objection taken on Appeal.—On appeal to sessions against a decision of an assessment committee under the Act of 1869 the appellant is entitled to take the point that the property to which the appeal relates comes within the category of “houses or buildings let out in separate tenements,” and raise a claim accordingly to a larger deduction from the gross value than would otherwise be permissible, though he did not, in his original notice of objection, expressly allege or necessarily imply that there was any error in the list as regards

the class under which the property was entered. *Ib.*

New Valuations—Alteration in Value—General Rise in Values.—In order to justify an alteration in the valuation of premises either by a supplementary valuation under section 46 of the Valuation (Metropolis) Act, 1869, or by a provisional valuation under section 47 of that statute, the alteration in value must be such that, if the fact relied on as constituting the alteration had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment, and the fact constituting the alteration in value should affect the premises in question in particular. A general rise in values is not a fact constituting such an alteration, but it is otherwise where an increase in values arises from some cause affecting merely the particular class of premises in question, and not from general prosperity affecting all classes of the community. The onus of shewing an alteration in the value of premises is on those who seek to have a provisional or supplemental valuation made. *Ellis v. Camberwell Assessment Committee*, [1900] 1 Q.B. 68; 48 W. R. 162; 63 J. P. 820—C.A.

Supplemental Valuation List—Provisional Valuation List—Alteration in Value of Premises Rated.—The alteration in the value of a hereditament, which under section 47 of the Valuation (Metropolis) Act, 1869, justifies its inclusion in a provisional list, must be an alteration arising from a definable cause and affecting the particular hereditament, and not from general economic change, or from appreciation of the particular class of property to which the hereditament belongs; and it lies upon those who desire to alter the assessment to prove the nature and cause of the alleged alteration. The mere fact that subsequently to the quinquennial valuation a premium was paid for the lease of the premises is not—apart from other evidence, such as the premium paid on a previous transfer—evidence of alteration within the meaning of the statute. *Camberwell Assessment Committee v. Ellis*, 69 L. J. Q.B. 828; [1900] A.C. 510; 83 L. T. 201; 49 W. R. 283; 65 J. P. 132—H.L. (E.)

Quinquennial Valuation List—Omission of Notice of Alteration in Rateable Value—Objection taken to Issue of Distress Warrant.—The objection that no notice of an alteration in the gross and rateable value of a hereditament inserted in the valuation list has been served upon the occupier of the hereditament, under section 9 of the Valuation of Property (Metropolis) Act, 1869, cannot be taken by him upon an application for a distress warrant to recover a rate which is based upon the rateable value of the premises stated in the valuation list. *Westminster City Council v. Army and Navy Auxiliary Supply*, 71 L. J. K.B. 546; [1902] 2 K.B. 125; 87 L. T. 78; 50 W. R. 631; 66 J. P. 727—D.

Appeal against Valuation List—Occupier's Name Struck Out—“Alteration” in Assessment—Repayment of Rates.—An alteration in a valuation list on appeal to a superior Court is not by the terms of section 44 of the Valuation (Metropolis) Act, 1869, confined to a mere altera-

tion in the amount of the assessment; but the striking out from the valuation list of the name of an occupier is equally an alteration within the contemplation of the section. So where, in such a case, the person wrongly entered as occupier has been compelled to pay rates, he can maintain an action against the vestry for repayment of the same. *Burton v. St. Giles's Vestry*, 70 L. J. K.B. 127; [1901] 1 K.B. 650; 84 L. T. 30; 49 W. R. 334; 65 J. P. 167—Mathew, J.

Assessment — Gross Value — Rent — Payment made to Third Party for Cleaning and Lighting Common Stair.—Where the tenant of each of several tenements, the access to which is by a common stair, by arrangement with the landlord, pays, in addition to his weekly rent to the landlord, a weekly sum to a third party in respect of the cleaning, watching, and lighting of the common stair, that sum must be taken into account in determining the "gross value" within the meaning of section 4 of the Valuation (Metropolis) Act, 1869, of the tenement in respect of which it is paid. *Pullen v. St. Saviour's Union*, 69 L. J. Q.B. 139; [1900] 1 Q.B. 138; 81 L. T. 583; 48 W. R. 186—D.

Rector's Rate—Liability—"House"—Dwelling-house.—A house converted by internal alterations into a warehouse, and not actually occupied as a dwelling-house or suitable in its present condition for such occupation, but capable of re-conversion into a dwelling-house, is still a "house" within the meaning of an Act of Parliament by which rates are charged upon the houses within a parish. *Dicta in Surman v. Darley* (14 L. J. M.C. 145; 14 M. & W. 181) disapproved. *Lewin v. End*, 75 L. J. K.B. 473; [1906] A.C. 299; 94 L. T. 649; 54 W. R. 606; 4 L. G. R. 618; 70 J. P. 263; 22 T. L. R. 504—H.L. (E.)

Statutory Exemption of Property from—Fore-shore Reclaimed from River Thames—Implied Repeal of Local Act by Subsequent Local Act.—The exemption from taxes and assessments conferred by section 51 of 7 Geo. 3, c. 37, upon the ground and soil of the River Thames inclosed and embanked by virtue of the Act, is taken away by section 169 of the City of London Sewers Act, 1848. *Sion College v. London Corporation*, 69 L. J. Q.B. 766; [1900] 2 Q.B. 581; 83 L. T. 76—D.

Land Covered with Water.—The partial exemption from rateability under the Public Health Acts of land covered with water is continued, as regards hereditaments situated in Woolwich, by section 10, sub-section 1 of the London Government Act, 1899, and the scheme made under it, notwithstanding the repeal of the Public Health Acts as to Metropolitan boroughs. *London and India Docks Co. v. Woolwich Borough*, 71 L. J. K.B. 394; [1902] 1 K.B. 750; 86 L. T. 619; 50 W. R. 639; 66 J. P. 484—D.

Appeal—Hereditament Partly Exempt—No Separate Valuation.—The occupier of a hereditament, part of which is covered with water, may appeal against a rate on the ground that effect has not been given to the exemption, although the hereditament has been valued as a whole in the valuation list, and the parts entitled to exemption and the parts not so entitled have not been separately valued. *Ib.*

— "From all taxes and assessments whatsoever"—**New Rate Subsequently Authorised.**—The provision of section 51 of 7 Geo. 3, c. 37, that the ground reclaimed from the River Thames under that Act should vest in the owners therein mentioned "free from all taxes and assessments whatsoever," applies only to taxes and assessments in existence at the time of the passing of that Act, and does not apply to the consolidated rate which the Corporation of London were empowered to make under the City of London Sewers Act, 1848, inasmuch as the provisions of that Act shew that that rate is substantially a new rate, and was not in existence at the time of the passing of 7 Geo. 3, c. 37. *Sion College v. London Corporation*, 70 L. J. K.B. 369; [1901] 1 K.B. 617; 84 L. T. 133; 49 W. R. 361; 65 J. P. 324—C.A.

— **Special Statutory Exemption, whether Confined to Existing Rates—Fixed Composition Payable "for ever hereafter."**—The 52 Geo. 3, c. 49, extended the time for the exercise of certain statutory powers then vested in the Treasury for the purchase of the "legal quays" (which were at that time private property) in front of the old Custom House in Lower Thames Street, in the City of London, and gave the Treasury power for the acquisition of certain premises in Lower Thames Street for the purpose of erecting a new Custom House in substitution for the old Custom House. Section 3 of the Act provided that an annual sum of 220*l.* 12*s.* 10½*d.*, which was then paid by the Treasury in respect of the old Custom House, and a like sum which was then paid as rates in respect of the legal quays, to the collectors of the parochial and ward rates in the ward of T. and in the parish of A. in the said ward, should for ever thereafter be paid out of consolidated Customs to the collectors of the rates to whom the sums were then paid and should be considered as part of the produce of such rates. Section 4 of the Act provided for the payment of a contribution in lieu of rates in respect of the premises to be purchased for the site of the new Custom House. And section 5 enacted that the old Custom House and "the said premises in Lower Thames Street" should be exempt from all rates and assessments, although the same might become private property. By the 2 & 3 Will. 4, c. 66, provision was made as to the sale of the legal quays and the site of the old Custom House. And by sections 2 to 4 of that Act it was provided that the two sums of 220*l.* 12*s.* 10½*d.* each referred to in section 3 of the 52 Geo. 3, c. 49, should after the sale of the property by the Treasury cease to be payable out of the Customs and become payable by the proprietors for the time being of the property:—*Held*, that the legislation had the effect of putting the legal quays in the same position as the site of the old Custom House as regards rates. *London Corporation v. Netherlands Steamboat Co.*, 93 L. T. 566; 69 J. P. 443; 3 L. G. R. 1087—H.L. (E.)

That the provisions exempting the property in the hands of private individuals from rates, except to the extent of the fixed contribution, were not confined to rates existing at the time of the Acts, but extended to future rates. *Sion College v. London Corporation* (70 L. J. K.B. 369; [1901] 1 K.B. 617) distinguished. *Ib.*

That the privilege attaching to the property was not taken away as regards the consolidated rate by the City of London Sewers Act, 1848, notwithstanding the provisions of that Act declaring that such rate should be levied on property in the city whether the occupiers were liable to poor rate or were not liable to poor rate by reason of the property being situate in any precinct or extra-parochial place or otherwise, and declaring that churches, prisons, public buildings, &c., should be rateable to such rate. *Ib.*

— **Commutation for Payment of Rates—Extent of Exemption—New Rates.**—By section 5 of 52 Geo. 3, c. 49, certain property in the City of London, formerly belonging to the Commissioners of the Treasury but now vested in the respondents, was, in consideration of a fixed composition, made “free and exempt from the payment of all and all manner of rates and assessments,” although it might come into private ownership:—*Held*, that the exemption was not confined to rates then existing, but extended to all rates and assessments to be thereafter imposed. *London Corporation v. Netherlands Steamboat Co.*, 75 L. J. K.B. 771; [1906] A.C. 263; 93 L. T. 566; 69 J. P. 443; 3 L. G. R. 1087—H.L. (E.)

“Name of person liable to be rated omitted or described by a wrong name”—**Correction.**—E. was the occupier of premises known as the Pall Mall Club during the whole of the qualifying period. On the rate-book his predecessors in the premises, the New Nimrod Club, were entered as occupiers. Two days after the expiration of the period for which the rate was made a summons was taken out under section 72 of the Valuation (Metropolis) Act, 1869, to have the error rectified, but the magistrate refused to insert E.’s name, being of opinion—first, that E.’s name had not been “omitted from the rate” within the meaning of the section; secondly, that E. was not a person “described in such rate by a wrong name” within the meaning of the section; and thirdly, that E.’s name could not legally be inserted in the said rate after the expiration of the period for which the rate was made:—*Held*, that the magistrate was wrong in so holding, and that he ought to have inserted E.’s name. *Westminster City Council v. Edgcombe*, 67 J. P. 25—D.

Collection—Parish of St. Marylebone—From Sheriff in Possession—Goods “taken in execution” —Payment of Judgment Debt—Withdrawal of Sheriff without Paying Rate—Liability of Sheriff for Rate.—Section 195 of 35 Geo. 3, c. 73, provides that when the goods of any person liable to pay any rate “by virtue of this Act” shall be “taken in execution” within the parish of St. Marylebone by any sheriff before such rate shall have been paid, then the sheriff, upon demand made by the collector of the vestry, “shall and he is hereby directed and required, in the first place, to pay to such collector” the rate. A sheriff seized the goods of a judgment debtor in the parish under a writ of *fi. fa.*, and whilst he was still in possession the collector of the vestry served on him a notice that parochial rates, consisting of poor rate, general rate, sewers rate, and two other small rates, were due from the judgment debtor to the vestry, and demanding payment by the sheriff

under section 195 of 35 Geo. 3, c. 73. The judgment debtor having paid the judgment debt, the sheriff withdrew without paying the rate, leaving on the premises goods of more than sufficient value to satisfy the rate:—*Held*, in an action by the vestry against the sheriff to recover the amount of the rate, that the goods were “taken in execution” within the meaning of 35 Geo. 3, c. 73, s. 195, when they were seized by the sheriff, and that, as the privilege of collecting the rate from the sheriff given by that section applied directly to the poor rate, and was extended by section 161 of the Metropolitan Management Act, 1855, to the other rates, the vestry was entitled to recover the amount of the rate from the sheriff. *St. Marylebone Vestry v. County of London (Sheriff)*, 69 L. J. Q.B. 848; [1900] 2 Q.B. 591; 83 L. T. 355; 49 W. R. 86; 64 J. P. 628—C.A.

Right of Action—Demand—Statute of Limitations.—The Statute of Limitations, if applicable, does not begin to run in favour of any owner until demand has been made upon him for the amount due from him. *Ib.*

Appeal—Costs—No Consent of Borough Council.—*See col. 1862.*

See also col. 1419 and POOR LAW.

G. PARISH PROPERTY.

Metropolitan Vestry Hall—Borough Council or Vicar and Churchwardens—User for Secular or Ecclesiastical Purposes—Transfer to Local Authority—“Property connected with the affairs of the church.”—An Act of 1719, passed to authorise the rebuilding of the parish church of St. Martin-in-the-Fields, provided, *inter alia*, for the enlargement of the churchyard and for the erection of a vestry room for the parish. Under that Act land was acquired and conveyed to trustees upon trust “for the parish and parishioners, and that the same be made part of the site of the parish church now to be rebuilt, or to be laid out as part of the churchyard.” The vestry room was erected upon part of such land. The site of the vestry room, together with vaults constructed underneath it, was duly consecrated for burial; but the room itself was not consecrated. By an Act of 1826, passed to authorize certain street improvements, the Commissioners of Woods and Forests were empowered to remove the vestry room above mentioned and to provide a new vestry room in its stead, which, by the terms of the Act, was to vest in the persons in whom the previous room would have been vested had the Act not been passed. The Commissioners of Woods and Forests removed the old vestry room accordingly, and erected a building comprising a new vestry room, together with other accommodation:—*Held*, that the earlier vestry room became vested in the vicar of the parish by virtue of section 4 of the Burial Grounds Act, 1816, whereby all ground consecrated as burial ground is, as from twenty years after consecration, to be considered as vested in the trustees, if any, and, if not, in the vicar. That the room remained vested in the vicar notwithstanding the provisions of section 17 of the Poor Relief Act, 1819, vesting parish property in the churchwardens and overseers. That the fact that it was used for civil purposes by the vestry both before and after the establishment of an elective vestry for the parish

under the Metropolis Management Act, 1855, did not affect the title to the room. And that, consequently, it remained vested in the vicar, and was not subject to the provisions of the London Government Act, 1899, transferring the property of Metropolitan vestries and of the churchwardens and overseers of Metropolitan parishes to the Metropolitan borough councils. *Westminster City Council v. St. Martin-in-the Fields*, 96 L. T. 491; 5 L. G. R. 500; 71 J. P. 82; 23 T. L. R. 112—Joyce, J.

Land Purchased and Sold under Compulsory Powers—Consent of Local Government Board to Payment out of Court—Sanction to Application of such Money.—Land purchased in the year 1894 by a vestry of a parish which by the London Government Act, 1899, had been converted into a Metropolitan borough, had, after notices to treat under the Lands Clauses Consolidation Act, 1845, served upon the borough council by undertakers for the purposes of the East London Waterworks Act, 1900, and the Metropolitan Water Board, been conveyed by the borough council, being parties under disability under the Lands Clauses Consolidation Act, 1845, in March, 1906, to the Water Board and the purchase money paid into Court. Section 6, sub-section 5 of the London Government Act, 1899, provides that the proceeds of sale of "any land sold" by a borough council "shall be applied in such manner as the Local Government Board sanction." The Local Government Board having been made parties to a summons taken out by the council asking for an order that the purchase money in Court might be paid out to be applied by the borough treasurer towards the purchase money of land for the purpose of widening a street in the borough,—*Held*, that the London Government Act, 1889, s. 6, sub-s. 5, applied only to proceeds of sale of any land sold pursuant to that section, and not to the sale of any land under any Act, and the sanction of the Local Government Board was not necessary, the Court expressing the opinion that the Board was not a proper party to the application. *Islington Borough Council, In re*, 97 L. T. 78; 5 L. G. R. 1203; 71 J. P. 896—Kekewich, J.

7. THAMES.

Floods—Prevention of—Banks—Prohibition of "Alteration" without Sanction of County Council—Repair without Sanction—Liability to Penalty.—Pursuant to the Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879, the predecessors of the London County Council, the appellants, ordered a bank of a certain height to be formed for the protection of lands within the limits of the Act from floods caused by the overflow of the River Thames. Part of the bank, which was upon the property of a railway company, consisted of upright piles driven into the river soil, which gave support to campshedding, consisting of horizontal planks, and was surmounted by a capping of wooden beams. The railway company, with a view to repairing that part of the bank, and without communicating with the appellants, removed the timber capping and the upper part of the campshedding in order to replace them by new material, thereby reducing the height of the bank below the height at

which it was ordered to be maintained, with the result that an exceptionally high neap tide flowed over that part of the bank and did damage:—*Held*, that the railway company had not made an "alteration" of the bank within the meaning of section 23 of the Act, and consequently that they were not liable to the penalty imposed by virtue of that section upon a person making such an alteration without the sanction in writing of the appellants. *London County Council v. London, Brighton, and South Coast Railway*, 75 L. J. K.B. 613; [1906] 2 K.B. 72; 94 L. T. 773; 70 J. P. 293; 4 L. G. R. 721—D. *And see* THAMES.

S. OTHER MATTERS.

Commissioner Interested in Contract—Validity.—*See* CORPORATION.

Contract with Corporation—Avoidance.—*See* CORPORATION.

Lojng-house.—*See* LOCAL GOVERNMENT, cols. 1329 and 1359.

Metropolitan Commons.—*See* COMMONS.

Right of County Council to Sue.—*See* GAS COMPANY.

MIDDLESEX REGISTRY.

See DEED.

MIDWIVES.

Statute.—2 Edw. 7 c 17 is the *Midwives Act*, 1902. *See* MEDICINE AND MEDICAL PRACTITIONER.

MINES AND MINERALS.

1. *Statutes*, 1674.
2. "*Minerals*," what are, 1675.
3. *Mode of Working*, 1675.
4. *Support*, 1676.
5. *Explosives*, 1679.
6. *Miners*, 1680.
7. *Offences by Mine Owners*, 1630.
8. *Refuse Heaps*, 1682.
9. *Siding Adjacent to Mine*, 1682.
10. *Mining Lease*, 1692.
11. *Reservation of Minerals on Sale*, 1684.
12. *Compulsory Taking*, 1685.
13. *Minerals under Adjoining Land*, 1686.
14. *Minerals under or near Railway*, 1636.
15. *Rent and Royalties*, 1633.
16. *Tenant for Life*, 1638.

1. STATUTES.

Child Labour.—63 & 64 Vict. c. 21 is the *Mines (Prohibition of Child Labour Underground) Act*, 1900.

Coal Mines Regulation.]—3 Edw. 7 c. 7 is the *Coal Mines Regulation Act (1887) Amendment Act, 1903.*

Weighing Minerals.]—5 Edw. 7 c. 9 is the *Coal Mines (Weighing of Minerals) Act, 1905.*

2. MINERALS, WHAT ARE.

Clay, whether a Mineral.]—Clay, forming the surface or subsoil of land, is not a "mineral" within the meaning of sections 77, 78, or 79 of the Railways Clauses Act, 1845. *Glasgow (Lord Provost) v. Farie* (58 L. J. P.C. 83; 13 App. Cas. 657) followed. *Todd and North-Eastern Railway, In re*, 72 L. J. K.B. 337; [1903] 1 K.B. 603; 88 L. T. 366; 67 J. P. 105—C.A.

Gravel and Sand—Quarry.]—The expression "minerals" in section 1 of the Quarries Act, 1894, includes gravel and sand taken by a railway company from land adjoining their railway for the purpose of maintaining and repairing the line. *Scott v. Midland Railway and Great Northern Railway*, 70 L. J. K.B. 228; [1901] 1 K.B. 317; 83 L. T. 737; 49 W. R. 318; 65 J. P. 135—D.

Sand.]—In applying the rule in *Hext v. Gill* (41 L. J. Ch. 761; L. R. 7 Ch. 699) to the construction of a reservation by deed of mines and minerals, the Court must take into consideration all the circumstances of the particular case, the true nature of the transaction between the parties, and their real object as evidenced by the subject-matter of the grant. On the construction of such a reservation,—*Held*, that sand was not a mineral. *Staples v. Young*, [1909] 1 Ir. R. 135—C.A.

3. MODE OF WORKING.

Presumption.]—In the case of a concealed trespass in the working of coal mines there is no presumption either that the trespasser has extracted his neighbour's coal in the usual or proper mode, or in an improper mode. The amount payable by the trespasser must be decided in accordance only with the evidence. *Bull's Coal-Mining Co. v. Osborne*, 68 L. J. P.C. 49; [1899] A.C. 351; 80 L. T. 430; 47 W. R. 545—P.O.

Right to Use Surface for Winning—Compensation to Surface-owner—Inclosure Act.]—An Inclosure Act enacted that "nothing in this Act contained shall prejudice lessen or defeat the right title and interest" of the owner of the royalties "of in or to the royalties incident or belonging to the said common . . . but the said" owner "his heirs and assigns and all and every person or persons claiming under or in trust for him or them . . . and all succeeding owners thereof . . . shall and may at all times for ever hereafter hold and enjoy all rents perquisites profits mines quarries waifs estrays and other royalties and jurisdictions whatever to the owner of the royalties . . . incident appendant and belonging or appertaining . . . in as full ample and beneficial manner to all intents and purposes as he or they could or might have held and enjoyed the same in case this Act had not been made, provided always

. . . that in case the . . . owner or owners for the time being of the royalties . . . or any person or persons claiming under him or them shall after" the "inclosure . . . work any mine or mines lying within or under any of the . . . allotments or inclosures then and in such case such person or persons so working the same shall make reasonable satisfaction for the damage and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil":—*Held*, that, on the true construction of the Act, the owner of the royalties was entitled to use the surface of any particular allotment, so far as was reasonably necessary, for the purpose of winning the minerals lying under not only that allotment but also any other allotment, and accordingly to sink pits and use existing pits and put up machinery on the particular allotment, but not to use existing engine-houses, engines, or shops which were the property of the surface-owner. *Love v. Bell* (52 L. J. Q.B. 290; 53 ib. 257; 10 Q.B. D. 547; 9 App. Cas. 286) considered and applied. *Hayles v. Pease*, 68 L. J. Ch. 222; [1899] 1 Ch. 567; 80 L. T. 220; 47 W. R. 370—Stirling, J.

Surface Owners — Injury to Ground and Buildings—Obligation to Pay Damage in Conveyance of Minerals — Existing Buildings — Substituted Buildings.]—The proprietor of a piece of ground, partly covered by buildings, in 1875 disposed the minerals, with the disponent's "whole right, title, and interest present and future therein, with full power to search for, work, win, carry away, and dispose of the said minerals," the disponees being taken bound "to make up and pay" to the disponent and his successors "all loss and damage which may be done by the operations of" the said disponees and their forefathers "to the ground before described, and the buildings existing thereon at the date hereof." In an action brought in 1901 by the proprietor of the surface, the successor of the disponent, against the owners of the minerals for damage done to the ground and buildings by the defendants' underground operations,—*Held*—first, that the conventional obligations by the disponees of the minerals as to damage to the surface superseded their common-law obligation; secondly, that the obligation to pay for damage done to buildings existing at the date of the disposition of the minerals did not apply to new buildings on the site of old buildings then existing, which had been removed; and thirdly, that the obligation to pay for damage to vacant ground included the extra cost necessary for the foundations of new buildings thereon. *Aspden v. Seddon* (44 L. J. Ch. 359; L. R. 10 Ch. 394) followed. *Barr v. Baird*, 6 F. 524—Ct. of Sess.

4. SUPPORT.

Letting Down Surface—Compensation.]—The owner of the surface of land does not by parting with the minerals under such land lose his common-law right of support, and in the absence of express power, or necessary implication in the conveyance, the grantee of the minerals has no right to work them so as to let down the surface. This obligation is not

affected by a provision that compensation shall be payable for damage to the surface. *New Sharlston Collieries Co. v. Westmortland (Earl)*, 82 L. T. 725—H.L. (E.)

— **Power to Work.**—In the year 1865 Lady W., the plaintiff's predecessor in title, sold and conveyed to J. C. & Sons, Lim., at the price of 28,500l., all the mines, veins, and seams of coal, iron, and other ores under certain hereditaments known as the S. Estate, containing 1,178 acres or thereabouts, together with full power to make, sink, and work all such pits, shafts, drifts, levels . . . and do all such other acts as might be deemed necessary or convenient for working, searching for, getting and raising the same, and to do all other works and things which might be necessary or convenient for the purposes aforesaid, or any of them, doing as little damage as might be consistent with the due and proper carrying out of the said works. The deed contained a covenant by the company not to sink any shaft or drive any level which should or might weaken or damage any building on the vendor's lands, and to make satisfaction to be assessed as therein mentioned for the spoil, or damage, or injury done to, in, and upon the said lands by the machinery for getting and raising the said coal, or by the sinking or working of any pit or shaft, or otherwise by virtue of or under the powers aforesaid. The defendants in this action were lessees of J. C. & Sons, Lim. They were working on the long-wall system some of the deeper seams of coal under the S. Estate, and had caused some subsidence of the surface in places, but no substantial damage was proved. The plaintiff brought this action for an injunction to restrain the defendants from working the coal so as to cause subsidence of the surface. The defendants claimed a right to cause subsidence so long as they worked in a proper method. There was a conflict of evidence whether it was possible to work the coal at all without causing subsidence, but it was in effect admitted that it was not possible to do so at a profit:—*Held*, that the grant of the minerals did not expressly or by necessary implication give power to let down the surface, and the plaintiff was entitled to the injunction. *Westmorland (Earl) v. New Sharlston Colliery Co.*, 80 L. T. 846—C.A. Affirming, 63 J. P. 198—North, J.

Subsidence—Pumping Brine—Brine Produced by Dissolution of Rock Salt in Plaintiffs' Mine—Cause of Action.—The defendants, the owners of a plot of land and of certain mines containing beds of rock salt lying beneath it, worked a brine-pumping station for the purpose of pumping up salt brine, and from time to time pumped up large quantities of such brine. The plaintiffs were the owners of an adjacent piece of land also comprising rock-salt mines, and a large portion of the brine pumped up by the defendants was produced by the dissolution of rock salt in the plaintiffs' mines. Subsidence having occurred upon the plaintiffs' land, they brought an action against the defendants claiming an injunction restraining them from abstracting salt or brine from their land and from pumping so as to cause a subsidence, and also for damages:—*Held*, that the defendants had not, under the circumstances of the case, committed an actionable wrong by pumping up brine formed by

the dissolution of rock salt belonging to the plaintiffs. *Salt Union v. Brunner, Mond & Co.*, 76 L. J. K.B. 55; [1906] 2 K.B. 822; 95 L. T. 647—Lord Alverstone, C.J.

Injury to House—Liability of Owners and Lessees of Mine—Damage Arising from Acts of Predecessor in Title.—There is no right of action against the owner of a mine, or his lessee, in respect of damage caused by the working of the mine by a predecessor in title, although the actual subsidence which causes the damage occurs when such owner or lessee is in possession. *Greenwell v. Low Beechburn Coal Co.* (66 L. J. Q.B. 643; [1897] 2 Q.B. 165) considered and followed. *Hall v. Norfolk (Duke)*, 69 L. J. Ch. 571; [1900] 2 Ch. 493; 82 L. T. 836; 48 W. R. 565; 64 J. P. 710—Kekewich, J.

Subsidence Due to Past Mining Operations—Apprehension of Future Damage—Depreciation of Selling Value—Statute of Limitations.—The surface owner has no cause of action against the owner of the subjacent stratum for the removal thereof until actual damage results from such removal. If damage is caused, the surface owner may recover for that damage as and when it occurs, and the Statute of Limitations is no bar to the recovery of damages, however long a time has elapsed since the removal. Depreciation in selling value caused by apprehension of future mischief gives no cause of action. *West Leigh Colliery Co. v. Tunnickcliffe*, 77 L. J. Ch. 102; [1908] A.C. 27; 98 L. T. 4—H.L. (E.)

Water-pipes, for—Arbitration—Liability to Pay Compensation.—The appellants were the owners of two water-pipes called the C pipe and the M pipe. The pipes were laid so close together that support from subjacent minerals could not be removed from one pipe without affecting the support of the other. The C pipe was laid under a local Act, and for it the appellants had a common-law right of support. The M pipe was laid under an Act which incorporated the provisions of the Waterworks Clauses Act, 1847. The respondents, who were the owners of the subjacent minerals, gave notice under section 22 of the Waterworks Clauses Act of their intention to work the minerals under the M pipe. The appellants thereupon gave a counter-notice under the Act intimating their willingness to pay compensation under the Act "so far as you are entitled thereto;" and requiring them to leave the minerals unworked. The respondents accordingly left the minerals unworked, and the amount of compensation was referred to arbitration in the usual course under the Act. The appellants reserved all their right of support to the C pipe. The arbitrator awarded a sum as compensation for the non-working of the minerals under the M pipe, but the appellants refused to pay it, on the ground that the right of support for the C pipe necessarily involved abstention from working the minerals under the M pipe, and therefore that there was no damage to the respondents for which they were entitled to compensation:—*Held* (Lord Halsbury *dubitante*), that the appellants, having elected to put in force the procedure provided by the statute, were bound to pay the compensation fixed by the arbitrator in accordance with it, it not appearing that the arbitrator had in any way exceeded his jurisdiction. *Edinburgh and District Water Trustees v. Clippens Oil Co.*, 87 L. T. 275—H.L. (Sc.)

Canal, for—Compulsory Purchase—“Possession” of Lands Required for Support—Vendor and Purchaser—Purchase-money—Interest.]—A railway company's special Act provided that, if the workings of any mine owner in any seam of minerals should have come within a certain distance of a canal, and such mine-owner should desire to continue (and but for the existence of the canal would have continued) to work within such distance, the company might, if it should appear that such working was likely to damage the canal, give notice to the mine-owner of their willingness to purchase and make compensation for such seam within the prescribed distance, and then the said seam should not be wrought but should be purchased by the company, the purchase-money and compensation to be settled in case of dispute by arbitration, the compensation to include (in addition to the value of the seam) such additional expenses and losses as should be incurred by the mine-owner by reason of the leaving of minerals for the support of the canal or of the continuous working of his mines being interrupted or of other kindred matters. On November 19, 1892, the railway company gave the plaintiff notice of their willingness to purchase under the above provision. The parties endeavoured to settle the amount of the purchase-money and compensation between themselves, but it was eventually referred to arbitration, and in 1901 the arbitrator awarded the sum of 16,565*l.* as the amount of purchase-money and compensation to be paid by the company, with interest:—*Held*, that upon the construction of the Act the plaintiff was not entitled to interest, but that upon the general principles applicable to vendor and purchaser, as laid down in *Birch v. Joy* (3 H.L. Cas. 565) and applied in *Rhys v. Dare Valley Railway* (L. R. 19 Eq. 98), he was entitled to interest at 4 per cent. from November 19, 1892, to the time of payment. *Caledonian Railway v. Carmichael* (L. R. 2 H.L. Sc. 56) distinguished. *Fletcher v. Lancashire and Yorkshire Railway*, 71 L. J. Ch. 590; [1902] 1 Ch. 901; 50 W. R. 423; 66 J. P. 681—Buckley, J.

Highway — Subsidence of — Measure of Damages.]—See WAY.

Sewer — Right of Support.] — See LOCAL GOVERNMENT, cols. 1372-3.

Water-pipe, for.]—See EASEMENT.

Water Reservoir, for.]—See WATER.

5. EXPLOSIVES.

Order by Secretary of State — Validity — Notice of Order—Publication.]—An Order made by a Secretary of State as to explosives under section 6 of the Coal Mines Regulation Act, 1896, comes into operation as soon as it is made, and is valid although no notice of the Order has been given. The provision of section 6 as to notice is merely directory, and is not a condition precedent to the validity of the Order. *Jones v. Robson*, 70 L. J. K.B. 419; [1901] 1 K.B. 673; 84 L. T. 230; 65 J. P. 273; 19 Cox C.C. 651—D.

The fact that a Secretary of State has made an Order with regard to an explosive is sufficient

evidence that he was satisfied that it was “likely to become dangerous” within the meaning of section 6. *Id.*

6. MINERS.

Colliers' Wages — Agreement — Payment by Measurement or Weight.]—Where in a colliery agreement men are to “receive payment by measurement for work done by them as miners” at specified rates, the amount of wages to be paid does not depend on the quantity of mineral gotten, and section 38 of the Coal Mines Regulation Act, 1896 (New South Wales), does not apply. [Similar to section 12 of the Coal Mines Regulation Act, 1887.] *Humble v. Humphreys*, 71 L. J. P.C. 18; [1902] A.C. 207; 85 L. T. 563—P.C.

Check-weigher—Interference with Workmen —Order for Removal.]—By section 13, sub-section 4 of the Coal Mines Regulation Act, 1887, “If the owner, agent, or manager of the mine desires the removal of a check weigher on the ground that the check weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, . . . he may complain to a Court of summary jurisdiction,” and by sub-section 5 the Court may make a summary order for the check-weigher's removal:—*Held*, that it is not necessary, in order to constitute an “interference” with workmen within the meaning of sub-section 4, that the acts of interference should be acts done by the defendant in his capacity of check weigher, or that they should be acts done at the mine. *Sykes v. Barraclough*, 73 L. J. K.B. 920; [1904] 2 K.B. 675; 91 L. T. 560; 53 W. R. 205; 68 J. P. 561; 20 T. L. R. 680—D.

— Removal of—Order of Justices.]—Justices having made an order under section 13 of the Coal Mines Regulation Act, 1887, for the removal of a check-weigher, added the words: “And that from henceforth he shall cease to perform the duties of check-weigher on behalf of the persons employed in the said mine as aforesaid”:—*Held*, that the order was good. *Semble*, a check-weigher removed under the section cannot immediately be reappointed. *Re v. Llewellyn; Squire, Ex parte*, 96 L. T. 32; 71 J. P. 51—D.

7. OFFENCES BY MINE OWNERS.

Disused Shaft — Accumulation of Water — Public Well Vested in Local Authority — Liability of Local Authority to Fence Shaft.]—A local authority in whom is vested by statute a public well formed by an accumulation of water in the disused shaft of a mine is not liable under section 13 of the Metalliferous Mines Regulation Act, 1872, as owner of the mine or interested in the minerals, to keep the shaft fenced for the prevention of accidents. *Knuckey v. Redruth Rural Council*, 73 L. J. K.B. 265; [1904] 1 K.B. 382; 90 L. T. 226; 52 W. R. 558; 68 J. P. 172; 2 L. G. R. 456; 20 T. L. R. 164—D.

Abandoned Seam—Plan of, to be sent to Secretary of State—Non-Compliance by Mine Owner—

Information by Government Inspector—Time.]—Where the owner of a coal mine has, after abandoning a seam, failed to furnish a Secretary of State with a plan shewing the boundaries of the workings up to the time of abandonment, the mine inspector's complaint or information of an offence by the mine owner under section 38 of the Coal Mines Regulation Act, 1887, must, by sub-section 5 of that section, be laid within six months of the abandonment or within six months of the inspector's notice to the mine owner to comply with the requirements of the section. It is sufficient that such notice should call attention to section 38, without specifying its particular requirements. *Stokes v. Hill*, 70 L. J. K.B. 381; [1901] 1 K.B. 493; 84 L. T. 122; 49 W. R. 375; 65 J. P. 280; 19 Cox C.C. 206—D.

Contravention of Rule in Coal Mine—Certificated Manager—Liability of Agent.]—Section 50 of the Coal Mines Regulation Act, 1887, provides that in the event of a contravention of any of the rules in the Act in a mine to which the Act applies, the agent and manager "shall each be guilty of an offence . . . unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules . . . to prevent such contravention." The agent and the certificated manager and under-manager of a mine to which the Act applied were separately charged under that section in respect of a contravention of rule 1 under section 49 of the Act, which provides for the production of an adequate amount of ventilation in a mine. It was proved that the contravention was caused by the temporary diversion of the air-pipes from one of the headings into another heading which was then being driven. There was no evidence that the agent had ever visited the mine. No evidence was brought on behalf of the agent, and the publication of the rules was not proved. The Justices found that the agent had taken all proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules, and whose duty it was to carry them out; that the contravention was in no way caused by the agent omitting to enforce the rule; and that as against the agent only an occasional irregularity was proved, and not one which had been continuous. They convicted the manager and under-manager, but acquitted the agent:—*Held*, that the evidence justified the findings of the Justices, and that they had rightly acquitted the agent. *Stokes v. Mitcheson*, 71 L. J. K.B. 677; [1902] 1 K.B. 357; 86 L. T. 767; 50 W. R. 553; 66 J. P. 615; 20 Cox C.C. 254—D.

Person not Qualified Allowed to Work Engine for Raising Material—Responsibility of Manager.]—By the special rules in force under section 51 of the Coal Mines Regulation Act, 1887, at a mine usually entered by means of machinery, it was provided that the engine-man should remain in charge and so near his engine as at all times to have it completely and entirely under his control; should watch and attend to the various signals for raising and lowering the cage, whether laden with persons or materials or empty; and should not allow any person to interfere with the engine while being worked:—*Held*, that these special rules and general rule 24 of section 49 of the Act

applied when the engine was being used for raising and lowering material as well as when it was being used for raising and lowering persons, and that the colliery manager was liable under section 51 for permitting a person under twenty-two years of age to raise material, but not persons, by means of the winding engine when it was under the charge of a qualified winding-engine man. *Soutar v. Clark*, 7 F. (Just. Cas.) 1—Ct. of Justy.

8. REFUSE HEAPS.

Chattels—Freehold.]—Mounds of tap-cinder produced by lessees in working ironstone mines, and left in heaps on the land as refuse, are not chattels, but form part of the soil out of which they were produced. Such mounds are the property of the lessor, and may not be worked or removed by subsequent lessees of the mines, whose lease includes the coal and ironstone, and "all mines, seams, veins, beds, as well opened as unopened, of all other minerals and clay lying and being within and under the lands." *Boileau v. Heath*, 76 L. J. Ch. 529; [1898] 2 Ch. 301; 78 L. T. 622; 46 W. R. 602—Bigham, J.

9. SIDING ADJACENT TO MINE.

Per the LORD JUSTICE-CLERK: The whole of a private line leading from a mine to a main line of railway is not a siding adjacent to the mine within the meaning of section 75 of the Coal Mines Regulation Act, 1887. *Anderson v. Lochgelly Iron and Coal Co.*, 7 F. 187—Ct. of Sess.

10. MINING LEASE.

Exception or Reservation of "mines and minerals"—Substances without Commercial Value—Trusspass.]—An exception of reservation contained in a lease of "mines and minerals" under lands demised, includes (*prima facie*) all those substances otherwise falling under the definition of minerals which have a use and value of their own, either for the purpose of sale or for other purposes, independently of and separately from the use of the rest of the soil, whether capable or not of being worked for commercial profit. *Johnstone v. Crompton*, 68 L. J. Ch. 559; [1899] 2 Ch. 190; 81 L. T. 165; 47 W. R. 604—Byrne, J.

A power subsequently contained in the lease, for the lessor and those claiming under him "to drain get and dispose of the said mines and minerals at his and their free will and pleasure, nevertheless not breaking open nor doing any damage to the surface of the land . . . or the buildings thereon, and making reasonable compensation . . . for all damage thereby occasioned," does not restrict the meaning of the words "mines and minerals" to such substances as can be worked for commercial profit. *Id.*

Covenant to "fairly duly and honestly win work and get the whole of the said mine of coal"—Working becoming Unprofitable—Absolute Covenant to Work.]—By a mining lease the

whole of a mine of coal lying under a certain area was demised for twenty-one years from the date at which the working of the coal should actually have been begun at 100*l.* an acre, and until such date at a rent of 5*l.* The lessees covenanted that they would during the term "fairly duly and honestly win work recover obtain and get the whole of the said mine vein or seam of coal demised in a proper and workmanlike manner." Operations for getting at the coal were carried on for several years, but were found too costly to be remunerative, and were abandoned:—*Held*, that the lessees had broken the covenant, which was an absolute covenant to win and get the coal, and were liable to damages to the lessor. *Charlesworth v. Watson*, 75 L. J. K.B. 137; [1906] A.C. 14; 94 L. T. 6—H.L. (E).

Rents and Royalties from—Tenants for Life—Remaindermen—Construction of Will—Direction to Accumulate.—A testator devised his residue upon trust to convert, with power to postpone conversion for twenty-one years, and with a direction that the surplus income of the unconverted estate during the twenty-one years and all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life and remaindermen. The trustees, under powers in the will, granted a mining lease, and retained the leased property unconverted for more than twenty-one years:—*Held*, that the rents and royalties received under the mining lease during the twenty-one years ought to be invested, and that the income therefrom ought to be invested and accumulated. *Held also*, that after the twenty-one years the tenants for life of settled shares in the residue were entitled to receive out of the rents and royalties such an annual sum as, in the opinion of the Court, would under all the circumstances of the case be a fair equivalent for the annual income that would have resulted if the estate had been converted. The rule laid down in *Meyer v. Simonson* (5 De G. & Sm. 723) and *Brown v. Gellatly* (L. R. 2 Ch. 751) approved. *Wentworth v. Wentworth*, 69 L. J. P.C. 13; [1900] A.C. 163; 81 L. T. 682—P.C.

Working and Winning—Coal under Reservoir—Prohibition on Working—Compensation—Lessor and Lessee—Right to make up Short Workings—Right to Lessor's Compensation Money.—A corporation acquired land under their special Act (which incorporated the Waterworks Clauses Act, 1847), and constructed thereon a reservoir. The subsoil remained part of a settled estate, the tenant for life of which leased the minerals, including those under the reservoir, to a colliery company, under a power which entitled the immediate reversioner to the whole of the rents and payments reserved. The lease reserved an acreage rent and a minimum rent, and had a provision that if the coal gotten in any year, calculated at the acreage rent, should fall short of the minimum rent, the lessees might make up the deficiency by over-workings in any subsequent year without paying more than the minimum rent. On the lessees proposing to work the coal under the reservoir the corporation refused permission, and compensation both of lessor and leasees was fixed by arbitration on the basis that the coal in question would in the ordinary course have been worked out in the five years

ending December 31, 1908. The lessees' share was paid to them, the lessor's being paid into Court. At the date of the award the amount of short workings which the lessees were entitled to make up represented a sum far in excess of the lessor's compensation. They therefore claimed the fund in Court, and agreed with the tenant for life that he should have credit for it in the account for short workings:—*Held*, that, but for the provision for short workings, the tenant for life would have been entitled to one-fifth of the fund in each of the five years; but that in view of that provision, which bound the remainderman as well as the tenant for life, the lessees were entitled contingently on their remaining in possession under the lease, and that the fund must be paid out to them in periodical instalments on affidavit that they still were in possession. *Barrington, In re; Gamlen v. Lyon* (56 L. J. Ch. 175; 33 Ch. D. 523), not followed. *Dictum* of CHITTY, J., in *Robinson's Settlement Trusts, In re* (60 L. J. Ch. 776, 777; [1891] 3 Ch. 129, 133), followed. *Fullerton's Will, In re*, 75 L. J. Ch. 552; [1906] 2 Ch. 138; 94 L. T. 667—Swinfen Eady, J. *And see* LANDLORD AND TENANT.

11. RESERVATION OF MINERALS ON SALE.

Sale of Land—Sandstone Lying under Surface—Right of Purchaser to Quarry Stone.—A deed of conveyance upon the sale of a plot of land conveyed the land to the purchaser "except all coal, ironstone, and other mines and minerals (including fireclay) lying or being within or under the lands hereby assured," and it reserved unto the owners of the excepted mines and minerals for the time being full liberty and power to work and get the coal, ironstone, and other minerals by underground working, and to use or allow lessees to use so much of the clay lying within or under the land as might be necessary for making bricks for colliery purposes; and the conveyance of another plot of the land excepted "all mines, beds, and quarries of coal, ironstone, and other minerals (including fireclay)" lying under the land. The purchaser had opened quarries for quarrying and getting certain sandstone as building stone which lay at a considerable depth below the surface:—*Held*, that the sandstone was included within the reservation of the minerals, and that the purchaser was not entitled to work and get the stone without the leave and licence of the vendors. In such cases the conditions or particulars of sale cannot be referred to for the purpose of explaining the subsequent deed of conveyance. *Greville v. Hemingway*, 87 L. T. 443—Lord Alverstone, C.J.

Inclosure—Allotment of Surface to Commoners—Support—Subsidence—Compensation.—In all cases where there has been a severance in title between the upper and lower strata of lands the surface owner is entitled to support for his property, without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance be authorised by the instrument of severance either by express terms or by necessary implication. The presence of a provision for compensation which is obviously inadequate or plainly inappropriate to subsidence is cogent evidence that subsidence was not contemplated.

And a compensation clause which is capable of being satisfied by reference to acts done on the surface, though it may be wide enough to cover damage done by withdrawal of support, will be confined to damage done on the surface. *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Society*, 75 L. J. Ch. 541; [1906] A.C. 305; 94 L. T. 795; 70 J. P. 361; 22 T. L. R. 516—H.L. (E.)

By an Inclosure Act the lords of a manor were authorised to work and win the mines and quarries under the respective allotments made under the Act "without making or paying any satisfaction for so doing," the damage caused by such working to be borne and distributed among the holders of the allotments in manner prescribed:—*Held*, that damage caused by the withdrawal of support was not included in such exemption. LORD DAVEY'S judgment in *New Sharlston Collieries v. Westmorland (Earl)* (73 L. J. Ch. 338n.; [1904] 2 Ch. 443n.) explained by LORD DAVEY. *Conssett Waterworks Co. v. Ritson* (64 L. J. Ch. 293n.; 22 Q.B. D. 318, 702) commented on. *Ib.*

Grant of Lands—Title—"Except and reserved all mines and veins of coal"—Property in Strata Underlying Coal—Carriage of "foreign coal."—By deeds of lease and release in and prior to 1768, lands of a manor were granted to the plaintiff's predecessors "other than and except and always reserved" unto the grantors (the defendants' predecessors), their heirs and assigns, "all mines and veins of coal" in and under the lands, with liberty for the grantors to mine and erect works necessary for carrying away the coal:—*Held*, that "mines and veins of coal" included not only the layers of coal, but also part of the strata underlying the coal, and that the property in them was excepted from the grant and remained in the grantors. *Hamilton (Duke) v. Graham* (L. R. 2 H.L. (Sc.) 166) and *Eardley v. Granville (Earl)* (45 L. J. Ch. 669; 3 Ch. D. 826) followed. *Ramsay v. Blair* (1 App. Cas. 701) distinguished. *Batten-Poole v. Kennedy*, 76 L. J. Ch. 162; [1907] 1 Ch. 256—Warrington, J.

Held, also, upon the facts, that a road which the defendants were using for the carriage of "foreign coal" was within that part of the underlying strata which was comprised in the exception. *Ib.*

12. COMPULSORY TAKING.

Compensation for Unworked Coal—Value at Date of Notice to Treat—Subsequent Rise in Value—Basis of Assessment.—In assessing the value of property taken under the compulsory powers of the Lands Clauses Consolidation Act, 1845, facts affecting the value of the property in existence at the date of the notice to treat may, but facts occurring after that date cannot, be taken into account. Therefore in an arbitration under section 23 of the Act of 1845 to determine the amount of compensation payable in respect of certain coal required to be left unworked by a notice to treat under section 18 of the Act,—*Held*, that the arbitrator could not take into account a rise in the market price of coal which took place after the date of the notice to treat. *Bullfa and Merthyr Dare*

Steam Collieries and Pontypridd Waterworks Co., In re, 71 L. J. K.B. 613; [1902] 2 K.B. 135; 87 L. T. 291; 50 W. R. 627—C.A.

13. MINERALS UNDER ADJOINING LAND.

Notice to Mine-owner to Leave Minerals Unworked—Subsequent Rise in Value of Minerals—Compensation—Basis of Assessment.—Under the Waterworks Clauses Act, 1847, where notice is served by a water company on a mine-owner to leave a portion of his mines unworked, full compensation is to be made and all expenses and losses to be recouped to the mine-owner. Where, therefore, there has been a rise in the value of the minerals subsequent to the notice, and it is shewn that but for the notice the mine-owner would have obtained the benefit of the rise in value, consideration must be had in the assessment of compensation of such rise in value. *Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co.*, 72 L. J. K.B. 805; [1903] A.C. 426; 89 L. T. 280; 52 W. R. 193—H.L. (E.)

Wrongful Working—No Title by Statute of Limitations.—Where a mine-owner wrongfully works an adjoining seam of coal for more than twelve years before action brought, he acquires no title to such seam under the Statute of Limitations. *Ashton v. Stock* (6 Ch. D. 719) followed. *Thompson v. Hickman*, 76 L. J. Ch. 254; [1907] 1 Ch. 550; 90 L. T. 454; 23 L. T. R. 311—Neville, J.

14. MINERALS UNDER OR NEAR RAILWAY.

Right of Railway Company to Prevent Mine-owner Working Mines—Interest on Compensation-moneys.—An arbitrator, in settling the amount of compensation in respect of minerals left unworked under or near a railway in consequence of a notice from the railway company to the mine-owner under section 78 of the Railways Clauses Consolidation Act, 1845, has no jurisdiction to award that interest shall be paid on the sum awarded for compensation from the date of the notice to the date of the award. *Caledonian Railway v. Carmichael* (L. R. 2 H.L. (Sc. 56) and *Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co.* (72 L. J. K.B. 805; [1903] A.C. 426) followed. *Fletcher v. Lancashire and Yorkshire Railway* (71 L. J. Ch. 590; [1902] 1 Ch. 901) distinguished. *Richard v. Great Western Railway*, 74 L. J. K.B. 9; [1905] 1 K.B. 68; 91 L. T. 724; 53 W. R. 83; 69 J. P. 17; 21 T. L. R. 37—C.A.

Lessee of more Coal than can be Gotten during Lease—Measure of Compensation—Lessee and Reversioner—Compensation "for such mines."—By section 78 of the Railways Clauses Act, 1845, if the owner, lessee, or occupier of mines lying within the prescribed distance from a railway is desirous of working the same he is to give notice to the railway company, and, if the railway company is willing to make compensation for such mines, the amount of such compensation is to be settled as therein provided. A colliery company were lessees and occupiers of certain coal mines within the prescribed distance within the meaning of section 78 of

the Act of 1845. A railway company gave notice to the colliery company that they required certain specified coal to be left unworked. The colliery company could not within the term of their lease have worked out the whole of the demised coal. On receiving the railway company's notice they ceased working the specified coal. If they had been able to work the specified coal they would have realised a sum of 730*l.*. They continued working coal other than the specified coal and realised the sum of 630*l.*:—*Held*, that the measure of compensation to which they were entitled was 730*l.*, the amount which they would have realised if they had been able to work the specified coal, and not the difference between that sum and the amount which they realised by working coal other than the specified coal. *Joicey v. North-Eastern Railway*, 75 L. J. K.B. 57; [1906] 1 K.B. 195; 94 L. T. 143; 54 W.R. 332; 70 J.P. 75; 22 T. L. R. 105—Bigham, J. Reversed, 23 T. L. R. 163—C.A.

If the specified coal had been worked out, the owners of the reversion expectant on the termination of the lease would have received for royalties the sum of 155*l.*. The loss in value of the reversion owing to the notice of the railway company was 310*l.*:—*Held*, that the owners of the reversion were entitled to 155*l.*, and not to 310*l.*, as compensation. *Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co.* (72 L. J. K.B. 805; [1903] A.C. 426) followed. *Ib.*

Owner desiring to Work Minerals—Purchase and Compensation—Act under which Land Purchased Repealed by Later Act—Saving by Later Act of Rights Accrued under Earlier Act.—When the surface of land has been sold under the provisions of a special Act which lays down certain terms with respect to the minerals and the purchase thereof, and that Act is repealed by a later statute which enacts a different set of conditions less favourable to the surface-owner in respect of the minerals, but also provides that the repeal is not to annul or prejudice any purchase, sale, conveyance, or the like made or executed under the earlier statute, the rights and obligations of the parties with respect to the sale of the minerals or compensation for the same are regulated by the earlier and not by the later legislation. *Reg. v. London and North-Western Railway* (68 L. J. Q.B. 685; [1899] 1 Q.B. 921) overruled. *London and North-Western Railway v. Walker*, 72 L. J. K.B. 578; [1903] A.C. 280; 83 L. T. 705—H.L. (E.)

Right of Railway Company to Call for Conveyance of Minerals.—A railway company which has given notice to a landowner under section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845 (corresponding to section 78 of the Railways Clauses Consolidation Act, 1845), requiring him to leave unworked certain minerals lying under or near the railway line, is not entitled, on payment to the landowner of the compensation due to him for leaving the minerals unworked, to demand a conveyance of these minerals. *Hamilton's (Duke) Trustees v. Caledonian Railway*, 7 F. 847—Ct. of Sess.

Purchase by Railway—Expiration of Powers.]

—A railway company can purchase minerals after the expiration of its statutory powers to purchase if such purchase is reasonably incident to its business. *Thompson v. Hickman*, 76 L. J. Ch. 254; [1907] 1 Ch. 550; 96 L. T. 454; 23 T. L. R. 311—Neville, J.

Compensation by Railway Company for not Working Mines—Measure of Compensation.—The compensation to be paid to the lessee or worker of a mine by a railway company for the mineral left unworked under the line for the support of the line is the full net value of the mineral so reserved, whether or not there are other parts of the mine which can be worked in substitution for that which is placed under embargo. The liability of the railway is unaffected by the methods which the mine owner may adopt in the conduct of his own business. Decision of the COURT OF APPEAL (*sub nom. Joicey & Co. v. North-Eastern Railway*) (76 L. J. K.B. 253; [1907] 1 K.B. 402) reversed, and that of BIGHAM, J. (75 L. J. K.B. 57; [1906] 1 K.B. 195), restored. *Eden v. North-Eastern Railway*, 76 L. J. K.B. 940; [1907] A.C. 400; 97 L. T. 254; 71 J. P. 450; 23 T. L. R. 685—H.L. (E.)

Notice to Treat—Compensation.—See *Rugby Portland Cement Co. v. London and North-Western Railway Co.*, 72 J. P. 116—Bray, J.

15. RENT AND ROYALTIES.

“Opened” Mines—Income or Capital.—The rents and royalties of “opened” mines—which mines are the subject of a settlement in the form of a trust for sale and for division, after the death of the tenant for life, according to the exercise of a power of appointment—are to be treated as income and not capital, and the term “opened mines” is not confined to mines worked for the first time by the settlor or testator. *Greville-Nugent v. Mackenzie*, 69 L. J. P.C. 1; [1900] A.C. 83; 81 L. T. 793—H.L. (Sc.). And see SETTLED LAND ACTS and SETTLEMENT.

16. TENANT FOR LIFE.

Implied Authority to Commit Waste—Settlement—Open Mines.—A tenant for life entitled to work mines may be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arise from the terms of the settlement or from the circumstance that the mines are open. *Chaytor's Settlement, In re*, 69 L. J. Ch. 837; [1900] 2 Ch. 804; 49 W. R. 125—Stirling, J.

Mines Open or Unopen.—The statement of the law in *Elias v. Snowdon Slate Quarries Co.* (48 L. J. Ch. 811; 4 App. Cas. 454) to the effect that when a mine is once open, the sinking a new pit on the same vein is not necessarily the opening of a new mine, is inapplicable to a case where two portions of a settled estate are separated from each other by a strip of land belonging to a different owner, although one continuous seam of coal runs under the whole. If, therefore, the seam of coal has been worked under one portion of the settled estate in the lifetime of the settlor, but not under the other, the unworked portion cannot be held an “open

mine," even when the tenant for life has acquired the coal under the intervening strip. The Court, in sanctioning a lease of the unworked portion, will consequently direct that three-fourths of the rent must be set aside and invested, according to section 4, sub-section iii. of the Settled Estates Act, 1877. *Maynard's Settled Estate, In re*, 68 L. J. Ch. 609; [1899] 2 Ch. 347; 81 L. T. 163; 48 W. R. 60; 63 J. P. 552—Kekewich, J.

17. OTHER MATTERS.

Accident—Coal Mines—Liability for, to Servant.—See *Bett v. Dalmeny Oil Co.*, 7 F. 787—Ct. of Sess.

Compensation—Injuriously Affected.—See LANDS CLAUSES ACT, col. 1265.

Mistake—Omission to Purchase Compulsorily through.—See LANDS CLAUSES ACT, col. 1257.

Opened Mines—Powers of Tenant for Life.—See ESTATE, col. 794.

Trespass—Concealed Fraud.—See LIMITATIONS (STATUTE OF), col. 1281.

Trustees—Powers of, to Lease Unopened Mines.—See TRUST.

Working Clay—Purchase of Surface.—See RAILWAY.

Working Minerals—Compensation—Right of Support.—See WATER.

MINOR.

See INFANT.

MISDEMEANOUR.

See CRIMINAL LAW.

MISDIRECTION.

See PRACTICE AND PLEADING—NEW TRIAL, cols. 1938–9.

MISFEASANCE.

Directors, by.—See COMPANY, col. 356.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

Prospectus, in.—See COMPANY, col. 329.

MISTAKE.

Payment by Mistake—Right to Recover.—The appellants and B. & Co., who were both bankers, financed K., a merchant, making

advances against goods. K. sold a parcel of goods to the respondents, and directed them to remit the price to B. & Co., who had an equitable mortgage on these goods. The respondents by mistake, but acting in good faith, paid the money to the appellants, who received it in good faith, believing it to represent the price of goods on which they had made advances to K. A jury found, in answer to a specific question, that they had not been led to alter their position for the worse as regarded K.:—*Held*, that the respondents were entitled to recover the money from the appellants as being money paid under a mistake of fact. *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. 263; 23 T. L. R. 696—H. L. (E.)

Money Paid to Agent—Remittance to Banker—Credit given by Banker to Customer—Remittance made by Mistake—Recovery Back from Banker by Payer.—K. was a merchant, financed by two banks. These banks were each in the habit of advancing money to K., on the security of the shipping documents of goods bought by him. When he sold such goods he was in the habit of obtaining from the banks the necessary documents to enable him to deliver the goods, and at the same time assigning to them the purchase-money. On receipt of the purchase-money from the purchasers of the goods, the banks would credit the amount to K.'s account. The plaintiffs bought several parcels of goods from K., and received from him notice of the assignment of the purchase-money. The purchase-money of some of the parcels was assigned to one bank, and of the other parcels to the other bank. Through a mistake of their clerk the whole of the money payable by the plaintiffs in respect of all these parcels of goods was paid over by them to only one of the banks, with instructions to credit K.'s account with the amount. This was accordingly done by the bank under the belief that the whole of the money was rightly paid over to them. On discovering the over-payment, the plaintiffs asked the bank to return it. The bank refused. In an action to recover back the money,—*Held*, that the plaintiffs were entitled to the return from the bank of the money that had been thus paid them by mistake. *Continental Caoutchouc and Gutta-percha Co. v. Kleinwort*, 90 L. T. 474; 52 W. R. 489; 9 Com. Cas. 240; 20 T. L. R. 403—C.A.

Banker and Customer—Money Paid under Mistake of Fact.—The defendants, who were foreign bankers, were in the habit of making advances to K., who then purchased goods which the defendants held as security; when K. found a purchaser he assigned the right to receive the purchase-money to the defendants, who accordingly released the goods. K. also carried on the same system with B. & Co. The plaintiffs bought from K. two parcels, the one released by the defendants and the other by B. & Co. K. instructed the plaintiffs to pay the defendants and B. & Co. respectively for the goods so purchased. By mistake the plaintiffs paid both sums to the defendants, who credited K.'s account, notifying K. of their having done so. The defendants, acting *bona fide*, continued to make advances to K., who knew of the mistake, but did not disclose it, and afterwards became bankrupt. The plaintiffs sought to recover from the defendants the

sum which should have been paid to B. & Co. as money paid under mistake of fact:—*Held*, that the defendants were holding the money to the use of the plaintiffs, and that as the defendants were not prejudiced by such payment the sum was recoverable as money paid under mistake of fact. *Continental Caoutchouc and Gutta-percha Co. v. Kleinwort*, 51 W. R. 541; 8 Com. Cas. 277—Bigham, J.

Money Paid under Compulsion of Legal Process—Erroneously Giving Credit in Writ—Settlement of Action—Action for Recovery of Money Wrongly Credited.—The rule of law that money paid under compulsion of legal process cannot be recovered back does not apply where there has been an absence of *bona fides* on the part of the defendant; but the rule is applicable to a case where the plaintiff, although he has paid no money to the defendant, has by mistake given him credit for a payment on account which has not in fact been made. *Ward v. Wallis*, 69 L. J. Q.B. 423; [1900] 1 Q.B. 675; 82 L. T. 261—Kennedy, J.

Representation by Insurance Agent—Illegality of Insurance—Right to Recover Back Premiums Paid.—Where a person unskilled in insurance law has been induced by the *bona fide* representation of the agent of an insurance company that the policy will be valid to effect a policy on the life of a relation which is illegal and void for want of insurable interest, he is entitled to recover back from the company the premiums paid by him upon the policy. *Harse v. Pearl Life Assurance Co.*, 72 L. J. K.B. 638; [1903] 2 K.B. 92; 89 L. T. 94—D.

Rates—Unequal Tolls—Money Paid to Collecting Agent—Liability of Agent.—The plaintiff, a coal merchant, entered into an agreement with the Midland Railway for the conveyance by them of certain coke breeze from Birmingham to a station on the defendants' railway at a certain through rate. From time to time coke breeze was delivered to the plaintiff at the station in question, and payments at the agreed rate were made by him to the defendants as collecting agents for the Midland Railway. The money so paid was paid over by the defendants to that company or settled for in account. The plaintiff subsequently discovered that in the Midland Railway's book of rates there was a lower through rate between the same stations for coke breeze for fuel purposes, and he thereupon brought an action against the defendants to recover the amount of the over-charges, on the ground that the coke breeze delivered to him was used for fuel. The County Court Judge found that the coke breeze was not used for fuel, but held that the charging of two different rates for the carriage of the same article between the same stations was a breach of section 90 of the Railways Clauses Act, 1845, and gave judgment for the plaintiff:—*Held*, that, under the circumstances, there had been no breach of section 90, as, in order to establish a contravention of that section, it would have been necessary for the plaintiff to shew that some other persons had in fact been charged at the lower rate.—*Held*, further, that in any case the action was not maintainable against the defendants, who had received the money merely as agents for the Midland Railway, and had paid it over to them, or settled for it in

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account, without notice of any over-charge, and that it made no difference that, under the arrangement between the two companies, the defendants were entitled to retain a portion of the money for their own use. *Taylor v. Metropolitan Railway*, 75 L. J. K.B. 735; [1906] 2 K.B. 55; 95 L. T. 149; 22 T. L. R. 479—D.

Water Rates—Over-payment.—The owner of a house situate on the estate of the see of the Bishop of London, at Paddington, and entitled accordingly, under section 4 of the Grand Junction Waterworks Act, 1856, to a supply of water at a rate 15 per cent. less than owners of houses not on that estate, had for many years past paid to the water company water rates on the higher scale in ignorance that his house stood on the estate, and that he was therefore entitled to the deduction:—*Held*, that these over-payments were made under a mistake of fact, and could be recovered back from the water company. *Meadows v. Grand Junction Waterworks*, 3 L. G. R. 910; 69 J. P. 255; 21 T. L. R. 538—D.

Bankruptcy, in Proof in.—See BANKRUPTCY, cols. 131-2.

Compromise, in Case of.—See COMPROMISE, col. 484.

Contract, in Case of.—See CONTRACT, col. 520.

Money paid under Mistake of Fact—Interest—Fraud.—See *Johnson v. Regem, ante*, INTEREST, col. 1082.

MONEY COUNTS.

See PRACTICE AND PLEADING.

MONEY PAID INTO COURT.

See PRACTICE AND PLEADING.

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MONUMENTS.

Statute.—63 & 64 Vict. c. 34 is the *Ancient Monuments Protection Act*, 1900.

MORTGAGE.

1. *Execution of Mortgage*, 1698.
2. *Property comprised in Security*, 1698.
3. *Clogging the Equity of Redemption*, 1695.
4. *Equitable Mortgage*, 1698.
5. *Floating Charge*, 1699.
6. *Interest*, 1699.
7. *Further Advances*, 1702.
8. *Priorities*, 1703.
9. *Leases by Mortgagor and Mortgagee*, 1713.

10. *Redemption*, 1714.
11. *Enforcing Security*, 1717.
 - (a) *Entry*, 1717.
 - (b) *Receiver*, 1718.
 - (c) *Foreclosure*, 1719.
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12. *Consolidation and Tacking*, 1724.
13. *Merger*, 1725.
14. *Transfer*, 1727.
15. *Devolution and Administration*, 1729.
16. *Costs*, 1732.
17. *Other Matters*, 1732.

1. EXECUTION OF MORTGAGE.

Mortgagee Solicitor — Receipt Clause — Estoppel — No Money Advanced — Sub-mortgage — Mortgagee Absconding.—On February 3, 1906, the plaintiff mortgaged certain reversionary interests to B., his solicitor, for 2,500*l.*, which sum B. arranged to lend to another client of his at a higher rate of interest than the rate he charged the plaintiff. This mortgage of February 3, 1906, contained the usual receipt clause acknowledging that the sum of 2,500*l.* had that day been advanced to the mortgagor, the plaintiff. In fact no money was advanced by B. to the plaintiff. B. then informed the plaintiff that his other client had executed a mortgage in favour of the plaintiff to secure the 2,500*l.*, and that he would hold the deeds on his behalf as his solicitor. No such mortgage was in fact ever executed. On April 24, 1906, B. sub-mortgaged the mortgage of February 3, 1906, to the defendant, who knew that B. was the solicitor of the plaintiff, the mortgagor. On this sub-mortgage and a collateral security B. obtained 1,200*l.* from the defendant. The collateral security turned out to be a forgery and of no value, and in June, 1906, B. absconded. The defendant, when he took the sub-mortgage of April 24, 1906, did not enquire as to the state of account between the mortgagor, the plaintiff, and B., the mortgagee, and no notice was given to the plaintiff of this sub-mortgage, which the plaintiff first heard of after B. had absconded. On a claim that the mortgage of February 3, 1906, was void as against the plaintiff on the ground that it was obtained from him by fraudulent misrepresentation, and that no money was in fact advanced on it, and that the sub-mortgage was also void as against him, and for a re-assignment of the reversionary interests by the defendant,—*Held*, that it would be unduly extending the *dictum* of constructive notice if the claim of the plaintiff were allowed to be maintained; and that the receipt clause contained in the mortgage deed operated as an estoppel. *Powell v. Browne*, 97 L. T. 854; 24 T. L. R. 71—C.A. Reversing *Joyce*, J., 97 L. T. 167; 23 T. L. R. 604.

2. PROPERTY COMPRISED IN SECURITY.

Public-house—Goodwill.—A public-house, of which a testator was owner in fee (subject to a lease), was mortgaged by him to secure 1,500*l.*

The testator at this time was occupying the house, as underlessee, and carrying on there the business of a licensed victualler, but the goodwill of the business was not mentioned in the mortgage. The lease was afterwards surrendered to the testator, and he continued to carry on the business of the house until his death. After the death of the tenant for life under the testator's will, the house and the goodwill were sold by the trustee of the will (who had previously paid off the mortgage debt) for a sum, of which 2,617*l.* was ascertained to be the value of the goodwill:—*Held*, that the goodwill did not pass to the mortgagee by the mortgage deed; and that, as he had never been in possession, he had not acquired the goodwill *de facto*. The legatee of the goodwill was therefore entitled to receive the 2,617*l.* without any deduction therefrom on account of the mortgage debt. *Bennett, In re; Clarke v. White*, 68 L. J. Ch. 104; [1899] 1 Ch. 316; 47 W. R. 406—North, J.

Fixtures—No Specific Mention of Fixtures on Property Mortgaged—Bills of Sale Acts.—C. took a lease of building ground on which he erected a shop, in which he carried on the trade of a chemist and druggist, having fitted up the premises with suitable trade fixtures, all of which were admittedly capable of being detached without injury to the freehold. After the annexation of the fixtures C. mortgaged the premises. In the mortgage the parcels were simply described as "building ground," with boundaries, &c., as in the lease, omitting any specific mention of the fixtures:—*Held*, that the fixtures passed to the mortgagees, and further, that the mortgage did not come within the provisions of the Bills of Sale Acts. *Calvert, In re*, [1898] 2 Ir. R. 501—Boyd, J. *And see* FIXTURES.

Compensation for Loss of Licence under Licensing Act, 1904—Apportionment of Compensation—Possession.—By a debenture-holders' trust deed certain leasehold licensed premises belonging to a brewery company were demised to the trustees for the unexpired term, excepting the last day, of which there was the usual trust for the benefit of the trustees. The deed provided that the trustees should permit the company to hold the premises thereby specifically mortgaged until the security should become enforceable, in which event they might enter upon and take possession of the mortgaged premises and receive the rents and profits thereof; and, by clause 23, that the proceeds of any sale prior to entry, as provided in the deed, should be received by the trustees and applied in various specified works appropriate to licensed premises. The licensing authority, having refused to renew the licence, awarded a sum of 1,133*l.* for compensation to the company as leaseholders, besides other sums to the freeholder and the licence-holder. The trustees for the mortgagees, notwithstanding that their security had not become enforceable, claimed to be entitled to the sum of 1,133*l.*:—*Held*, that the mortgagees were entitled to receive the balance of the moneys after payment of the costs, but, under present circumstances, were not entitled to apply it towards the payment off of their debt, as the income produced by the investment of it should be paid to the brewery company, being still in possession of the premises. *Law Guarantee and Trust Society v. Mitcham and*

Cheam Brewery Co., 75 L. J. Ch. 556; [1906] 2 Ch. 98; 94 L. T. 809; 54 W. R. 551; 22 T. L. R. 499—Kekewich, J.

Tied Public-house—Covenant to take Beer—Successors in Business—Person Claiming under Mortgagor.—The benefit of a covenant, contained in a brewer's mortgage, to take beer from him only, will go to his successors in business, if that intention appears from the deed, though the words "successors and assigns" are not used. *John Brothers Abergarw Brewery Co. v. Holmes*, 69 L. J. Ch. 149; [1900] 1 Ch. 188; 81 L. T. 771; 48 W. R. 236; 64 J. P. 153—Kekewich, J.

The burden of such a covenant attaches to every person claiming under the original mortgagor who has notice of the covenant, whether legally an assign or not. *Ib.* And see col. 1226.

Deeds Deposited—Injury to—Liability of Mortgagee.—There is no implied covenant on the part of a mortgagee to take reasonable care of the title-deeds during the continuance of the security. *Gilligan and Nugent v. National Bank*, [1901] 2 Ir. R. 513—Q.B. D.

Per BARTON, J.—*Brown v. Sewell* (11 Hare, 49) and other cases in which indemnity and compensation have been decreed to mortgagors for loss of title-deeds by mortgagees are not founded on the hypothesis of an implied covenant by the mortgagee to take care of the deeds, but are referable to the ancient jurisdiction of Courts of equity to give relief in cases of accident. *Ib.*

Insufficient Security—Apportionment—Tenant for Life and Remainderman.—See *Phillimore, In re*, 73 L. J. Ch. 671, *post*, SETTLEMENT.

3. CLOGGING THE EQUITY OF REDEMPTION.

"Once a mortgage always a mortgage"—**Fetter on Equity of Redemption—Free Public-house—Tying Covenant to Continue after Redemption.**—A covenant, purporting to bind the land, in the mortgage of a leasehold public-house, that the mortgagor will not during the continuance of the term, whether or not any principal money or interest is still owing on the security, sell on the mortgaged premises any malt liquors, except such as shall have been purchased from the mortgagees, is invalid as a clog on the equity of redemption, in so far as it purports to tie the public-house after payment of principal moneys and interest due on the security. *Santley v. Wilde* (63 L. J. Ch. 681; [1899] 2 Ch. 474) disapproved by LORD MACNAGHTEN and LORD DAVEY. *Noakes v. Rice*, 71 L. J. Ch. 139; [1902] A.C. 24; 86 L. T. 62; 50 W. R. 305; 66 J. P. 147—H.L. (E.)

Collateral Agreement by Mortgagor to Sell Land through Mortgagee or Pay Commission to Him.—Where land has been mortgaged as a security for money, on payment off, the land and its owner in the use of it must be as free as if it had never been mortgaged, and provisions in the mortgage-deed or collateral thereto inconsistent with this right cannot be enforced. *Browne v. Ryan*, [1901] 2 Ir. R. 653—C.A.

The defendant mortgaged his land to the

plaintiff to secure 200*l.* and interest. As part of the same transaction the defendant agreed by an independent deed to sell his land within twelve months, and to give the sale thereof to the plaintiff, who was an auctioneer, and that if the said land were sold otherwise than through the plaintiff the defendant would pay the plaintiff 5 per cent. on the purchase-money. The defendant subsequently sold the land through another auctioneer for 1,250*l.* In an action for the 62*l.* 10*s.*,—*Held*, that the collateral advantage stipulated for by the mortgagee in the independent deed placed such a fetter on the equity of redemption that it vitiated the agreement. *Ib.*

Option to Mortgagee to Purchase at any Time within Twelve Months—Mortgage by Company of Debenture Stock—Security for Loan.—A stipulation in a mortgage of debenture stock, the advance being repayable at thirty days' notice on either side, that the mortgagee is to have "the option of purchasing the whole or any part of such stock at 40 per cent. at any time within 12 months" held to be void upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. *Samuel v. Jarralt Timber and Wood-paving Corporation*, 73 L. J. Ch. 526; [1904] A.C. 323; 90 L. T. 731; 52 W. R. 673; 11 Manson, 276; 20 T. L. R. 586—H.L. (E.)

Collateral Advantage to Mortgagee—Clogging Equity of Redemption.—There is no general and absolute rule that a mortgagor and mortgagee cannot at the time of entering into the mortgage transaction enter into some other agreement from which the mortgagee gets some advantage. So long as such collateral agreement is not unconscionable or oppressive, and so long as it does not place any absolute fetter on the right of the mortgagor to redeem on payment of principal, interest, and costs, it is not invalid. *Jennings v. Ward* (2 Vern. 520) and *Edwards' Estate, In re* (11 Ir. Ch. Rep. 367) discussed. *Biggs v. Hoddinott*, 67 L. J. Ch. 540; [1893] 2 Ch. 307; 79 L. T. 201; 47 W. R. 84—C.A.

A mortgage of a licensed house by a publican to a brewer provided that the loan should continue for a period of five years, and contained a covenant that the mortgagor should not during the continuance of the security sell on the premises beer other than that supplied by the mortgagee.—*Held*, that the covenant was valid, and could be enforced by injunction. *Ib.*

— **Fetter on Redemption—Invalidity of Covenant.**—A mortgage is a conveyance of property as a security for the payment of a debt, or the discharge of some other obligation, and the security is redeemable on such payment or discharge, and any provision inserted to prevent such redemption is a fetter on the equity of redemption, and is void; but the amount or nature of the debt or obligation is not a fetter. *Santley v. Wilde*, 63 L. J. Ch. 681; [1899] 2 Ch. 474; 81 L. T. 393; 48 W. R. 90—C.A.

A mortgagee may in the mortgage stipulate for a collateral advantage for himself, provided that the bargain is not unconscionable or oppressive; and there is no presumption that

where a mortgagee has stipulated for such a collateral advantage it has been obtained by pressure. *Ib.*

A covenant in a mortgage of a term of years that the mortgagor will, during the residue of the term, notwithstanding that all principal moneys and interest may have been paid, pay to the mortgagee one-third of the net profit rental derived from any underlease or tenancy affecting the same, with provisions for continuing the relative positions of mortgagee and mortgagor for the purpose of securing the said share of rental, is not void as clogging the equity of redemption. *Biggs v. Hoddimott* (67 L. J. Ch. 540; [1898] 2 Ch. 307) followed. *Ib.*

Option of Purchase by Mortgagee within Term—Clog on Equity of Redemption—Independent Agreement.—By an agreement dated April 23, 1896, the respondents agreed to lend the appellant on first mortgage of a ship a sum not exceeding 5,000*l.* The money was not to be called in or the mortgage redeemed before the expiration of two years, within which time the respondents were to have the option of entering into partnership with the appellant, on the terms of transferring the ship free of the mortgage to the partnership. The option was not exercised within the two years, and by an agreement dated July 9, 1898, reciting the previous transactions, the respondents were to be at liberty within five years to enter into partnership with the appellant on the terms therein mentioned, being in effect the terms specified in the instrument of April 23, 1896. The respondents claimed to exercise their option, but the appellant declined to admit them into partnership, on the ground that the agreement of July 9, 1898, forming part of a mortgage transaction, was not binding upon him because it created a clog on the equity of redemption. The respondents brought an action for specific performance or damages:—*Held*, that the agreement of July 9, 1898, was an entirely separate transaction from the mortgage. *Reeve v. Lisle*, 71 L. J. Ch. 768; [1902] A.C. 461; 87 L. T. 308; 51 W. R. 576—H.L. (E.)

Held, by BUCKLEY, J. (but doubted by the COURT OF APPEAL), that, treating the agreement of July 9 as part of the mortgage transactions, still, inasmuch as the option of purchase was exercised before the date for redemption at law, and therefore before any equity of redemption arose, the doctrine of clogging the equity of redemption had no application. *Ib.*

Stipulation that Lender should "always hereafter" Act as Broker to a Company—Collateral Advantage to Lender—Clogging Equity of Redemption.—The defendant, in consideration of an advance made to him by the plaintiff, agreed in writing, *inter alia*, to transfer certain shares in a company, in which he was a shareholder, to a nominee of the plaintiff; and the defendant further agreed as a shareholder in such company and in every other capacity to use his (the defendant's) best endeavours to secure that the plaintiff or any firm of brokers of which he for the time being should be a partner "shall always hereafter have the sale of all the company's teas as broker"; and in the event of any of the company's teas being

sold otherwise than through the plaintiff or his firm, the defendant personally agreed to pay to the plaintiff or his firm the amount of the commission which the plaintiff or his firm would have earned if the teas had been sold through him or his firm. The plaintiff having called in the loan, the defendant repaid it and transferred the shares in the company into his own name. The defendant immediately afterwards transferred them by way of security for a fresh loan, and the transferee having attempted to oust the plaintiff from his position as broker to the company, the plaintiff brought an action to recover damages for breach of the agreement:—*Held*, that, on the true construction of the agreement, the stipulations relating to the plaintiff occupying the position of broker were not merely limited to the period during which the security might remain in force; and that such stipulations were not of such a character as to clog the equity of redemption. *Carritt v. Bradley*, 70 L. J. K.B. 832; [1901] 2 K.B. 550; 85 L. T. 197; 49 W.R. 593—C.A. On appeal to H.L., *held* that an agreement in a mortgage of shares under which the mortgagor undertakes to use his best endeavours to secure that the mortgagee shall "always hereafter" be employed as broker for the company, is invalid as constituting a clog on the equity of redemption (LORD SHAND and LORD LINDLEY dissenting). *Santley v. Wilde* (68 L. J. Ch. 681; [1899] 2 Ch. 474) discussed. *Bradley v. Carritt*, 72 L. J. K.B. 471; [1903] A.C. 253; 88 L. T. 633; 51 W. R. 636—H.L. (E.)

Independent Agreement—Provision for Increase of Interest on Mortgage Debt—Collection of Rents by Mortgagee—Agency Fees.—M. being previously indebted to T. in the sum of 1,500*l.* secured by mortgages on land, with interest at 5 per cent., in 1878, in consideration of a further advance of 300*l.*, gave his bond, and executed a collateral agreement by which he appointed T. his agent over the mortgaged lands, and empowered him to charge agency fees; and agreed to pay 6 per cent. interest on the whole 1,800*l.* due by him to T., being 1 per cent. additional on the 1,500*l.* secured by the mortgages. This additional 1 per cent. rate of interest was not by the agreement charged on the lands:—*Held*, that the agreement of 1878 being a new contract for a fresh consideration, had not the effect of imposing a fetter on the equity of redemption by reason of increasing the rate of interest payable or by reason of making the mortgagee the agent of the mortgagor to receive the rents, and empowering him to charge agency fees. *Maxwell v. Tipping*, [1903] 1 Ir. R. 498—M.R.

4. EQUITABLE MORTGAGE.

Validity—Charge of Real and Personal Estate—Vagueness—Public Policy.—A charge upon the whole of a mortgagor's real and personal estate is a valid equitable charge upon all the mortgagor's property existing at its date; and the mortgagee under such a charge has a lien upon all such property in preference to general creditors. *Kelcey, In re*; *Tyson v. Kelcey*, 68 L. J. Ch. 742; [1899] 2 Ch. 530; 81 L. T. 354; 48 W. R. 59—Kekewich, J.

Notice of Mortgage to Mortgagor's Tenant—Rent Paid by Tenant to Equitable Mortgagee—Action to Recover Back Money so Paid.—An equitable mortgagee by deposit served notice upon the tenant of the mortgagor (who was in default under the mortgage) intimating the fact of the mortgage and requiring the tenant to pay him, the equitable mortgagee, the rent due in respect of the premises. In pursuance of such notice, the tenant paid his rent to the equitable mortgagee. Subsequently the tenant sought to recover it back on the ground that it had been paid without consideration:—*Held*, that the action failed, inasmuch as the rent had been paid with full knowledge of the fact that it was claimed by the defendant as equitable mortgagee. *Finch v. Tranter*, 74 L. J. K.B. 345; [1905] 1 K.B. 427; 92 L. T. 297—D.

"Reasonable" Provisions—Redemption—Consolidation.—A provision in an equitable mortgage that the mortgagor will execute to the mortgagee a legal mortgage of the property, "with such powers and provisions and in such form" as the mortgagee may require "for further securing the said principal moneys and interest," does not entitle the mortgagee to a legal mortgage excluding the operation of section 17 of the Conveyancing and Law of Property Act, 1881, so as to give him the right of consolidation. *Whitley v. Challis* (61 L. J. Ch. 307; [1892] 1 Ch. 64) applied. *Farmer v. Pitt*, 71 L. J. Ch. 500; [1902] 1 Ch. 954; 50 W. R. 453—Byrne, J.

The wife of a builder, having mortgaged certain property, equitably mortgaged as collateral security to the mortgagee for loans to her husband other property under a memorandum containing a provision as above:—*Held*, that the mortgagee could redeem the first mortgage without at the same time redeeming the second. *Id.*

5. FLOATING CHARGE.

Mortgage—Possession of Title-deeds—Negligence of First Mortgagee.—Bankers of a company who in the usual course of business have without notice or enquiry advanced moneys to the company on a deposit of title-deeds coupled with a memorandum of equitable charge, are, under ordinary circumstances, entitled to priority over debenture-holders of the company, notwithstanding that the property comprised in the title-deeds is included in the debenture security, and by the express terms of the debenture itself prohibited from being charged by the company in priority to the debentures. *Castell & Brown, Lim., In re; Roper v. Castell & Brown*, 67 L. J. Ch. 169; [1898] 1 Ch. 315; 78 L. T. 109; 46 W. R. 248—Romer, J. *And see* COMPANY, col. 416.

6. INTEREST.

"Punctually paid."—The word "punctually" in a clause which provides that mortgage moneys shall not be called in for three years "if in the meantime every half-yearly payment of interest shall be punctually paid" does not mean "within a reasonable time," but "on the days named." *Leeds and Hanley Theatre of*

Varieties v. Broadbent, 67 L. J. Ch. 135; [1898] 1 Ch. 343; 77 L. T. 665; 46 W. R. 230—C.A.

Rate of—Covenant—Judgment—Covenant not Extinguished by the Judgment—Merger.—Mortgagees brought an action against mortgagors upon a covenant in the mortgage-deed to repay the principal sum by a day named, and if it was not then paid to pay interest at 5 per cent. upon so much of the principal as should remain unpaid after that date. The deed contained a proviso for redemption, that if the mortgagors should pay to the mortgagees the principal sum "with interest for the same after the rate, at the times and in manner hereinafter covenanted and agreed for the payment thereof," they should have back the property. The mortgagees, on default made by the mortgagors, recovered judgment for principal and interest due on the covenant:—*Held*, in a subsequent mortgagees' action, that though a judgment merges a debt and bears only 4 per cent. interest, yet the mortgage being in such a form that the property could not be taken out of the hands of the mortgagee without payment of the principal and full interest, the mortgagees were entitled to interest at 5 per cent. *Economic Life Assurance Society v. Osborne*, 71 L. J. P.C. 34; [1902] A.C. 147; 85 L. T. 587—H.L. (Ir.)

In Arrear—Mortgagee in Possession—Special Provision as to Interest.—A mortgage contained a special provision that if interest should be twenty-one days in arrear it should be capitalised and bear interest. The mortgagee entered into possession when interest was in arrear, but payment of the arrears was subsequently tendered and accepted, and the rents and profits were afterwards (at least *prima facie*) sufficient to keep down the interest:—*Held*, on taking the accounts, that the mortgagee had not established a case to be entitled to compound interest under the special provision. *Union Bank of London v. Ingram* (50 L. J. Ch. 74; 16 Ch. D. 53), *Bright v. Campbell* (41 Ch. D. 388), and *Cockburn v. Edwards* (51 L. J. Ch. 46; 18 Ch. D. 449) considered. *Wrigley v. Gill*, 74 L. J. Ch. 160; [1905] 1 Ch. 241; 92 L. T. 491; 53 W. R. 334—Warrington, J.

—Deficient Security—Capital and Income—Tenant for Life and Remainderman—Apportionment.—Funds held under a will in trust for A for life, remainder for B for life, with remainder over for certain persons, were invested in 1875 on the security of a mortgage of real estate then of sufficient value. The interest due on the mortgage fell into arrear, and in 1880 a petition for sale and the appointment of a receiver was presented by the trustees of the will, and a receiver was appointed in the same year. In 1898 A (the first tenant for life) died. At her death considerable arrears of income were due to her, a portion of which was afterwards paid to her executors. In 1901 the lands subject to the mortgage were sold under the Land Purchase Acts, and did not realise the amount of the mortgage security. Prior to the sale nothing had been paid to B (the present tenant for life) in respect of interest:—*Held*, that the date of the sale of the mortgaged lands must be taken to be the period at which the deficiency of the security was first ascertained; and that the sum realised by the sale should be apportioned,

in proportion to the amounts due at that date between the executors of the first tenant for life, the present tenant for life, and the trustees of the will, as representing the persons entitled to the corpus of the fund. The principle of *Moore, In re* (54 L. J. Ch. 432), preferred to that of *Foster, In re* (60 L. J. Ch. 175; 45 Ch. D. 629). *Stewart v. Kingsale*, [1902] 1 Ir. R. 496—M.R.

— **Real Estate—Fund in Court—Application by Mortgagor for Payment Out.**—The rule established by *Hunter v. Nockolds* (19 L. J. Ch. 177; 1 Mac. & G. 640)—namely, that in a foreclosure action the mortgagee, by virtue of the Real Property Limitation Act, 1833, s. 42, can only recover six years' arrears of interest—does not apply to redemption proceedings taken by the mortgagor, nor where the proceeds of sale of land have come to the hands of the mortgagee; and similarly the rule in *Hunter v. Nockolds* (*supra*) does not apply where the mortgagor of a share in an estate is himself seeking to obtain payment out of Court of the proceeds of sale of land sold in an administration action. In such a case the mortgagor ought only to be allowed to recover the fund as against the mortgagee upon the same terms as if he had brought an action for redemption—that is, on the terms of paying all arrears of interest. *Lloyd, In re; Lloyd v. Lloyd*, 72 L. J. Ch. 78; [1903] 1 Ch. 385; 87 L. T. 541; 51 W. R. 177—C.A.

Edmunds v. Waugh (35 L. J. Ch. 234; L. R. 1 Eq. 418), *Marshfield, In re* (56 L. J. Ch. 599; 34 Ch. D. 721), and *Dingle v. Coppen* (68 L. J. Ch. 337; [1899] 1 Ch. 726) approved. *Mason v. Broadbent* (33 Beav. 296) disapproved. *Hughes v. Kelly* (3 Dr. & W. 482; 5 Ir. Eq. R. 286) and *Stead's Mortgaged Estates, In re* (45 L. J. Ch. 634; 2 Ch. D. 713), distinguished. *Slater's Trusts, In re* (48 L. J. Ch. 473; 11 Ch. D. 227), overruled. *Ib.*

— **Realisation of Security—Apportionment of Proceeds—Tenant for Life and Remainderman—Interest and Capital—Mortgagees in Possession.**—A fund was settled in trust for certain persons for life, with remainder to the plaintiffs. Part of the fund was invested on a mortgage of real estate bearing interest at 5 per cent. (but reducible to 4 per cent. on punctual payment), which was an authorised investment. Interest having fallen into arrear, the trustees in 1889 entered into possession. The rents were not sufficient to keep down the interest, and considerable arrears of interest were owing to the tenants for life. In 1898 part of the mortgaged property was sold, and the question arose as to how the proceeds of sale should be apportioned as between the tenants for life and remaindermen:—*Held*, that they should be apportioned in the proportion which the amount of interest in arrear bore to the amount of principal due under the mortgage without bringing into hotchpot any sums already received by the tenants for life for interest. *Atkinson, In re; Barbers' Co. v. Grose Smith*, 73 L. J. Ch. 585; [1904] 2 Ch. 160; 90 L. T. 825; 53 W. R. 7—C.A.

The principle applied in *Moore, In re; Moore v. Johnson* (54 L. J. Ch. 432), and in *Alston, In re; Alston v. Houston* (70 L. J. Ch. 869; [1901] 2 Ch. 584), approved and followed. *Foster, In*

re; Lloyd v. Carr (60 L. J. Ch. 175; 45 Ch. D. 629), and *Phillimore, In re; Phillimore v. Herbert* (72 L. J. Ch. 591; [1903] 1 Ch. 942), overruled. *Bird, In re; Evans, In re; Dodd v. Evans* (70 L. J. Ch. 514; [1901] 1 Ch. 916), distinguished. *Ib.*

— **Capitalisation of—Proviso for—Mortgagee in Possession—Receipt of Unappropriated Rents Sufficient to Satisfy Interest.**—A mortgagee in possession having in his hands unappropriated rents which he might, but does not, apply to the payment of the amount of a half-year's interest as it falls due, is not entitled to say that such half-year's interest is "in arrear" within the meaning of a usual proviso for capitalisation of interest in that event. The dicta of COTTON, L.J., and BRETT, L.J., in *Cockburn v. Edwards* (51 L. J. Ch. 46; 18 Ch. D. 449), followed in preference to the dictum of JESSEL, M.R. *Union Bank of London v. Ingram* (50 L. J. Ch. 74; 16 Ch. D. 58) and *Bright v. Campbell* (41 Ch. D. 388) distinguished. *Wrigley v. Gill*, 75 L. J. Ch. 210; [1906] 1 Ch. 165; 94 L. T. 179; 54 W. R. 274—C.A.

Petition by Incumbrancer.—In an incumbrancer's petition matter an incumbrancer who avails himself of the proceedings is not entitled to receive interest on his incumbrance which has accrued more than six years next before the filing of the petition, such interest being barred under section 42 of 3 & 4 Will. 4, c. 27. *Lloyd v. Lloyd* (72 L. J. Ch. 78; [1903] 1 Ch. 385) only applies to a proceeding in the nature of a redemption suit. *Lewis's Estate, In re*, [1903] 1 Ir. R. 348—Ross, J.

Payment of Interest by Person Liable to the Mortgagor to Pay.—See LIMITATIONS, STATUTES OF, col. 1296.

Runs from time when money payable. *Drax, In re; Saville v. Drax*, 72 L. J. Ch. 505.

7. FURTHER ADVANCES.

Covenant to Make—Settlement of Equity of Redemption—Advance after Notice.—The doctrine of *Hopkinson v. Rolt* (34 L. J. Ch. 463; 9 H.L. C. 514), according to which a prior mortgagee, whose mortgage is taken to cover further advances, cannot claim priority in respect of advances made after notice of a second mortgage, applies as well to a case where the prior mortgagee has covenanted to make the further advances as to a case where the further advances are voluntary. *West v. Williams*, 68 L. J. Ch. 127; [1899] 1 Ch. 132; 79 L. T. 575; 47 W. R. 308—C.A.

In 1895 A mortgaged his equitable interest under a will to the plaintiff, who gave no notice at the time to the trustees of the will. In 1896 A mortgaged the same interest to the defendants (who gave notice to the trustees of the will) to secure a present advance and any further sums advanced by the defendants under a covenant in a settlement of even date. By this settlement (notice of which was also given to the trustees of the will) A, as part of the same transaction, settled the equity of redemption of his interest under the will on trust to pay the income to himself during his life or until alienation, with trusts over in favour of

other persons; and the defendants thereby covenanted to pay to A 200*l.* a year for five years. The defendants received notice of the plaintiff's mortgage in 1897, after which they made further payments to A under the covenant in the settlement:—*Held*, that the defendants were not entitled to priority over the plaintiff's mortgage in respect of their payments made after notice of the plaintiff's mortgage, and that the settlement had no validity against that mortgage. *Ib.*

Notice of Puisne Incumbrance—Tacking—Joint Tenants.—In the case of a mortgage of real estate to joint tenants on a joint account, notice to one of them of a second mortgage is sufficient to displace their right to tack a further advance. *Freeman v. Laing*, 68 L. J. Ch. 586; [1899] 2 Ch. 355; 81 L. T. 167; 48 W. R. 9—Byrne, J.

S. PRIORITIES.

Legal Mortgage—Possession of Title Deeds by Subsequent Equitable Mortgagee.—The mere fact of non-possession of the deeds by a prior legal mortgagee and possession of them by the subsequent equitable mortgagee, there being no evidence or circumstance pointing to fraud or negligence on the part of the prior legal mortgagee, or connecting him with the fraud of the mortgagor,—*Held*, not to be sufficient to displace the priority of the prior legal mortgagee. *Greer, In re*, [1907] 1 Ir. R. 57—Barton, J.

Legal Estate—Trustees—Omission to Obtain Title Deeds—Subsequent Equitable Interest—Fraud—Negligence.—Where, through the negligence of the trustees of a marriage settlement in not obtaining the title deeds of the settled property, the husband is enabled to mortgage the settled property and to hand over the title deeds to the mortgagee, who afterwards sells the property, neither the mortgagee nor the purchaser from him having had notice of the settlement, the legal estate of the trustees is postponed to the subsequent equitable interest of the purchaser from the mortgagee, and the wife is in no better position than the trustees. *Lloyd's Banking Co. v. Jones* (54 L. J. Ch. 981; 29 Ch. D. 221) followed. *Walkerv. Linom*, 76 L. J. Ch. 500; [1907] 2 Ch. 104; 97 L. T. 92—Parker, J.

Portions—Mortgage to Raise some of the Portions—Priority of Mortgage over other Portions.—Where some of the portions charged on real property are raised by a legal mortgage of the whole estate, such mortgage is not entitled to priority over other portions not yet raisable. Nor is a portion which is secured by bond or covenant entitled to priority over a portion which is merely charged in equity under a will. *Nightingale v. Reynolds*, 71 L. J. Ch. 586; [1902] 2 Ch. 117; 86 L. T. 703—Kekewich, J.

Notice—Real Estate—Equitable Mortgages—Legal Estate—Breach of Trust.—A testator, after bequeathing legacies, devised his real estate to three trustees, of whom the defendant K. was one, upon trust out of the rents and profits in aid of his personal estate to pay the legacies, and subject thereto upon trust as to a certain freehold house for K., his heirs and

assigns. In September, 1872, K. assigned his interest in his own right under the will by way of mortgage to the plaintiff's predecessors, and covenanted to execute all such further assurances as might be reasonably required. The mortgagees gave notice to his two co-trustees. In 1879 K. became sole trustee by reason of the death of his surviving co-trustee. In 1890 he deposited the deeds of the house and the probate of the will with his bankers with a memorandum of charge to secure an overdraft, and in 1903 he conveyed the legal estate in the house to the bank by way of mortgage to secure the existing debt and further advances. The bankers did not know of the plaintiff's equitable mortgage, but in 1890 the bank manager examined the deeds without professional legal assistance. In 1890 there was a trust legacy of 100*l.* still unsatisfied. In an action to determine the priorities of the mortgagees,—*Held*, that, the trust of the will not having been fully executed, K.'s equitable interest had not in 1903 become merged in his legal estate, and that the bank must be taken at that date to have had notice of all the subsisting trusts of the will, including incumbrances of which the trustees had received notice, and that their security must be postponed to the plaintiff's mortgage. *Perham v. Kempster*, 76 L. J. Ch. 223; [1907] 1 Ch. 373; 96 L. T. 297—Joyce, J.

The possession of a legal estate obtained through the medium of a breach of trust on the part of the mortgagor does not give a priority over a prior equitable mortgage. *Ib.*

Equitable Assignment of Future Crops—Irrevocable Appointment of Auctioneer to Let and Manage Lands.—M. was in the habit of employing the defendants to let the grazing and manage her land. The defendants sometimes paid in advance the rents and taxes, recouping themselves out of the rents of the meadows and price of crops sold, and paid the balance to M. M. had deposited the title-deeds of the farm with the defendants by way of equitable mortgage. M. applied to the plaintiff for advances to pay off the defendants and also some rent due, and this the plaintiff agreed to give upon getting the title-deeds and upon the security of an agreement dated December 29, 1900, whereby she, in consideration of the plaintiff paying 200*l.* for her, assigned to him the authority to let and manage her farm, and out of the proceeds of the letting to retain such sums to liquidate the above or any other sum advanced to M. or paid by him on her account; and M. appointed the plaintiff her auctioneer and salesman to dispose of same at such time and place as he thought best, and to retain the sums advanced out of the proceeds, together with commission and expenses, and hand M. the balance—the agreement to be irrevocable. The plaintiff paid off the defendants and paid the rent due. The plaintiff attempted, but unsuccessfully, to let or sell the meadows, and M. subsequently employed the defendants to auction the meadows, and they were sold. Immediately thereafter notice was given on behalf of the plaintiff to the defendants of the agreement of December 29, 1900, and cautioning them not to pay over the proceeds of the sale to M. Notwithstanding this, the defendants paid over the balance of the money to M. after deducting the

expenses of the auction and commission:—*Held*, that the defendants, having had notice of the agreement of December 29, 1900, were liable to the plaintiff for the balance of the proceeds paid over to M. *Per* PORTER, M.R., and WALKER, L.J.—The agreement of December 29, 1900, conferred an equitable charge in favour of the plaintiff on the land and growing crops. *Coonan v. O'Connor*, [1903] 1 Ir. R. 449—C.A.

Equitable Mortgage—Correspondence Constituting Equitable Charge—Deposit of Deed—Subsequent Registered Charge—Priorities.—A customer of the respondent bank, whose account was overdrawn, undertook in letters to the bank manager to lodge the title-deeds of an estate which he was about to buy when he should have received them. When the purchase was completed the deeds were lodged with the bank without any memorandum of charge. The letters were not registered. Subsequently a second equitable charge was created in favour of the appellants and registered:—*Held*, that an equitable mortgage was constituted by the letters, which, not having been registered, must be postponed to the subsequent registered charge. *Fullerton v. Provincial Bank of Ireland*, 72 L. J. P.C. 79; [1903] A.C. 309; 89 L. T. 79; 52 W. R. 238—H.L. (Ir.)

Competing Equities — Priority — Equitable Mortgage—Subsequent Legal Mortgage — Lis Pendens—Locke King's Act—Breach of Trust not Amounting to Fraud—Cestui que Trust Bound by Acts of Trustees.—A died seised and possessed of lands, including a denomination X, and indebted to his bank in a sum of 10,000*l.*, to secure which all his title-deeds, including those of X, had been deposited with the bank by way of equitable mortgage. A made a will whereby in effect X became the property of his eldest son B. He left other lands to his two younger sons and pecuniary legacies of 1,000*l.* each to his three daughters, one of whom was the petitioner. He appointed B and two other executors and trustees, to whom probate was granted. Within nine months after his death the executors paid off the testator's debt to the bank, and obtained the title-deeds, giving a receipt to the bank for them; but on the same day the title-deeds of X were re-deposited by B with the bank to secure a past debt of his own and future advances. Upon this large advances were made by the bank to B, far more than sufficient to exhaust the value of X. A suit to establish the right of the legatees to be paid out of X was registered as a *lis pendens*, and immediately afterwards the bank took a legal mortgage of X from B:—*Held*, that under Locke King's Act, as each payment was made an equity arose in favour of the legatees in the nature of an equitable charge against X to be recouped the amount necessary for payment in full of the legacies which the remaining personal estate was insufficient to discharge; but *held*, also, that the conduct of the trustees, though constituting a breach of trust, was not fraudulent, and that, irrespective of the legal mortgage, the bank, as purchasers for value without notice, obtained by their equitable mortgage priority over the earlier charge of the legatees. *Shropshire Union Railway and Canal Co. v. Reg.* (45 L. J. Q.B.; 31; L. R.

7 H. L. 496) distinguished. *Bobbett's Estate, In re*, [1904] 1 Ir. R. 461—Ross, J.

— **Breach of Trust—Fraudulent Conveyance of Trust Property—Receipt in Deed—No Contract of Sale—Equitable Mortgagee without Notice.**—C. was sole trustee for sale of real estate under a will, and the plaintiffs were entitled to the proceeds of sale. In breach of trust C. arranged with M., a private creditor, to convey to him part of the trust property as security for the debt. M. had full notice of the breach of trust. The conveyance purported to be in execution of the trust for sale and in consideration of 2,000*l.* The receipt of this sum was acknowledged by the deed, but none of it was in fact paid or intended to be paid. M. afterwards deposited the conveyance with the defendant B. by way of equitable mortgage. B. had no notice, actual or constructive, of the breach of trust or of the non-payment of the purchase-money, and was not guilty of any conduct which would make his equity inferior to the equity of the plaintiffs, the beneficiaries:—*Held*, that there was no contract of sale between C. and M., and that the equity of the plaintiffs was therefore not a right to enforce a vendor's lien, but to have the land sold and the proceeds distributed according to the will; that they were not estopped by the receipt in the conveyance to M. from denying that the transaction was one of purchase and sale; and that the equities of the plaintiffs and of B. being otherwise equal, the equity of the plaintiffs, by reason of its priority in point of time, must prevail. *Lloyd's Bank v. Bullock* (85 L. J. Ch. 680; [1896] 2 Ch. 192) distinguished. *Capell v. Winter*, 76 L. J. Ch. 496; [1907] 2 Ch. 376; 97 L. T. 207; 23 T. L. R. 618—Parker, J.

— **Possession of Title-deeds.**—On April 1, 1897, the defendant company, which had been formed to take over the business of M., and of which he was managing director and practically the owner, being indebted to its bankers, and requiring further advances, issued debentures in favour of the bank, charging the same on all the property of the company. These documents shewed that there was power to issue further debentures. There was a collateral agreement by the company authorising the bank to hold the debentures as a collateral security for advances and transactions. On April 16, 1897, two further debentures, charged on the property of the company for the sum of 11,000*l.*, were issued to M. and T., who were the trustees of B., deceased, in respect of investments made (in breach of trust) of the trust moneys of B.'s estate in M.'s business taken over by the company, and in the company itself. On May 28, 1897, M. deposited certain title-deeds of the company's property with the bank as a collateral security for all moneys then due or to become due by the company to the bank. When this charge was given the amount due to the bank exceeded the nominal amount of the debentures issued to them on April 1. The bank had no notice of the existence of the debentures of April 16, and made no enquiries. The bank commenced an action to enforce its securities, and the company passed a resolution for voluntary winding-up. On an application by the *cestuis que trust* of the estate of B. for liberty to intervene in the action and to have it

declared that the debentures of April 16 took priority over the equitable charge to the bank by deposit of the title-deeds on May 28.—*Held*, on the assumption that at the date of the issue of the two debentures for 11,000*l.* there was money due by the company to M. and T. as trustees of the B. estate, that the bank, as having the stronger equity, was entitled to priority in respect of its equitable mortgage over these two debentures. *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 Ir. R. 219—M.R.

— **Trust Fund—Advance by Bank on Deposit of Title-deeds—Absence of Notice—Blended Fund.**—The trustees of a marriage settlement applied to a bank for an advance to enable them to complete the purchase of certain house property, agreeing to deposit the title-deeds thereof (with others) as security. The trustees received the advance from the bank, blended it with trust-money in their hands, and purchased the property therewith. The bank had no notice of any trust. On the date of the advance the trustees deposited the title-deeds of the purchased property with the bank. The property was subsequently sold at a loss, and the proceeds lodged in Court:—*Held*, that the bank had the superior equity, and were entitled to be paid the amount of their advance with interest in priority to the claim of the *cestuis que trust*. *Bourke v. Lee*, [1904] 1 Ir. R. 280—M.R.

— **Notice—Equitable Interest in Personality.**—Priorities, as between mortgagees of the distributive share of one of the next-of-kin of an intestate, rank according to the dates of the notices given to the administrator after administration has been taken out. Notice given before administration has been taken out to a possible or future administrator, even if he be also the holder of a fund out of which moneys may be payable to the future administrator, are ineffectual for the purpose of obtaining priority as against other mortgagees who give notice to the administrator after he has obtained administration. *Kinahan's Trusts, In re*, [1907] 1 Ir. R. 321—Barton, J.

— **Equitable Sub-mortgagees of Mortgage of Land—Notice to Original Mortgagor.**—**Effect of.**—The doctrine of obtaining priority by notice does not apply as between successive equitable sub-mortgagees of a mortgage of land, and the second sub-mortgagee in time will gain no priority by being the first to give notice to the original mortgagor. *Richards, In re; Humber v. Richards* (59 L. J. Ch. 728; 45 Ch. D. 589), followed. *Hopkins v. Hemsworth*, 67 L. J. Ch. 526; [1898] 2 Ch. 347; 78 L. T. 832; 47 W. R. 26—Kekewich, J.

— **First Mortgage unknown to Mortgagee.**—A solicitor misappropriated a client's money entrusted to him for investment, and subsequently executed a mortgage to his client of his equity of redemption in certain life policies as security for part of the misappropriated money. The solicitor never gave notice of this mortgage to the insurance society, and, without communicating the fact of its existence to the client or any one else, executed another mortgage of the same equity in favour of another person as trustee for other clients whose moneys had been misappropriated. This trustee gave notice of his mortgage to the in-

surance society. On the solicitor's bankruptcy the earlier mortgage was found, and notice of it given to the society. Upon an application to determine the question of priorities, *—Held*, that, notwithstanding that the first mortgagee had not been guilty of *laches* or any want of diligence, the second mortgagee was entitled to priority over him, inasmuch as he had been the first to give notice to the society. *Lake, In re; Cavendish, ex parte*, 72 L. J. K.B. 117; [1903] 1 K.B. 151; 87 L. T. 655; 51 W. R. 319; 10 Manson, 17—Wright, J.

— **Equitable Charge by Deposit of Title-deeds—Sale by Mortgagor—Actual Notice of Charge to Purchaser—Forged Receipt—Legal Estate.**—A purchaser, before completion, had through her solicitor actual notice of an equitable charge created by deposit of title-deeds which her solicitor required to be paid off. On completion the vendor's solicitor produced the memorandum of deposit with a forged receipt, purporting to be signed by the owner of the equitable charge, which, together with the title-deeds, was handed over to the purchaser, who by her conveyance from the vendor acquired the legal estate. The owner of the equitable charge had not been guilty of negligence:—*Held*, that the purchaser could not set up the legal estate against the equitable charge, and must hold the property subject to the equitable charge. *Jared v. Clements*, 72 L. J. Ch. 291; [1903] 1 Ch. 428; 88 L. T. 97; 51 W. R. 401—C.A.

— **Notice to Trustees—Chose in Action—Proceeds of Land held in Trust for Sale—Mortgagor Trustee—Notice through His Knowledge.**—The knowledge of one of several trustees, who is also a beneficiary, of a mortgage, created by himself, of his own share in the proceeds of land held in trust for sale is not, by itself, notice to the trustees. Such a mortgage will be postponed to a subsequent mortgage of which due notice has been given to the trustees. *Browne v. Savage* (4 Drew. 635) followed. *Lloyd's Bank v. Pearson*, 70 L. J. Ch. 422; [1901] 1 Ch. 865; 84 L. T. 314—Cozens-Hardy, J.

A reversionary interest in the proceeds of land held in trust for sale, but not yet sold, is a *chose in action* within the principle laid down in *Dearle v. Hall* (8 Russ. 1) as to gaining priority by notice to trustees. *Ib.*

— **Chose in Action—Notice—Charge on Expectancy under Will—Renunciation of Probate by Sole Executor—Grant of Letters of Administration—Notices to Administrator.**—A testator, by his will dated July 7, 1893, gave a legacy of 10,000*l.* to his son, and he appointed the son and two other persons (who predeceased him) to be his executors. He afterwards became of unsound mind, and he had not recovered at the time of his death on December 24, 1902. On January 9, 1903, the son renounced probate, and on March 4, 1903, letters of administration with the will annexed were granted to another person. The son was aware in his father's lifetime of the legacy to him, and he from time to time charged his expectancy with sums of money lent to him by various persons. The total amount of these charges was more than 10,000*l.* Certain of the incumbancers gave notice of their incumbrances to the admi-

nistratrix on March 5, 1903. Another incumbrancer, whose charge was prior in date to the charges of some of the incumbrancers who gave notice on March 5, was not aware until March 12, 1903, of the grant of the letters of administration, but he gave notice of his incumbrance directly he became aware of the grant:—*Held*, that the incumbrances must take priority according to the dates on which notice of them was given to the administratrix after the grant of the letters of administration. The rule laid down in *Dearle v. Hall* (2 L. J. (o.s.) Ch. 62; 3 Russ. 1) applied; and *Ward v. Duncombe* (62 L. J. Ch. 881, 892; [1898] A.C. 369, 390) followed. *Dallas, In re*, 73 L. J. Ch. 365; [1904] 2 Ch. 385; 90 L. T. 177; 52 W. R. 567—C.A.

The rule laid down in *Dearle v. Hall* (*supra*) applies, although there was no trust fund and no trustee in existence at the time of the several assignments, notices given after the fund has come into existence and there is a person who has legal control over it being effective to establish priorities. The principle of *Johnstone v. Cox* (50 L. J. Ch. 216; 16 Ch. D. 571; 19 Ch. D. 17) applied. *Ib.*

The knowledge which a sole trustee of a fund who has made charges on it has of the several incumbrances made by himself is not equivalent to notice entitling the several assignees to priority in order of date. Neither would express notice given by an incumbrancer to a sole assignor trustee be operative for the purpose of establishing priority. The principle of *Brown v. Savage* (4 Drew. 635) and *Lloyd's Bank v. Pearson* (70 L. J. Ch. 422; [1901] 1 Ch. 865) applied. *Ib.*

Quære (*per* STIRLING, L.J., and COZENS-HARDY, L.J.), whether notice to an executor, who does not act and renounces, of a charge on a fund passing under the will of his testator is of any value for the purpose of establishing priority against the fund. *Ib.*

Notice of Charge—Conveyance subject to "payments and outgoing ecclesiastical and civil charged upon or payable out of" Hereditaments.]—Certain lands were allotted in 1834 in lieu of great tithes of a certain parish under an Inclosure Act which provided that any allotment should not prejudice any person or persons having any right or claim out of or affecting any lands allotted or inclosed, but the persons to whom any hereditaments should be allotted should be seised thereof subject to such and the same charges and incumbrances as the hereditaments whereof they were seised before the award. It was proved that the great tithes had from time immemorial been subject to the annual provision of a certain quantity of corn for the benefit of the poor of the parish, and from 1834 to 1881 the owners or occupiers of the lands allotted in lieu thereof had made payments in money or kind in respect of this charge. In 1881 the lands in question were sold to the defendants' predecessor in title, and conveyed to him "subject to the unredeemed land tax and tithe commutation rentcharge both rectorial and vicarial and to all other payments and outgoing ecclesiastical and civil charged upon or payable out of the said hereditaments." Payments had occasionally been made by him on

account of the charge. The purchaser mortgaged the property, and the mortgage was made subject to the like charge as the conveyance on sale and in like terms. The mortgagee had made no enquiry and had no express notice of the charge, and was now in possession of the land:—*Held*, that the mortgagee ought to have enquired as to the existence of such a charge, and, no enquiry having been made, that she took with notice of and was liable to it. *Alms Corn Charity, In re; Charity Commissioners v. Bode*, 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 533—Stirling, J.

— Constructive Notice—Purchase for Valuable Consideration without Notice—No Independent Solicitor.]—A., who was found, as a fact, to be a person of limited intelligence and incapable of understanding the effect of legal instruments, was induced by the fraud of his agent F. to assign by deed in 1892 all his property to F., subject to and in consideration of (*inter alia*) an annuity of 200*l.* payable to him for life. In the present action, brought by the heiress-at-law and personal representative of A., this deed was set aside. F. in 1896 mortgaged the property to a bank, A. joining in the deed to postpone his annuity. The bank, who had no knowledge of the state of A.'s intelligence, or that the deed of 1892 was procured by the fraud of F., but who were put on enquiry by facts appearing upon the face of the deed of 1892 and by other circumstances within their knowledge, made no enquiry, and allowed A. to execute the deed without being represented by an independent solicitor:—*Held*, that, as against the plaintiff, the bank could not rely on the defence of purchase for value without notice. *Aldritt v. Maconchy*, [1906] 1 Ir. R. 416—Ross, J.

— Past Consideration.]—F. mortgaged the property in 1901 to M. to secure a sum of 8,000*l.* then due by F. to M. M. had no notice of the infirmity of F.'s title, and made no enquiry:—*Held*, that M., being a purchaser for a past consideration, had no equity sufficient to prevail against the plaintiff's title. *Ib.*

— Innocent Trustee—Fraud.]—In 1886, I. and R., co-trustees of F.'s marriage settlement, advanced 500*l.* of the trust moneys to A. on a mortgage of A.'s property, thereby enabling F. to defraud A. of the said sum of 500*l.* I. had no knowledge or notice of the state of A.'s intelligence:—*Held*, assuming R. to have had such knowledge, and to be guilty of a fraud, that such fraud could not be imputed to I., and that the mortgage could not be set aside by the plaintiff. *Ib.*

— Non-disclosure by Solicitor to all Parties—Statute of Limitations.]—A mortgagee, who was also a solicitor, deposited the mortgage deeds with his bankers to secure an overdraft on his current account. No notice of such deposit was given to the mortgagor. Subsequently the mortgagor and mortgagee joined in a further mortgage of the property to S. The mortgagee acted throughout the transactions as solicitor for all parties, but he did not disclose the existence of the bankers' mortgage either to the mortgagor or to S.:—*Held*, that S. was affected with constructive notice of the bank's mortgage, and that therefore the bank was

entitled to priority over S.; but that the mortgagor had not through his solicitor notice of the bank's mortgage. *Dixon v. Winch* (69 L. J. Ch. 465; [1900] 1 Ch. 736) distinguished. *Berwick v. Price*, 74 L. J. Ch. 249; [1905] 1 Ch. 632; 92 L. T. 110—Joyce, J.

Equitable Mortgage—Prior Hire-purchase Agreement—Priority.]—See *FIXTURES*, col. 868.

Notice—Deposit of Deeds.]—See *BANKER*, col. 73.

Negligence—No Enquiry as to Title, and no Production of Deeds—Legal Estate—Purchaser Postponed to Equitable Mortgagee.]—A legal purchaser for value will be postponed to a prior equitable incumbrancer, of whose charge he has had no notice, if he is guilty of such gross negligence as would make it unjust for him to be allowed to take up the position of a *bona fide* purchaser for value, and deprive some one else of his security. *Oliver v. Hinton*, 68 L. J. Ch. 533; [1899] 2 Ch. 264; 81 L. T. 212; 48 W. R. 3—C.A.

It is not necessary that he should have been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. *Dictum* of JAMES, L.J., in *Ratcliffe v. Barnard* (40 L. J. Ch. 777; L. R. 6 Ch. 652), to that effect, dissented from. *Ib.*

A purchaser for value of land who acquires the legal estate, but does not make any enquiry as to the vendor's title, and does not ask for the production of the title-deeds, but rests satisfied with a statement by the vendor that he has the deeds, and will retain them, as they relate to other property, is guilty of such gross negligence as to make it unjust that he should be preferred to a prior equitable mortgagee by deposit, of whose charge he had no notice at the time of purchase. *Ib.*

—Deeds Left with Solicitor—Subsequent Deposit of Deeds.]—Shortly before his death W. P. advanced money on mortgage to his solicitor, leaving the deeds with the latter. After W. P.'s death the plaintiff, as his executor, applied to the mortgagor for the deeds, and in answer to such application received the mortgage deed, which the plaintiff was led to believe was the only one relating to the property. The mortgagor had meanwhile deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage:—*Held*, that neither the plaintiff nor his predecessor had been guilty of such gross negligence as that their legal mortgage ought to be postponed to the subsequent equitable mortgage. *Cotter v. National Provincial Bank of England*, 20 T. L. R. 607—Swinfen Eady, J.

Trust—Fraud of Trustee—Legal Estate—Relation Back—Notice.]—An equitable mortgagee, who has made an advance without notice of a prior equitable title, cannot gain priority by getting in the legal estate if at the time when he so gets it in he has notice that it is held on an express trust in favour of persons who assert a claim to the property. *Taylor v. London and County Banking Co.; London and County Banking Co. v. Nixon*, 70 L. J. Ch. 477; [1901] 2 Ch. 231; 84 L. T. 397; 49 W. R. 451—C.A.

A person who on being appointed a trustee of property requires and obtains a transfer of the legal estate in that property from his co-trustee to himself and the co-trustee, jointly, becomes a purchaser for value of the property, inasmuch as he gives up a right of action against the co-trustee for the property. *Thorn-dike v. Hunt* (28 L. J. Ch. 417; 3 De G. & J. 563) and *Taylor v. Blakelock* (55 L. J. Ch. 97; 32 Ch. D. 560) followed. *Ib.*

Where one of two trustees is a solicitor, the lay trustee on a transfer of property to the two will not be affected with notice of a prior equitable interest known to the solicitor trustee by reason of a previous independent transaction, and fraudulently concealed by him, if such prior interest would not have been disclosed if an independent solicitor had been employed on behalf of the trustees and had made reasonable enquiries and inspections. *Ib.*

Where the relationship between an equitable incumbrancer and the person in possession of the title-deeds to property is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (for example, of *cestui que trust* and trustee, or of client and solicitor), the equitable incumbrancer will not be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose any want of good faith on the part of that person. *Shropshire Union Railways and Canal Co. v. Reg.* (45 L. J. Q.B. 31; L. R. 7 H. L. 496) and *Vernon, Ewens & Co., In re* (56 L. J. Ch. 12; 33 Ch. D. 402), applied. *Ib.*

A purchaser for value without notice is entitled to the priority conferred by the legal title not only where he has actually got it in, but also where he has a better right to call for it; for instance, if he procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee for the purchaser, or even to join as party in a conveyance of the equitable interest. *Ib.*

Joint Advance—Trust Moneys and also Moneys of Solicitors—Security not in Names of Trustees —“Residue”—Breach of Trust—Inadequacy of Security.]—A firm of solicitors advanced on mortgage of certain freeholds a sum of money which was expressed in the mortgage-deed to belong to the mortgagees (one of whom was a member of the firm) on a joint account. The money was in fact advanced as to one moiety by trustees out of trust funds, and as to the other moiety by the firm out of their partnership assets. The security contemplated advances on the footing of equality, and contained no unusual provisions. The firm acted on the occasion of the mortgage as the solicitors of the trustees, and advised the investment, and subsequently became bankrupt. The mortgaged property was not at any time a sufficient security for the money advanced:—*Held*, that the firm were involved in a breach of trust, on the ground that the security was inadequate, and that it ought to have been taken in the names of the trustees, and that for omitting to advise the trustees that the investment was a breach of trust the firm might be answerable in damages, but that the benefit acquired by the firm under the security was one which was

in the contemplation of the parties at the time of the advance, and was not a sufficient ground for declaring the firm to be trustees in the whole or in part of their moiety of the mortgage debt and security, and that consequently the trustees were not entitled to be paid out of the security in priority to the persons claiming under the firm. *Stokes v. Prance*, 67 L. J. Ch. 69; [1898] 1 Ch. 212; 77 L. T. 595; 46 W. R. 183—Stirling, J.

Inclosure—Land Allotted in Lieu of Tithes—Annual Payment for Poor of Parish—Charge on Tithes.—Certain lands were allotted in 1834 in lieu of great tithes of a certain parish under an Inclosure Act which provided that any allotment should not prejudice any person or persons having any right or claim out of or affecting any lands allotted or inclosed, but the persons to whom any hereditaments should be allotted should be seised thereof subject to such and the same charges and incumbrances as the hereditaments whereof they were seised before the award. It was proved that the great tithes had from time immemorial been subject to the annual provision of a certain quantity of corn for the benefit of the poor of the parish, and from 1834 to 1881 the owners or occupiers of the lands allotted in lieu thereof had made payments in money or kind in respect of this charge. In 1881 the lands in question were sold to the defendants' predecessor in title, and conveyed to him "subject to the unredeemed land tax and tithe commutation rentcharge both rectorial and vicarial and to all other payments and outgoing ecclesiastical and civil charged upon or payable out of the said hereditaments." Payments had occasionally been made by him on account of the charge:—*Held*, that the payment constituted a valid charge on the property allotted in lieu of tithes, and that the purchaser took subject thereto under his conveyance. *Lanchbury v. Bode* (67 L. J. Ch. 196; [1898] 2 Ch. 120) distinguished. *Alms Corn Charity, In re; Charity Commissioners v. Bode*, 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 593—Stirling, J.

Notice of Charge—Conveyance subject to "payments and outgoing ecclesiastical and civil charged upon or payable out of" Hereditaments.—The purchaser mortgaged the property, and the mortgage was made subject to the like charge as the conveyance on sale and in like terms. The mortgagee had made no enquiry and had no express notice of the charge, and was now in possession of the land:—*Held*, that the mortgagee ought to have enquired as to the existence of such a charge, and, no enquiry having been made, that she took with notice of and was liable to it. *Id.*

9. LEASES BY MORTGAGOR AND MORTGAGEE.

Lease by Mortgagor—Surrender of Lease—Consent of Mortgagee.—A mortgagor who has granted a lease under the power given him by section 18 of the Conveyancing Act, 1881, cannot accept a surrender of the lease without the concurrence of the mortgagee. *Municipal Permanent Investment Building Society v. Smith* (58 L. J. Q.B. 61; 22 Q.B. D. 70) applied. *Robins v. Whyte*, 75 L. J. K.B. 38; [1906] 1 K.B. 125; 94 L. T. 287; 54 W. R. 105; 22 T. L. R. 106—Warrington, J.

Lease by Mortgagor in Possession—Landlord and Tenant—Sporting Rights—"Occupation lease."—Section 18 of the Conveyancing Act, 1881, enables a mortgagor in possession of land, part of which is at the date of the mortgage leased to tenants reserving sporting rights, to bind the mortgagee by a lease of the remainder of the land together with sporting rights over the whole of the land. *Browne v. Peto*, 69 L. J. Q.B. 869; [1900] 2 Q.B. 653; 83 L. T. 303; 49 W. R. 324—C.A.

Lease by Mortgagee—Appointment of Receiver—Distress.—In 1896 a house was let to K. by the defendant, who was at that time a mortgagor in possession. There was some dispute as to the first quarter's rent, and part of it was never in fact paid, but with this exception rent was regularly paid. In July, 1898, the mortgagee appointed a receiver. In 1899 the mortgagor asked the receiver to distrain for the first quarter's rent, and on his declining to do so put in a distress:—*Held*, that the effect of the appointment of a receiver was to deprive the mortgagor of the power of distress, and that the distress was illegal. *Woolston v. Ross*, 69 L. J. Ch. 363; [1900] 1 Ch. 788; 82 L. T. 21; 48 W. R. 556; 64 J. P. 264—Cozens-Hardy, J.

Breach of Covenant—Action by Mortgagee for Damages.—*Semble*, it is no objection to an action by a mortgagee for damages for breach of covenant in a lease that he has not realized his security to test its sufficiency. *Molynaux v. Richard*, 75 L. J. Ch. 39; [1906] 1 Ch. 34; 93 L. T. 698; 54 W. R. 177; 22 T. L. R. 76—Kekewich, J.

Action by Mortgagor—Lease Granted before Mortgage.—A mortgagor cannot as reversioner sue for possession of the mortgaged property and damages, on the ground of breach of a covenant in a lease granted before the mortgage. *Matthews v. Usher* (69 L. J. Q.B. 856; [1900] 2 Q.B. 535) followed. *Id.*

Lease by Mortgagee and Mortgagor.—Where a lease is granted by a first mortgagee and the mortgagor, the lessee must take by the better title. Since the Conveyancing Act the mortgagor if in possession can give the better title. Such a lessee will therefore be bound by the covenant of the mortgagor contained in a second mortgage, and will not be deemed to take under the paramount title of the first mortgagee. *John Brothers Abergarw Brewery Co. v. Holmes*, 69 L. J. Ch. 149; [1900] 1 Ch. 188; 81 L. T. 779.

10. REDEMPTION.

Notice to Pay Off—Tender after Notice—Withdrawal of Notice.—A mortgagee who had given notice to the mortgagor to pay off the principal moneys and interest owing on the mortgage was not entitled to withdraw the notice without the mortgagor's consent. *Santley v. Wilde*, 68 L. J. Ch. 681; [1899] 1 Ch. 747; 80 L. T. 154; 47 W. R. 297—Byrne, J. See s.c. in C.A., *supra*.

Payment off—Tender—Cheque instead of Cash—Solicitor's Authority.—A solicitor, having

authority from the mortgagees to accept a tender of the amount due under the mortgage, has no implied authority to accept the tender of a cheque in lieu of cash, so as to make such a tender good in law as against the mortgagees. *Baumberg v. Life Interests and Reversionary Securities Corporation*, 66 L. J. Ch. 127; [1897] 1 Ch. 171; 75 L. T. 637; 45 W. R. 246—Keke-wich, J. Affirmed on the facts, 67 L. J. Ch. 118; [1898] 1 Ch. 27; 77 L. T. 506—C.A.

Amount Recoverable—Covenant for Payment—Joint-Account Clause—Payment to Partner—Implied Agency—Survivorship.—Payment to one of two joint creditors is a good discharge of a joint debt. A partner has no implied authority to receive payment of a debt due to his co-partner in his individual capacity. The amount recoverable upon a covenant for repayment of the principal moneys secured by a mortgage is not necessarily the only relevant consideration in determining the amount recoverable in foreclosure or redemption proceedings. Where therefore a payment was made on account of a mortgage debt to the partner of one of two mortgagees entitled under a deed which contained the usual joint-account clause, the payment was held bad at law and in equity, although the partner mortgagee survived his co-mortgagee. *Matson v. Dennis* (4 De G. J. & S. 345) followed. *Powell v. Brodhurst*, 70 L. J. Ch. 587; [1901] 2 Ch. 160; 84 L. T. 620; 49 W. R. 532—Farwell, J.

Trust Fund—Right of Mortgagee to Receive Whole of Fund Mortgaged.—Trustees of a fund which is mortgaged are, under section 22, subsection 1 of the Conveyancing and Law of Property Act, 1881, if they act honestly, and without notice of anything wrong, safe in handing over the money to the mortgagee upon his receipt, and are not concerned to enquire whether any money remains due on the mortgage or not. They are not, however, obliged to do so in all cases, and if there is any circumstance which makes it reasonable for the trustees to decline to be satisfied with the statutory receipt they will be justified in paying the money into Court under the Trustee Act, 1893. *Bell, In re; Jeffery v. Sayles* (65 L. J. Ch. 188; [1896] 1 Ch. 1), approved. *Hockey v. Western*, 67 L. J. Ch. 166; [1898] 1 Ch. 350; 78 L. T. 1; 46 W. R. 312—C.A.

Mortgagee in Possession—Accounts—Sale-moneys—Rents and Profits—Rests—Practice.—In taking the accounts in a mortgagee's redemption action against a mortgagee in possession, and in the absence from the order, according to the practice, of any direction for making any rests in such accounts, the account of rents and profits, unlike that of purchase-moneys, should be taken as a whole without rests. *Wrigley v. Gill* (74 L. J. Ch. 160; [1905] 1 Ch. 241) approved. *Thompson v. Hudson* (40 L. J. Ch. 28; L. R. 10 Eq. 497) explained. *Ainsworth v. Wilding*, 74 L. J. Ch. 256; [1905] 1 Ch. 435; 92 L. T. 679; 53 W. R. 281—Joyce, J.

Consolidation—Express Contract—Different Properties.—The owner of freehold property created thereon three different mortgages, all dated after 1882, the second being subject to the first, and the third to the two prior mort-

gages. The first mortgage expressly provided that section 17 of the Conveyancing and Law of Property Act, 1881, should not apply in respect to redemption of the mortgage thereby created. The other mortgages were silent with regard to consolidation. The third mortgage included property other than that comprised in the earlier mortgages. The first and third mortgages subsequently became vested in the second mortgagees. Upon an application by the trustees in bankruptcy of the mortgagor for a declaration that they were entitled to redeem the third mortgage without redeeming the other two,—*Held*, that the proviso in the first mortgage expressly reserved the mortgagee's right of consolidation, and that, as there was nothing to exclude either of the other mortgages from the benefit of the proviso, the second mortgagees were entitled to consolidate, and the trustees were not entitled to the declaration for which they asked. *Semble*, section 17 applies only to cases where the several mortgages include different properties. *Salmon, In re; Trustee, ex parte*, 72 L. J. K.B. 125; [1903] 1 K.B. 147; 87 L. T. 654; 51 W. R. 288; 10 Manson, 22—Wright, J. *And see infra*, CONSOLIDATION AND TACKING.

Option of Purchase to be Exercised before Time Fixed for Repayment—“Once a mortgage always a mortgage”—Clog on Equity of Redemption—Conditional Sale—Independent Transactions.—In July, 1898, the defendant was indebted to the plaintiffs in the sum of 5,000*l.* and interest, which was secured by an agreement dated April 23, 1896, and certain mortgages dated July 4, 1896, and June 27, 1898, on the defendant's ship, the *Norfolk*, and other property. The agreement contained an option of partnership to be exercised by the plaintiffs within two years from its date. The plaintiffs did not exercise the option within the two years. By an agreement dated July 9, 1898, and made between the plaintiffs and the defendant (after reciting that the time limited by the mortgage of the *Norfolk* for the repayment of the loan having expired, the plaintiffs had applied to the defendant to pay off the mortgage, and that the defendant, being unable to do so, had requested the plaintiffs to extend the time for such repayment), the time for repayment was extended for a further period of five years, which would expire on July 9, 1903, and an option was given to the plaintiffs by the defendant at any time within the five years to enter into a partnership with him, on the terms (*inter alia*) that the consideration to be paid by the plaintiffs for a half-share of the partnership should be the release by them of the 5,000*l.* and interest, and that the partnership assets should comprise the *Norfolk*. On February 24, 1900, the plaintiffs exercised the option reserved to them by the agreement of July 9, 1898, and elected to enter into partnership with the defendant, but the defendant refused to enter into such partnership. The plaintiffs thereupon commenced an action claiming specific performance of the agreement, or in the alternative damages for breach of it:—*Held*, by the COURT OF APPEAL (affirming BUCKLEY, J., on different grounds), that the agreement of July 9 was an independent transaction, and not part of the mortgage transactions, and ought to be supported as a fair contract for the purchase of the mortgaged property by the mortgagees.

Lisle v. Reeve, 71 L. J. Ch. 42; [1902] 1 Ch. 53; 85 L. T. 464—C.A. Affirming on other grounds, 49 W. R. 188—Buckley, J.

Held, by BUCKLEY, J. (but doubted by the COURT OF APPEAL), that, treating the agreement of July 9 as part of the mortgage transactions, still, inasmuch as the option of purchase was exercised before the date for redemption at law, and therefore before any equity of redemption arose, the doctrine of clogging the equity of redemption had no application. *Ib.*

Redemption by Puisne Incumbrancer—Costs of Preparing Security—Right to Claim.]—A mortgagee is not entitled to claim payment of the costs incident to the preparation of his mortgage security from a puisne incumbrancer, as a term of redemption. *Wales v. Carr*, 71 L. J. Ch. 483; [1902] 1 Ch. 860; 86 L. T. 288; 50 W. R. 313—Farwell, J.

Redemption Action—Costs of Mortgagee.]—A customer of a bank deposited certain shares with the bank as security for a loan, with a memorandum of deposit. The bank afterwards obtained judgment against her in respect of the debt, when an arrangement was made under which her husband guaranteed payment of part of it by instalments. The bank sued him on his guarantee, and obtained judgment with costs; and, although the wife's debt to them had now been satisfied, they declined to retransfer the shares to her until these costs were paid. In an action by her against the bank to obtain a retransfer of the shares or their value:—*Held*, that the action was in effect one of redemption; that the costs of the action against the husband were properly incurred, and the wife was bound to indemnify him against them; and that the bank were entitled to the benefit of the indemnity and to retain the shares till payment of the costs of the action against him, on the principle laid down in *National Provincial Bank of England v. Games* (55 L. J. Ch. 576; 81 Ch. D. 582). *Sachs v. Ashby*, 88 L. T. 393—Joyce, J.

Leaseholds—Voluntary Assignment—Payment of Mortgage Debt by Assignor's Executors—Liability of Assignee to Contribute.]—The assignee of leasehold property, the deeds of which have been deposited by the assignor with a bank as security for payments owing on an account, is not liable to contribute to the payment of the debt to the bankers which the executors of the assignor have paid. *Ker v. Ker* (Ir. R. 4 Eq. 15) explained and distinguished. *Darby's Estate, In re*; *Rendall v. Darby*, 76 L. J. Ch. 639; [1907] 2 Ch. 465; 97 L. T. 900—Warrington, J.

11. ENFORCING SECURITY.

(a) Entry.

Title by Relation Back—Mortgagee.]—The entry of a mortgagee relates back to the time when he had the right to enter, so as to support an action against a wrong-doer for a trespass committed after the accrual of the right and before actual entry. *Barnett v. Guilford (Earl)* (24 L. J. Ex. 281; 11 Ex. 19) followed. *Ocean Accident and Guarantee Corporation v. Ilford Gas Co.*, 74 L. J. K.B. 799; [1905] 2 K.B. 493; 93 L. T. 381; 21 T. L. R. 610—C.A.

(b) Receiver.

Receiver Appointed by Mortgagee—Arrears of Interest Due at Date of Appointment—Duty to Pay Same.]—A receiver appointed by a mortgagee under the powers conferred by section 19 of the Conveyancing and Law of Property Act, 1881, is bound under section 24, sub-section 8 of that Act to pay arrears of interest due to the mortgagee at the time of the appointment, and not merely interest accruing due after that date. *National Bank v. Kenney*, [1898] 1 Ir. R. 197—V.C.

— Powers of.]—A receiver appointed by a mortgagee in pursuance of either an express power contained in the mortgage-deed, or the implied power conferred by the Conveyancing Act, 1881, is in the exercise of his duties the agent of the mortgagor for all purposes. He is not restricted to matters between the mortgagor and the mortgagee, but may affect the mortgagor's relations with third persons. *Hale, In re*; *Lilley v. Foad*, 79 L. T. 463; 47 W. R. 174—Byrne, J. See s.c. in C.A., *infra*.

Receiver and Manager—Appointment of, after Mortgagor's Death—Unsecured Debt.]—The power to appoint a receiver and manager conferred by a mortgage-deed is not revoked by the death of the mortgagor, and a receiver and manager of a business appointed by a mortgagee under such a power after the death of the mortgagor, becomes the agent of the mortgagor's executor to the extent of his assets. *Hale, In re*; *Lilley v. Foad*, 68 L. J. Ch. 517; [1899] 2 Ch. 107; 80 L. T. 827; 47 W. R. 579—C.A.

Whether a receiver, acting under the powers conferred by section 24 of the Conveyancing Act, 1881, can pay an unsecured debt of the mortgagor out of the moneys received by him as receiver, having regard to the fact that sub-section 8 of section 24 only confers power to apply such moneys in payment of debts and charges which affect the mortgaged property, *quære. Ib.*

Action by Puisne Incumbrancer to Enforce Security—Receiver—Right of Prior Incumbrancer to Rents in Receiver's Hands.]—A prior incumbrancer who intervenes in an action by a subsequent incumbrancer to enforce his security is entitled to the rents in the hands of a receiver appointed in the action which have been received after the date when he (the prior incumbrancer) first applies to the Court for the discharge of the receiver. *Preston v. Tunbridge Wells Opera-house, Lim.*, 72 L. J. Ch. 774; [1903] 2 Ch. 323; 88 L. T. 53—Farwell, J.

Account—Allowances—Costs of Repairs—Receiver—Mortgagee not in Possession.]—A receiver appointed by a mortgagee under the powers of the Conveyancing Act, 1881, cannot, on the account taken in a foreclosure action of what is due to the mortgagee, be allowed any costs of repairs to the mortgaged property, except costs of necessary or proper repairs directed in writing by the mortgagee as provided by clause 3 of sub-section 8 of section 24 of the Act. It is immaterial in such a case that the receiver be the manager of a society

which has guaranteed the mortgagee against loss in respect of his security, and that the costs of repairs in question have been paid out of moneys supplied by the society. Where the mortgagee by whom such money spent on repairs is to be taken to have been expended is a first mortgagee, he has no right or authority to charge it against the second mortgagee. *White v. Metcalf*, 72 L. J. Ch. 712; [1903] 2 Ch. 567; 89 L. T. 164; 52 W. R. 280—Kekewich, J. *And see* PRACTICE.

(c) *Foreclosure.*

Action for—Parties—Executrix only made Defendant—Rector and Churchwardens Residuary Legatees.]—A testator, after making certain bequests, gave to his wife an estate for life (determinable on certain events) in the residue of his estate, with remainder over to the rector and churchwardens of W. C. Church. The estate of the testator was, however, mortgaged to the extent of 30,000*l.* In a foreclosure action by the mortgagee against the wife, the sole legal representative of the testator, the wife entered an appearance but delivered no defence. On a motion for judgment it was ordered that the rector and churchwardens of W. C. Church be made parties to the action. *Watts v. Lane*, 84 L. T. 144—Joyce, J.

Parties—Debenture-Holders—Floating Security.]—The holders of debentures (subsequent in date to a specific mortgage on a company's property) which constitute a "floating charge" on all the property of the company are necessary parties to an action for foreclosure of the mortgage, even although their charge has not yet crystallised. *Wallace v. Evershed*, 68 L. J. Ch. 415; [1899] 1 Ch. 891; 80 L. T. 523; 6 Manson, 351—Cozens-Hardy, J.

Accounts and Enquiries, Foreclosure or Sale—Summons for Directions.]—An order for accounts and enquiries, foreclosure or sale, if made without objection on the hearing of a summons for directions under Order XXX., cannot subsequently be set aside solely on the ground of want of jurisdiction. The Court has jurisdiction to make an order for foreclosure in chambers on a summons under Order XV. Whether there is any jurisdiction to make the usual order for accounts and enquiries, foreclosure or sale, on the hearing of a summons for directions under Order XXX., *quære*. *Horton v. Bosson*, 80 L. T. 435—C.A.

Account—Allowances—Costs of Repairs—Receiver—Mortgagee not in Possession.]—A receiver appointed by a mortgagee under the powers of the Conveyancing Act, 1881, cannot, on the account taken in a foreclosure action of what is due to the mortgagee, be allowed any costs of repairs to the mortgaged property, except costs of necessary or proper repairs directed in writing by the mortgagee as provided by clause 3 of sub-section 8 of section 24 of the Act. It is immaterial in such a case that the receiver be the manager of a society which has guaranteed the mortgagee against loss in respect of his security, and that the costs of repairs in question have been paid out of moneys supplied by the society. Where the mortgagee by whom such money spent on repairs is to be taken to

have been expended is a first mortgagee, he has no right or authority to charge it against the second mortgagee. *White v. Metcalf*, 72 L. J. Ch. 712; [1903] 2 Ch. 567; 89 L. T. 164—Kekewich, J.

Decree—Bankruptcy Court.]—By consent of the parties, the Bankruptcy Court will, in a proper case, make the decree for accounts and foreclosure usual in a foreclosure action in the Chancery Division. *Salmon, In re; Trustee, ex parte*, 72 L. J. K.B. 125; [1903] 1 K.B. 147; 87 L. T. 654; 52 W. R. 288; 10 Manson, 22—Wright, J.

Counterclaim for Redemption—Arrears of Interest.]—Notwithstanding that in a foreclosure action, where the plaintiff is not claiming under the covenant in the mortgage, he can only recover six years' arrears of interest, yet where a mortgagor claims to redeem (this not being a suit to recover interest within the meaning of the Real Property Limitation Act, 1833), he will be allowed to redeem only on payment of all arrears of interest. *Edmunds v. Waugh* (35 L. J. Ch. 234; L. R. 1 Eq. 418) followed. *Dingle v. Coppen*, 68 L. J. Ch. 337; [1899] 1 Ch. 726; 79 L. T. 693; 47 W. R. 279—Byrne, J.

Covenant to Pay at Future Date with Interest then Due—Separate Covenant to Pay Interest Half-Yearly—Proviso for Redemption—Other Provisoes—Construction.]—A mortgage contained a covenant to pay the principal on January 1, 1914, with interest that might be then due, and to pay interest from the date thereof half-yearly. The proviso for redemption was that if on January 1, 1914, the mortgagor should pay the principal, with interest in the meantime that might be due and unpaid, the mortgagee would reconvey. There was also a proviso that if interest was paid on the half-yearly days appointed, or within twenty-one days after each of such days, the mortgagee would not call in the principal sum before January 1, 1914. The mortgagor made default in payment of interest on July 1, 1905. The mortgagee claimed to foreclose:—*Held*, that no condition had been broken according to the tenor of the deed, default in payment on January 1, 1914, not having arisen, and that the claim for foreclosure must be dismissed. *Turner, In re; Turner v. Spencer* (43 W. R. 153), followed. *Williams v. Morgan*, 75 L. J. Ch. 480; [1906] 1 Ch. 804; 94 L. T. 473—Swinfen Eady, J.

Choses in Action—Shares in Limited Company.]—The deposit of a certificate of shares to secure the repayment of money amounts to an agreement to transfer the shares by way of mortgage, and the deposit is entitled to a decree for foreclosure, and is not restricted to a remedy by sale. *Carter v. Wake* (46 L. J. Ch. 841; 4 Ch. D. 605) distinguished. *Harold v. Plenty*, 70 L. J. Ch. 562; [1901] 2 Ch. 314; 85 L. T. 45; 49 W. R. 646; 8 Manson, 304—Cozens-Hardy, J.

Deposit of Shares—Statute-barred Debt.]—The time at which a bar to an action for foreclosure arises under or by analogy to the Statute of Limitations is not that at which the personal remedy ceases, but that at which

the remedy against the property which is the subject of the charge is taken away. *London and Midland Bank v. Mitchell*, 68 L. J. Ch. 568; [1899] 2 Ch. 161; 81 L. T. 263; 47 W. R. 602—Stirling, J.

There is no provision in any Statute of Limitations with reference to personal property similar to the provisions contained in the Real Property Limitation Act, 1883, whereby the title to land is extinguished after a certain period; so that, though a debt may be barred after six years by the Limitation Act, 1623, in the sense that no personal action can be brought to recover it, yet the debt is not at an end and a mortgagee's right to the property is not destroyed. *Ib.*

Costs—Solicitor—Mortgagee—Foreclosure Judgment in 1893—Profit—Costs—Taxation in 1898.—Where a foreclosure order has been made prior to the Mortgagees' Legal Costs Act, 1895, finally settling the terms of redemption on payment of principal, interest, and costs, a solicitor-mortgagee will not be entitled to the benefit of section 3 of that Act because the taxation of his costs takes place under an order made after the Act has come into force. *Eyre v. Wynn-Mackenzie* (65 L. J. Ch. 194; [1896] 1 Ch. 135) followed. *Day v. Kelland*, 70 L. J. Ch. 3; [1900] 2 Ch. 745; 83 L. T. 447; 49 W. R. 66—C.A.

Power of Re-entry—Right of Mortgagee of Freehold to Enforce after Foreclosure.—See *Capital and Counties Bank v. Rhodes*, *infra*, MERGER, col. 1726.

Foreclosure—Second Action for Principal and Interest—Abuse of Process.—See PRACTICE.

(d) Sale.

Power of—Right to Exercise—Agent.—An agent merely authorised to receive a mortgage debt cannot by virtue of the Conveyancing and Law of Property Act, 1881, s. 21, sub-s. 4, execute the power of sale conferred on mortgagees by section 19 of the Act. *Dowson & Jenkins' Contract, In re*, 73 L. J. Ch. 684; [1904] 2 Ch. 219; 91 L. T. 121—C.A.

Implied Power of—Shares—Notice Demanding Payment.—In cases unaffected by the Conveyancing and Law of Property Act, 1881, s. 19, the law is that a mortgagee of stock or shares may sell the same at any time after the day originally fixed for payment of the loan, or, if no day was originally fixed, then after reasonable notice has been given to the mortgagor and default made by him in payment after such notice. *De Verges v. Sandeman, Clark & Co.*, 71 L. J. Ch. 328; [1902] 1 Ch. 579; 86 L. T. 269; 50 W. R. 404—C.A.

Requisites of Notice—Reasonable Time—Measure of Damages.—The requisites of such a notice considered. *Per* VAUGHAN WILLIAMS, L.J.—The object of such notice is to give to the mortgagor a reasonable opportunity to redeem, and it must fix a day certain for payment by the mortgagor. *Per* STIRLING, L.J.—Such notice must give a reasonable opportunity to the mortgagor to pay what is due under the

mortgage, and it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that if he fails to avail himself of the opportunity to redeem, the mortgagee will be in a position to put in force his rights. *Per* COZENS-HARDY, L.J.—The notice need not state that the mortgagee will sell; it is sufficient that the notice requires payment of the mortgage-money; but before the power can be exercised a reasonable time must elapse after the notice requiring payment. A mistake as to the amount due will not destroy the effect of the notice. *Ib.*

Brokers who advanced the money on a purchase of shares by their client had the shares registered in their names under a verbal agreement to hold them by way of mortgage to secure the debt. The mortgagees frequently wrote pressing for payment. In August, 1898, a reconstruction of the company was proposed, under which assenting shareholders were to obtain new shares with 3s. liability in lieu of the old shares. On August 22, 1898, the mortgagees wrote to the mortgagor asking whether he intended to participate in the scheme, or whether he would adopt the only other alternative of allowing his shares to be forfeited. They also gave him notice that they would not take up the new shares (which must be done before a named day) on his behalf; also that, as they were unprotected by any security, they should take any necessary steps to recover the debt owing to them. The mortgagor did not pay, and the mortgagees ultimately took up the new shares, paying the 3s. per share themselves; and acting under the belief that they were absolute owners thereof, sold the shares, which subsequently to the sale rose in value. The mortgagor, who did not know of the sale till after the rise in value, claimed damages for a wrongful sale:—*Held* (dissentiente VAUGHAN WILLIAMS, L.J.), that sufficient notice had been given by the mortgagees to entitle them to exercise their implied power of sale over the old shares; that such notice remained in force as to the new shares acquired under the reconstruction scheme, and that the sale could be justified under the power of sale though made by the mortgagees under the mistaken belief that they were absolute owners. *Held*, by VAUGHAN WILLIAMS, L.J., that no sufficient notice had been given by the mortgagees to enable them to exercise their implied power of sale, and that the plaintiff was entitled to damages for a wrongful sale, which, however, under the circumstances of this case, must be estimated at the price of the shares at the time of sale (less the amount owing to the mortgagees), and not at the highest price which the shares had subsequently obtained. *Ib.*

Sale of Part of Security—Preservation of Remainder.—A mortgagee of shares is justified at any time in selling part of his security in order to make payments necessary for the preservation of the remainder. *De Verges v. Sandeman, Clark & Co.*, 70 L. J. Ch. 47; [1901] 1 Ch. 70; 83 L. T. 706; 49 W. R. 167—Farwell, J.

Easement of Light.—A mortgagee who *bona fide* sells a portion of the mortgaged property under his statutory power of sale grants it so as to carry all legal incidents ordinarily accompanying a grant—for example, a right to

light over the unsold portion. *Born v. Turner*, 69 L. J. Ch. 593; [1900] 2 Ch. 211; 83 L. T. 148; 48 W. R. 697—Byrne, J.

Sale under Power—Friendly Society—Sale by Auction—Purchase by Officer of Society—Sale Set Aside.—Where a friendly society, being mortgagees, acting by their investment committee in exercise of their power of sale put up the mortgaged property for sale by public auction, and the property was sold under suspicious circumstances to a member of the investment committee,—*Held*, that the onus was on the member to prove the fairness of the transaction, and that in the absence of such proof the sale must be set aside. *Martinson v. Clowes* (51 L. J. Ch. 594; 21 Ch. D. 857; affirmed, 52 L. T. 706) followed. *Hodson v. Deans*, 72 L. J. Ch. 751; [1903] 2 Ch. 647; 89 L. T. 92; 52 W. R. 122—Joyce, J.

Sale of Portion of Mortgaged Property—Action for Redemption—Taking Accounts—Rests.—It is not the practice in taking the account against a mortgagee in possession who has sold a portion of the mortgaged property, that a rest as at the date of sale should be taken of the rents and profits as well as of the principal and interest. *Thompson v. Hudson* (40 L. J. Ch. 28; L. R. 10 Eq. 497) distinguished. *Wrigley v. Gill*, 74 L. J. Ch. 160; [1905] 1 Ch. 241.

Lease—Goodwill—Subsequent Incumbrances—Marshalling—Apportionment.—A mortgagor by deed dated February 24, 1894, mortgaged a leasehold house, in which he was carrying on the business of a restaurant keeper, to A. This mortgage included the lease, the goodwill of the business, the fittings, and fixtures. On August 16, 1894, the mortgagor mortgaged the house alone to B., and on August 22, 1894, gave a charge on the lease, goodwill, fixtures, and fittings to C. The interest on the mortgage fell into arrear, and the property was sold for 1,300*l.*, which in the assignment was apportioned, 160*l.* for the lease, 1,000*l.* for the goodwill, and 140*l.* for the fixtures. B., the holder of the second mortgage, claimed to be entitled to the whole proceeds. It was said that it was quite impossible to sever the goodwill from the lease. For C. it was said that the principle of *Barnes v. Raester* (1 Y. & C. C.C. 401) applied, and that the purchase-money ought to be apportioned between the goodwill and the house:—*Held*, that the purchase-money must be apportioned. *Baglioni v. Cavalli*, 83 L. T. 500; 49 W. R. 236—Cozens-Hardy, J.

Order Nisi for Foreclosure—Exercise of the Power of Sale.—An order *nisi* for foreclosure does not extinguish the power of sale of the mortgagee over the mortgaged property, but, until foreclosure absolute, the power can only be exercised by leave of the Court. *Stevens v. Theatres, Lim.*, 72 L. J. Ch. 764; [1903] 1 Ch. 857; 88 L. T. 458; 51 W. R. 535—Farwell, J.

Purchase under Power of Sale by Solicitor of Mortgagee—Validity.—As a mortgagee, selling under a power of sale in the mortgage, is not a trustee for the mortgagor, he may in good faith sell to his own solicitor who has acted for him in the mortgage, though not in the sale. Such a sale is not void, but possibly voidable,

and might under certain circumstances be impeached by the selling mortgagee, but not by the mortgagor, who never stood in the position of client to the solicitor, especially where the mortgagor, having full knowledge of the facts, stands by for ten years without taking any steps to impeach the sale. *Nutt v. Easton*, 68 L. J. Ch. 367; [1899] 1 Ch. 873; 80 L. T. 853; 47 W. R. 430—Cozens-Hardy, J. Affirmed, 69 L. J. Ch. 46; [1900] 1 Ch. 29; 81 L. T. 530—C.A.

Sale by Mortgagor—Notice of Charge before Completion—Priority.—See *Jared v. Clements*, 72 L. J. Ch. 291, *post*, VENDOR AND PURCHASER.

12. CONSOLIDATION AND TACKING.

Consolidation—Right of Sole Mortgagee to Consolidate Prior Mortgage Vested in Him Jointly with Another.—The right to consolidate two mortgages arises when the title of the mortgagees in respect to each mortgage can be shown to be vested in one and the same hand, and this fact must be established in order to bring into operation the doctrine of consolidation; consequently, in the case of a mortgage of freehold hereditaments in which A. and another were mortgagees advancing money on a joint account, and a second mortgage of the same hereditaments and certain leasehold premises in which A. was sole mortgagee, although there is a possibility of the mortgages becoming vested in one and the same hand, namely, in A. upon his surviving his co-mortgagee, and notwithstanding the fact that A. could give a good receipt for the moneys secured on both mortgages, the doctrine of consolidation does not apply. *Beevor v. Luck* (L. R. 4 Eq. 537) disapproved. *Riley v. Hall*, 79 L. T. 244—Stirling, J.

— **Express Contract—Equity of Redemption—Subsequent Mortgages with Notice—Priority.**—A mortgagor gave the defendants a first mortgage of a leasehold property, Whiteacre, and on the next day mortgaged it, subject to the first mortgage, to the plaintiffs. He subsequently mortgaged Blackacre and Greenacre to the defendants, with notice of the second mortgage to the plaintiffs. Prior in date to all these mortgages he had given to the defendants a mortgage of Blackacre, which contained a provision that he should not be entitled to redeem without first paying all other moneys that might be secured to the mortgagees by any other mortgage executed by the mortgagor. The plaintiffs sued for redemption of Whiteacre:—*Held*, that the defendants as first mortgagees could consolidate their prior mortgage on Blackacre with their mortgage on Whiteacre, but not their subsequent mortgages. *Hughes v. Britannia Permanent Benefit Building Society*, 75 L. J. Ch. 739; [1906] 2 Ch. 607; 95 L. T. 327; 22 T. L. R. 806—Kekewich, J.

— **Tacking—Right of Surety for one Debt—Principal Debtor or Surety—Construction of Deed.**—In 1821 a mortgage was created on estate A to secure 1,500*l.* In 1842 a mortgage was created on the equity of redemption in estate A and also on other real estate to secure 2,500*l.* In 1874 the 1,500*l.* mortgage was transferred to the owner of the 2,500*l.* mortgage, and

by the deed of transfer the then tenant for life of both estates by way of collateral security personally covenanted with the transferee for payment of the 1,500*l.*, subject to a proviso that, as between the covenantor on the one part, and estate A and the owners thereof on the other part, estate A should be the primary fund for payment of the 1,500*l.*, and the covenant should be only a collateral security, but that the transferee should be at liberty to resort to either means for enforcing payment in preference to the other means. In an action by the transferee's representatives to enforce payment of the 1,500*l.* by the covenantor's executors, and for foreclosure or sale of both estates,—*Held*, by BYRNE, J., on the authority of *Farebrother v. Wodehouse* (26 L. J. Ch. 81, 240; 23 Beav. 18), that the transferee was entitled to tack or consolidate the two sums of 1,500*l.* and 2,500*l.* as against the right of the covenantor on payment of the 1,500*l.* to call as surety for a transfer to himself of that mortgage. *Held* also, by BYRNE, J., that the covenantor was not entitled to a rateable proportion of the two consolidated securities. *Held*, on appeal, by ROMER, L.J., and STIRLING, L.J. (*dissentiente* VAUGHAN WILLIAMS, L.J.), that the covenantor was in the position of a principal debtor, and was not entitled to the rights of a surety as against the transferee, and that on this ground the decision of BYRNE, J., ought to be affirmed in accordance with the law stated by EARL SELBORNE, L.C., in *Duncan, Fox & Co. v. North and South Wales Bank* (50 L. J. Ch. 355, 357, 358; 6 App. Cas. 1, 11). *Held*, by VAUGHAN WILLIAMS, L.J., that, according to the true meaning of the deed of transfer, on payment of the 1,500*l.* by the covenantor the transferee was bound to assign to the covenantor the 1,500*l.* mortgage, and that on this ground the decision of BYRNE, J., ought to be reversed. *Nicholas v. Ridley*, 73 L. J. Ch. 145; [1904] 1 Ch. 192; 89 L. T. 653; 52 W. R. 226—C.A.

Tacking — Collateral Security — Covenant by Surety.—Certain lands were mortgaged in 1821 to secure 1,500*l.* and interest. Subsequently a mortgage comprising the same and other lands was executed, subject to the prior mortgage, to secure 2,500*l.* and interest. By a deed subsequently executed, the 1,500*l.* mortgage was transferred to the holder of the later mortgage for 2,500*l.*; and by this deed the tenant for life of all the mortgaged property covenanted with the transferee as a collateral security only to pay the 1,500*l.*, the transferee to be at liberty to enforce payment by means of either security. Upon action brought by the representatives of the transferee against the executors of the tenant for life to recover the amount due on the securities and claiming a declaration that they were entitled as against the defendant executors to tack the later mortgage to the earlier one, payment of what was due on the earlier mortgage, and foreclosure or sale,—*Held*,—that the plaintiffs were entitled to tack their securities. *Nicholas v. Ridley*, 89 L. T. 234—Byrne, J.

13. MERGER.

Lease—Mortgage by Sub-demise—Conveyance of Fee-simple to Lessee—Mortgage of Fee-simple—Intention.—Equitable merger depends

upon intention; and the intention must be construed so as to do justice between the parties. A lessee mortgaged his leasehold interest by sub-demise to the defendants, and he afterwards purchased the fee-simple and mortgaged it immediately to the plaintiffs. The defendants took possession under their mortgage:—*Held*, that the plaintiffs had no better title than their mortgagor, and were not entitled to re-enter on non-payment by the defendants of the rent reserved by the lease. *Capital and Counties Bank v. Rhodes*, 71 L. J. Ch. 573; 87 L. T. 17—Kekewich, J.

Redemption by Tenant for Life—Reconveyance to Himself—Intention to Keep Alive Charge.]

—A mortgagor who settles the equity of redemption, becoming tenant for life thereof, and who afterwards pays off the mortgage and takes a reconveyance to himself of the mortgaged premises freed from the mortgage debt, is entitled, on proving that he intended to keep the mortgage on foot for his benefit, to have a declaration by the Court to that effect, notwithstanding the form of the reconveyance. *Gifford (Lord) v. Fitzhardinge (Lord)*, 68 L. J. Ch. 529; [1899] 2 Ch. 32; 81 L. T. 106; 47 W. R. 618—North, J.

Mortgage of Fund and Right to Balance

—Assignment to Same Person—Intention to Keep Incumbrance Alive—Merger.]

—Where a person entitled to share in certain property has charged his rights by way of mortgage, and both the charge and the right to receive the balance of the share subject to the charge are assigned to the same person, the charge will not be held to have been merged and extinguished if there is nothing on the face of the assignment or in the nature of the transaction to shew an intention to effect such extinguishment. *Liquidation Estates Purchase Co. v. Willoughby*, 67 L. J. Ch. 251; [1898] A.C. 321; 78 L. T. 329; 46 W. R. 589—H.L. (E.)

Fund in Another's Hands—Notice of Assignment—Rights of Assignee of Charge.]

—Where a person in possession of a fund has received notice of an assignment of his rights by one of several persons entitled to charges on the fund, and nevertheless wrongfully makes payment out of the fund to the assignor, the rights *inter se* of the several persons entitled to the charges to what remains of the fund cannot in any way be affected by such payments. The mortgagee of a charge on a fund, or his assignee, when notice of the mortgage has been given to the holder of the fund, cannot be affected by transactions between the holder of the fund and the mortgagor unknown to the mortgagee. *Id.*

Foreclosure.—Observations of LORD MACNAGHTEN on the analogy between a foreclosure decree in England and a decree under the Heritable Securities Act. *Inland Revenue Commissioners v. Tod*, 67 L. J. P.C. 42; [1898] A.C. 399; 78 L. T. 571—H.L. (Sc.)

Loan to Pay Off Mortgage—Mortgagor-Trustee

—Equitable Mortgage to Secure Loan—Redemption by True Owner—Rights of Lender—Release.]

—Money was lent to a mortgagor on his promise to pay off a mortgage and transfer it to the lender. The borrower suppressed the fact that he was trustee for his wife of the

property mortgaged. He applied some of the money in part payment of the mortgage debt, and gave the lender an equitable mortgage of the property to secure repayment of the loan. In an action by his wife to redeem the charges on her property,—*Held*, that a charge thereon subsisted in favour of the lender to the extent the loan had been applied in paying off the mortgage, the equitable mortgage to the lender not operating as a release or extinguishment of the charge, nor causing it to become merged therein. *Chetwynd v. Allen*, 68 L. J. Ch. 160; [1899] 1 Ch. 353; 80 L. T. 110; 47 W. R. 200—Romer, J.

Investment of Trust-money on Mortgage—Conveyance of Mortgaged Land to Cestui que Trust.—*And see* MERGER, col. 1608.

14. TRANSFER.

Statutory Acknowledgment of Consideration.—A statement in statutory form in a statutory form of transfer that the consideration for the transfer has been paid, is sufficient to estop the person making such statement from asserting his title as against any person claiming under the transfer in good faith and for value. *Rimmer v. Webster*, 71 L. J. Ch. 561; [1902] 2 Ch. 163; 86 L. T. 491; 50 W. R. 517—Farwell, J.

Transfer with Concurrence of Mortgagor—Arrears of Interest Paid by Transferee Treated as Principal Bearing Interest.—Transferee of a mortgage, the mortgagor joining in the transfer, *held* entitled to treat as principal bearing interest arrears of interest on the original debt due at the date of the transfer, and paid by him to the mortgagee. *Agnew v. King*, [1902] 1 Ir. R. 471—V.O.

Leasehold—Conveyance of Benefit of Mortgage—Legal Estate in Term.—In a transfer deed of a mortgage of leasehold property made by a sub-demise (not being a transfer of a statutory mortgage within section 27 of the Conveyancing Act, 1881), a conveyance of the "benefit of the said mortgage," without more, will not pass the legal estate in the mortgage term to the transferee. *Beachey, In re; Heaton v. Beachey*, 73 L. J. Ch. 68; [1904] 1 Ch. 67; 89 L. T. 685; 52 W. R. 309—C.A.

State of Account between Mortgagor and Mortgagee—Negligence—Contemporaneous Deeds.—In 1892 the plaintiff, a tenant for life of freehold property which was subject to a mortgage for 1,500*l.*, put her solicitor in funds for the purpose of paying off the mortgage. The solicitor misappropriated the money and concealed the fraud by continuing to pay interest. The plaintiff did not enquire respecting a reconveyance or receipt for the money nor require the delivery of the deeds. The defendant and his co-trustee (who died before action brought) were also clients of the same solicitor, and on October 4, 1895, forwarded to him a cheque, which the solicitor paid into his private account on the following day. On October 4, 1897, the solicitor took a transfer of the mortgage debt and security to himself, drawing on his firm's account for the consideration-money. On the following day, October 5, 1897, he transferred the mortgage debt and security to the

defendant and his co-trustee. It did not appear that the defendant and his co-trustee had bargained with the solicitor for any particular investment for the proceeds of their cheque:—*Held*, that the two deeds of October 4 and 5, 1897, could not be regarded as part of one transaction; that the solicitor as mortgagee could not have set up the mortgage against the plaintiff, and the defendant as transferee took subject to the state of account between the solicitor and the plaintiff, and was in no better position. A reconveyance of the property was accordingly directed upon the footing that the defendant was a satisfied mortgagee. *Turner v. Smith*, 70 L. J. Ch. 144; [1901] 1 Ch. 213; 83 L. T. 704; 49 W. R. 186—Byrne, J.

Successive Transfers—Absolute Assignment—Death of Second Transferee—Notice of Assignment by Executor—Solicitor and Client—Advances by Solicitor—Mortgage to Secure Advances—Acknowledgment in Body of Deed—State of Account—Transferee—Constructive Notice.—A solicitor, having advanced money to the defendants, who were his clients, took from them in the name of a nominee a mortgage containing in the body of the deed an acknowledgment of the receipt by the defendants of a sum of 9,200*l.* alleged to have been advanced by the nominee, and a covenant to repay that sum. Having received from another client money to invest on mortgage, the solicitor requested the nominee to transfer the mortgage to that client. The nominee refused to transfer to the client, but subsequently transferred to the solicitor himself by a deed which recited that the principal sum of 9,200*l.* was still due and owing on the security of the mortgage deed. The solicitor then executed a transfer to the client. Neither the solicitor himself nor the transferee gave the defendants any notice of the assignments. On the death of the transferee, his executors, the plaintiffs, gave to the defendants, under section 25, sub-section 6 of the Judicature Act, 1873, notice of the assignment to their testator. In an action by the plaintiffs on the covenant in the mortgage deed,—*Held*, that there was nothing to prevent them from giving, after the death of their testator, notice in writing under section 25, sub-section 6 of the Judicature Act, 1873, and that they were entitled to sue in their own names. *Held*, further, that, assuming the amount advanced to the defendants by the solicitor was less than 9,200*l.*, the plaintiffs were nevertheless entitled to recover the full amount, for that, not having either actual or constructive notice of the relation between the defendants and the solicitor or of the state of accounts between them, they were entitled to rely on the acknowledgment in the mortgage deed that the full amount had been advanced. *Bickerton v. Walker* (55 L. J. Ch. 227; 31 Ch. D. 151) applied. *Bateman v. Hunt*, 73 L. J. K.B. 782; [1904] 2 K.B. 530; 91 L. T. 331; 52 W. R. 609; 20 T. L. R. 628—C.A.

Fraudulent Sale—Solicitor—Purchase-money Paid to Mortgagee—Payment off of Mortgage—General Agency—Imputed Notice—Priority.—A mortgagor in 1893 mortgaged land to his solicitor, who shortly afterwards transferred the mortgage to a transferee who gave no notice of the transfer to the mortgagor. Afterwards, in 1893 and 1894, the solicitor and the mort-

gagor, who put himself entirely in the solicitor's hands, conveyed the land to the plaintiff, the conveyances containing false recitals suppressing the mortgage then vested in the transferee. A statement of account was made out by the solicitor between himself and the mortgagor, and the solicitor retained the mortgage debt out of the purchase-money. In an action by the plaintiff claiming a declaration whether the mortgage was a valid and subsisting incumbrance against her,—*Held* (VAUGHAN WILLIAMS, L.J., *dubitante*), that the solicitor's knowledge of the transfer must be imputed to the mortgagor, who could not, therefore, justify his payment of the mortgage debt to the solicitor by his actual ignorance of the transfer; that the plaintiff had no better right than the mortgagor, and that the mortgage in the hands of the transferee was therefore a valid and subsisting incumbrance. *Dixon v. Winch*, 69 L. J. Ch. 465; [1900] 1 Ch. 736; 82 L. T. 437; 48 W. R. 612—C.A.

15. DEVOLUTION AND ADMINISTRATION.

Portions—Mortgage Pursuant to Order of Court to Raise some of Portions—Position of Mortgage as regards Portions not yet Raisable—Priority.]—M. had three daughters, and in the case of two of them, D. and R., he secured by bond or covenant on their respective marriages the payment of a portion of 5,000*l.* after his death to the trustees of their marriage settlements, and an annuity until the 5,000*l.* became payable. By his will M. gave to his third daughter, E., then unmarried, an annuity for life, and in case she should marry he gave a portion of 5,000*l.* for her children attaining twenty-one, and he charged all the three sums of 5,000*l.* on his real estate. The real estate was settled by the will. In 1880 the tenant for life (who was also legal personal representative of M.) commenced an action to get the real estate cleared of the charges. The defendants to that action were the remaindermen. The two portions given to D. and E. were then raisable, and an order was made that those portions should be raised by a mortgage of the estate to be settled by the Judge, together with a sum paid for the enfranchisement of certain copyholds, part of the estate. The annuitant R. and the portioners were served with notice of the judgment. The mortgage was executed, and the money paid into Court and distributed amongst the persons entitled. The mortgage was made by the tenant for life, who was appointed to execute the mortgage for the purpose of conveying the interests of the remaindermen. It contained a recital of the proceedings in the action, and was expressed to be without prejudice to any charge subsisting in the mortgaged property under the will. The mortgagee brought an action for a declaration that his mortgage took priority over the third portion:—*Held*, that the course of the proceedings and the orders made shewed that the Court in authorising the mortgage had not intended to interfere with the annuity of R., or the portion raisable for her children, and the mortgage did not as regards the money advanced, other than the enfranchisement money, take priority over that annuity and portion. *Held*, also, by COZENS-HARDY, L.J., that, treating the action as an action for the administration of the unadministered estate of

M., and the annuitant and portioners as legatees whose legacies were payable out of the real estate solely, the Court had jurisdiction to direct the two portions to be raised, and to give the mortgage a title free from the third portion, but the onus was on the mortgagee to shew that what was originally a *pari passu* charge had been postponed, and he had not done so. *Nightingale v. Reynolds*, 72 L. J. Ch. 564; [1903] 2 Ch. 236; 88 L. T. 654; 52 W. R. 1—C.A.

Mortgage-debt—Possession by Testator of Mortgaged Property—Continuance of Possession by Administratrix and Tenant for Life—Equity of Redemption Barred—Devolution of Mortgaged Property—Realty or Personality.]—A testator who died in 1864, by his will appointed his widow his executrix, and devised and bequeathed to her all his real and personal estate during widowhood. Subject to this gift he died intestate. At the time of his death the testator was entitled to a mortgage-debt of 1,075*l.*, secured upon certain real estate. In 1861, three years before his death, he entered into possession of the mortgaged property, and so remained until his death. After his death his widow, who did not marry again, went into possession, and so remained until her death in 1900:—*Held*, that, although the equity of redemption in the property had since the testator's death become barred by the Statute of Limitations, the property devolved upon the testator's legal personal representative as personality. *Flack v. Longmate* (8 Beav. 420) followed. *Ellis v. Guavas* (2 Ch. Ca. 50) explained. *Loveridge, In re*; *Drayton v. Loveridge*, 71 L. J. Ch. 865; [1902] 2 Ch. 859; 87 L. T. 294—Buckley, J.

Freehold Land—Mortgagee in Possession—Partial Intestacy—Reversionary Interest in Mortgage—Equity of Redemption Barred—Personalty or Realty—Conversion.]—A mortgagee, who since 1861 had been in possession of freehold land the subject of the mortgage, died in 1864, having by will given his residuary real and personal estate to his wife during widowhood. As to the reversionary interest, after his wife's death or re-marriage, he died intestate. His widow and brother were under the Statute of Distributions entitled to his personal estate. In 1879 the equity of redemption was barred by the Real Property Limitation Act, 1874. The brother died intestate in 1880 in the lifetime of the widow (who never re-married):—*Held*, that in 1879 a moiety of the reversion of the freeholds vested beneficially in the brother and passed on his death to his co-heiresses. *Loveridge In re*; *Pearce v. Marsh*, 73 L. J. Ch. 15; [1904] 1 Ch. 518; 89 L. T. 503; 52 W. R. 138—Buckley, J.

Marshalling—Legacies Charged on Lands—Mortgage of Portion of Lands Charged—Covenant against Incumbrances.]—A B devised Blackacre and Whiteacre to C D, subject to legacies in favour of M N. C D mortgaged Whiteacre to a bank to secure 7,000*l.* The mortgage contained a covenant against incumbrances. After C D's death, in an action to administer his real and personal estate, Whiteacre was sold, and the legacies were paid out of the proceeds of the sale, thereby nearly sweeping away the fund out of which the mortgage

debt was payable. Blackacre was subsequently sold:—*Held*, that the mortgagees were, under the doctrine of marshalling, entitled to resort to the fund produced by the sale of Blackacre for payment of the mortgage in priority to simple contract creditors of the deceased C. D. *M'Carthy v. M'Cartie*, [1904] 1 Ir. R. 100—C.A.

Whether the other circumstances above stated, apart from the covenant against incumbrances contained in the mortgage, would have entitled the bank to resort to the proceeds of the sale of the unmortgaged lands—*quære*. *Ib.*

Marriage Settlement—Representation that Lands are Unincumbered—Contribution to Charge—Right of Settled Lands to Indemnity—Purchaser for Value of Unsettled Lands—Marshalling.—The owner of two estates subject to a mortgage settled one of them on his daughter's marriage. There was no covenant against incumbrances in the settlement, but a verbal representation was made previously to the execution of it by the settlor to the intended husband that the estate was free from incumbrances, and it was conveyed without reference to incumbrances. The other estate passed under the settlor's will to his widow, who conveyed to a purchaser for value with notice of the settlement, but not of the verbal representation:—*Held*, that the purchased estate was bound to indemnify the settled estate from the mortgage debt. *Averall v. Wade* (Ll. & G. 252, *temp.* Sugden) followed. *Barnes v. Raxter* (1 Y. & C. C.C. 401) explained and distinguished. *Tighe v. Dolphin*, [1906] 1 Ir. R. 305—M.R.

Security by Partner for Partnership Debt—Death of Mortgagor—Partnership Assets Sufficient to Pay Joint Debts—Exoneration of Land Charged.—Real estate belonging to a partner and mortgaged by him to secure a partnership debt is not primarily liable to be applied in payment of the mortgage debt. If at the time of the death of that partner the joint assets are sufficient to pay the joint debts in full, no liability in respect of the mortgage falls on his estate. A dispute between the legatees of his personality and the devisee of the mortgaged land as to the incidence of the liability is therefore not a dispute between "persons claiming through or under the deceased person," within the meaning of Locke-King's Act, and the legatees cannot call upon the devisee to discharge the mortgage. *Ritson, In re; Ritson v. Ritson*, 63 L. J. Ch. 77; [1899] 1 Ch. 128; 79 L. T. 455; 47 W. R. 213—C.A.

Power of Sale—Surplus Proceeds to be Paid to Mortgagor, his "Heirs or assigns"—Mortgagor a Lunatic at Time of Sale—Right to Surplus—Real or Personal Estate—Conversion.—On a sale of real estate by a mortgagee under a power of sale in the lifetime of the mortgagor, surplus proceeds of sale are personal estate of the mortgagor notwithstanding that the mortgage deed directs them to be paid to the mortgagor, his "heirs or assigns," and that the mortgagor was a lunatic from before the date of the sale till his death. *Grange, In re; Chadwick v. Grange*, 76 L. J. Ch. 456; [1907] 2 Ch. 20; 96 L. T. 867—C.A.

Residuary Real and Personal Estate—Trust

for Conversion—Money Charged upon Land—Real Property Limitation Act, 1874.—Where a mortgagee's right of action, in respect of a sum of money charged upon proceeds of sale of land, is barred under section 8 of the Real Property Limitation Act, 1874, the mortgage is not dead; and, if money representing the property charged is paid into Court, the mortgagor can only obtain payment of it out of Court upon condition of his doing equity and satisfying the mortgage. *Lloyd, In re; Lloyd v. Lloyd* (72 L. J. Ch. 78; [1903] 1 Ch. 385), applied. *Kibble v. Fairthorne* (64 L. J. Ch. 184; [1895] 1 Ch. 219) distinguished. *Hazel-dine's Trusts, In re*, 76 L. J. Ch. 416; [1907] 1 Ch. 686—Warrington, J. Reversed, 77 L. J. Ch. 97; 97 L. T. 818; [1908] 1 Ch. 34—C.A.

Deficient Security—Interest.—See *Broadwood's Settlement, In re; Broadwood v. Broadwood*, 77 L. J. Ch. 18; [1908] 1 Ch. 115—Swinfen Eady, J.

Devise of Mortgaged Estate—Action to Administer Estate of Mortgagor—Right of Creditor before Judgment.—See EXECUTOR.

16. COSTS.

Solicitor-Mortgagee—Foreclosure Judgment in 1893—Profit-Costs—Taxation in 1898.—Where a foreclosure order has been made prior to the Mortgagees' Legal Costs Act, 1895, finally settling the terms of redemption on payment of principal, interest, and costs, a solicitor-mortgagee will not be entitled to the benefit of section 8 of that Act because the taxation of his costs takes place under an order made after the Act has come into force. *Eyre v. Wynn-Mackenzie* (65 L. J. Ch. 194; [1896] 1 Ch. 135) followed. *Day v. Kelland*, 70 L. J. Ch. 3; [1900] 2 Ch. 745; 83 L. T. 447; 49 W. R. 66—C.A.

Priority of, of Enforcing Mortgagee's Claim.—The costs incurred by a person entitled to an annuity and charge on an estate in successfully enforcing his claim against the owner, who resisted it, takes the same rank as the principal sum. *Baldwin's Estate, In re*, [1900] 1 Ir. R. 15—Ross, J.

17. OTHER MATTERS.

Alteration of Deed—Correction of Name.—See DEED.

Banker, to—Closing Account.—See BANKER.

Building Agreement—Reputed Ownership.—See *Weibking, In re; Ward, ex parte, ante*, BANKRUPTCY, col. 103.

Contract to Purchase—Stock Producing 3 per cent.—Conversion of Stock.—See NATIONAL DEBT.

Costs of Negotiating Mortgage.—See SOLICITOR.

Devise of Mortgaged Land.—See WILL.

Execution of Deed obtained by Fraud—Solicitor's Authority.—See SOLICITOR.

— Plea of Non est Factum.]—See DEED.

Foreclosure—Order Nisi—Second Action.]—See ESTOPPEL.

Freehold Tenement—Manor—Mortgagor in Possession.]—See COPYHOLDS.

Interest Payable in Lump Sum at End of Period—Income Tax.]—See REVENUE.

Limitations—Effect of Statute of.]—See LIMITATIONS, STATUTES OF.

Money Charged on Land—Recovery.]—See LIMITATIONS, STATUTES OF.

Mortgage of Land and Policy.]—See Charter v. Watson, col. 1299, LIMITATIONS, STATUTES OF.

Mortgagee a Married Woman—Concurrence of Husband.]—See HUSBAND AND WIFE, col. 999.

Mortgagor in Possession—Recovery of Premises—Breach of Covenant.]—See LANDLORD AND TENANT.

Official Receiver—Mortgagee.]—See Calcott and Elvin's Contract, In re, 67 L. J. Ch. 553, ante, BANKRUPTCY.

Redemption—Statute of Limitations.]—See LIMITATIONS, STATUTES OF.

Registration.]—See LAND REGISTRATION.

— Trade Fixtures.]—See BILLS OF SALE.

Separate Fund, of, in Administration Suit.]—See EXECUTOR.

Ship, of.]—See SHIPPING.

— Unregistered Mortgage of Shares in.]—See SHIPPING.

MORTMAIN.

See CHARITY.

MOTION.

See PRACTICE AND PLEADING.

MOTOR CAR.

See CRIMINAL LAW, col. 648; JUSTICE OF THE PEACE, col. 1163, and WAX.

MUNICIPAL CORPORATION.

See CORPORATION, LOCAL GOVERNMENT, and METROPOLIS.

MUSIC, COPYRIGHT IN.

See COPYRIGHT.

NAME.

Company—Similarity of.]—See TRADE NAME.

Divorce—Effect of.]—See HUSBAND AND WIFE, col. 941.

Name and Arms Clause.]—See CONDITION.

Partnership—Dissolution of.]—See PARTNERSHIP.

Trade Name.]—See TRADE.

NATIONAL DEBT.

1 Edw. 7 c. 35 is the Public Works Loans Act, 1901.

61 & 62 Vict. c. 54 is the Public Works Loan Act, 1898.

63 & 64 Vict. c. 36 is the Public Works Loans Act, 1900.

4 Edw. 7 c. 36 is the Public Works Loans Act, 1904.

Stock Transferred to National Debt Commissioners—List of Names and Residence of Parties—Inspection.]—By section 52 of the National Debt Act, 1870, where unclaimed Government Stock is transferred to the National Debt Commissioners, the Banks of England and Ireland are directed to enter in a list the names in which the stock stood immediately before the transfer, and the residence of the parties, and the amount transferred, "which list shall be open for inspection at the usual hours of transfer":—*Held*, that to entitle a person to inspection of the list he must at least shew some ground for claiming, either on his own behalf or on behalf of some other person, an interest in the stock. *Reg. v. Bank of England* (60 L. J. Q.B. 497; [1891] 1 Q.B. 785) followed. *Re v. Bank of England; Collis, Ex parte*, 22 T. L. R. 477—D.

Redemption—Contract to Purchase Stock Producing 3l. per cent.—Conversion of Three per Cent. Stock.]—Trustees sold in 1854 a sum of 4,226l. 11s. 4d. Three per Cent. Irish Consolidated Annuities and lent the proceeds on a mortgage. The proviso for redemption provided for the repurchase and transfer into the names of the trustees "of the said sum of 4,226l. 11s. 4d. Government 3 per cent. Irish Consolidated Annuities . . . or in case the said Government Irish 3 per cent. Consolidated Annuities shall have then ceased to exist," provided for the repurchase of "the like amount of some other Government Stock or Funds, producing at the time of such repurchase and transfer dividends at the rate of 3l. per cent. per annum at the least." Government Three per Cent. Irish Consolidated Annuities subsequently ceased to exist. The mortgagor offered to redeem by the transfer of 4,226l. 11s. 4d. New Two and a-Half per Cent. Consols:—*Held*, that the contract did not come within section 21 of the National Debt Conversion Act, 1888, as a contract "to transfer generally any amount of 3 per cent. stock," and that a 3 per cent. stock should be transferred. *Hall's Estate, In re*, [1903] 1 Ir. R. 475—Ross, J.

NATIONAL GALLERY.

Statute.—1 Edw. 7 c. 16 is the *National Gallery (Purchase of Adjacent Land Act)*, 1901.

NATURALISATION.

See INTERNATIONAL LAW.

NAVAL COURT.

See SHIPPING (SEAMEN).

NAVY.

See ARMY AND NAVY.

NE EXEAT REGNO.

Order on Trustee to Pay Money into Court—Actual Receipt.—The circumstances under which the Court will allow a writ *ne exeat regno* to issue must be such as would justify the issue of a writ or attachment, and in addition the evidence as to the intention of the defendant to leave the country must be direct and unequivocal. *Underwood, In re; Bowles, In re*, 51 W. R. 335—Joyce, J. And see WRIT.

NEGLIGENCE.

1. *Statute*, 1735.
2. *Accidents, Fatal (Lord Campbell's Act)*, 1735.
3. *Animals*, 1736.
4. *Books, in Keeping*, 1737.
5. *Carrier*, 1738.
6. *Dangerous Article*, 1739.
7. *Dangerous Premises*, 1742.
8. *Electricity*, 1746.
9. *Flood*, 1747.
10. *Railway Company*, 1748.
11. *Reckless Statements*, 1751.
12. *Work, in Doing*, 1752.
13. *On High Seas*, 1753.
14. *Other Matters*, 1754.

1. STATUTE.

Shipowners, by.—5 Edw. 7 c. 10 is the *Shipowners' Negligence (Remedies) Act*, 1905.

2. ACCIDENTS, FATAL (LORD CAMPBELL'S ACT).

Negligence Causing Death—Action by Father of Child—Damages—Funeral Expenses.—An action cannot be maintained either under the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), or at common law, by a

parent for the funeral expenses of a child whose death has been caused by the negligence of another person. *Clark v. London General Omnibus Co.*, 75 L. J. K.B. 907; [1906] 2 K.B. 648; 95 L. T. 435—C.A.

Action against Public Body—Right to Sue within Six Months of Ceasing of "injury or damage"—Injury or Damage to Plaintiff.—The injury or damage in respect of which an action lies under the Fatal Accidents Act, 1846, known as Lord Campbell's Act, is the injury or damage to the deceased by the act, neglect, or default which caused his death, and not the injury or damage resulting from his death to the plaintiff; consequently, where the action is brought against a statutory body, the period of six months within which section 1 (a) of the Public Authorities Protection Act, 1893, requires it to be commenced must be calculated from such act, neglect, or default, or, in case of a continuance of injury or damage to the deceased, from the ceasing thereof. *Markey v. Tolworth Joint Hospital District Board*, 69 L. J. Q.B. 738; [1900] 2 Q.B. 454; 83 L. T. 28; 64 J. P. 647—D.

An action under the Act of 1846 against a statutory body cannot be commenced at any time within the period of twelve calendar months mentioned in section 3 of that Act, but must be commenced within the period of six months prescribed by section 1 (a) of the Public Authorities Protection Act, 1893. *Ib.* See cols. 1156, 1289, and PUBLIC AUTHORITIES PROTECTION ACT.

Death more than Six Months after Accident Caused by Negligence of Public Authority.

A widow brought an action under the Fatal Accidents Act, 1846, to recover damages in respect of the death of her husband, which occurred in 1904, from injuries occasioned by the negligence of a public authority in 1902:—*Held*, that, as by reason of the provisions of section 1 (a) of the Public Authorities Protection Act, 1893, no action could have been brought by the deceased man (if death had not ensued) in respect of the alleged negligence after the lapse of six months from the date thereof, the widow could not maintain the action. *Williams v. Mersey Docks and Harbour Board*, 74 L. J. K.B. 481; [1905] 1 K.B. 804; 92 L. T. 444; 53 W. R. 488; 69 J. P. 196; 3 L. G. R. 529; 21 T. L. R. 397—C.A.

Two Actions Commenced in Respect of Death of Same Deceased Person—Next-of-Kin—Administrator.—The Court will not, in the absence of bad faith, make an order staying an action under Lord Campbell's Act brought by one of the next-of-kin of the deceased within six months after the death and before administration is taken out, although administration is subsequently taken out by another of the next-of-kin, and a second action in respect of the death of the same deceased person is instituted by the administrator. *M' Cabe v. Great Northern Railway*, [1899] 2 Ir. R. 123—C.A.

3. ANIMALS.

Bees Kept in Unreasonable Numbers and at Unreasonable Place—Smoking Hives with Knowledge of Danger to those in Immediate

Neighbourhood—Remoteness of Damage.]—The defendant kept a large number of beehives close to the boundary-fence between his and the plaintiff's yard. Complaints had been made as to the annoyance caused to those on plaintiff's farm by the bees swarming. On the occasion in question the defendant, for the purpose of removing honey, smoked the hives with a "smoker." There was evidence that he knew or ought to have known that the plaintiff was likely to be tackling his horse at this spot, and that his horse was there, but he did not warn the plaintiff or take any precautions on his account. The bees, irritated by the smoking operation, swarmed upon the plaintiff and his horse; the horse, stung by the bees, dragged the plaintiff and threw him violently against a wall, causing him severe injuries. The jury found that plaintiff's injuries were caused by the bees having stung him and his horse; that the bees were kept on defendant's land negligently, in unreasonable numbers, at an unreasonable place, and with appreciable danger to the inhabitants of the adjoining farm; that the bees were to the defendant's knowledge of a dangerous and mischievous nature and accustomed to sting mankind and domestic animals; and that the honey was not taken from the hives on the occasion in question with reasonable care, skill, and prudence; and returned a general verdict for the plaintiff with 200% damages:—*Held*, that the verdict ought not to be disturbed, and that the damage was not too remote. *O'Gorman v. O'Gorman*, [1903] 2 Ir. R. 573—K.B. D.

Runaway Horse and Carriage—Presumption of Negligence.]—Where a runaway horse and carriage runs down a person in broad daylight in a public street the presumption is that the owner of the horse and carriage is in fault. *Snee v. Durkie*, 6 F. 42—Ct. of Sess.

Accident to Member of Public Caused by Horse Let Out on Hire—Liability of Owner of Horse.]—An accident was caused to a child in the public street by an ammunition-waggon belonging to a Volunteer regiment. The waggon was drawn by horses which had been hired out by a firm of carting contractors, two of the Volunteers being the drivers. The pursuer alleged that the horses had run off and got beyond the control of the drivers, who were young members of the Volunteer regiment; that the horses were unsuited for the purpose for which they were hired, being young and restive and unaccustomed to drawing ammunition-waggons; that they had never previously been driven as a pair; and that the defenders were aware of these defects:—*Held*, that the pursuer had not stated a relevant case of fault against the defenders. *Wilson v. Wordie*, 7 F. 927—Ct. of Sess.

4. BOOKS, IN KEEPING.

Evidence of Witness in Criminal Proceeding—Keeping Records whereby False Evidence Given—Conviction for Forgery.]—A statement of claim alleging that the plaintiff had sustained damage by reason of the negligence of the Bank of England in keeping certain records relating to bank notes in circulation, whereby false evidence had been given by one of their

officers at the trial of the plaintiff on a charge of forgery (which trial terminated in his conviction), does not disclose any cause of action whilst the conviction stands. *Basee v. Matthews* (36 L. J. M.C. 93; L. R. 2 C.P. 684) followed. *Bynoe v. Bank of England*, 71 L. J. K.B. 208; [1902] 1 K.B. 467; 86 L. T. 140; 50 W. R. 359—C.A.

5. CARRIER.

Omnibus Driver—Finding by Jury of Negligence and Contributory Negligence—Disagreement of Jury as to whether Defendants could have Avoided Accident by Reasonable Care—Effect of Findings.]—In an action for personal injuries against the defendants, an omnibus company, the jury found that there had been negligence on the part of the defendants' omnibus driver and also contributory negligence on the part of the plaintiff. Two other questions were put to the jury—namely, whether notwithstanding the negligence of the plaintiff, the defendants' driver could have avoided the accident by the use of reasonable care, and whether the defendants' driver and the plaintiff could each of them up to the moment of the collision have prevented the accident by the use of reasonable care—but upon these questions the jury were unable to agree:—*Held*, that the Judge on these findings was right in entering judgment for the defendants. *Regnolds v. Tilling*, 20 T. L. R. 57—C.A.

—Projection—Injury to Passenger—Liability of Owner of Omnibus.]—The plaintiff was a passenger on the top of one of the defendants' omnibuses. The driver of the omnibus, in turning out of one street into another, drove the omnibus close to the kerb to avoid an electric tramcar which was passing in the same direction, and while passing an electric-light standard, which was on the pavement, the jolt of the omnibus grating round the kerb caused the plaintiff's arm to come in contact with a fire-alarm finger-post fixed to and standing out from the electric standard. The plaintiff's arm was at the time projecting from the omnibus, but the fire-alarm finger-post did not project over, but came flush with the kerb. In an action to recover damages for negligence there was no evidence that the driver either saw or knew of the fire-alarm finger-post:—*Held*, that, as it was not shewn that there was an obstruction of such a nature that with reasonable care the driver ought to have seen it and ought to have realized the fact that it would or might hit a passenger on the omnibus, there was no evidence of neglect. *Simon v. London General Omnibus Co.*, 23 T. L. R. 463—D.

The plaintiff was a passenger on the top of one of the defendants' omnibuses. In consequence of the road along which the omnibus usually travelled being closed, the driver of the omnibus had to pass through side streets, and in turning the corner of one of the side streets the omnibus was driven close to the kerb, so that the top of the omnibus, owing to the camber of the road, projected over the foot pavement. A street lamp stood at the corner with a small iron arm projecting from it, but not sufficiently far to extend over the roadway. While the omnibus was being driven round the

corner the iron arm struck the plaintiff on the chest and injured him. There was no traffic which prevented the omnibus from being driven further away from the kerb. In an action in the County Court to recover damages for negligence, the Judge found that the driver did not see the projecting arm, and that he was not guilty of negligence in not having seen it and in having driven close to the kerb, and he gave judgment for the defendants:—*Held*, that there was evidence to support the finding of the County Court Judge, which was a finding of fact, and therefore the Court could not interfere. *Hase v. London General Omnibus Co.*, 23 T. L. R. 616—D.

6. DANGEROUS ARTICLE.

Bath Bun—Stone Found in—“Res ipsa loquitur.”—In an action brought by the plaintiff to recover damages for personal injuries caused by the defendant's servant having negligently sold to the plaintiff a bath bun which contained a stone or other hard substance, the Judge told the jury that they should be cautious in taking a single instance as evidence of carelessness on the part of the defendant's servant; that if he had been careless the thing might have been expected to occur oftener, and that frequently accidents happened without any negligence; that if they thought there was negligence in the process by which the stone was allowed to get into the bun the jury must so find, but that it was for the plaintiff to make it out:—*Held*, that there must be a new trial, as the Judge's summing-up involved the possibility of two misapprehensions on the part of the jury—first, that, if the defendant's servant was generally cautious, and was only careless in this particular instance, they would be justified in not considering it as evidence of carelessness; and secondly, that the plaintiff was bound to make out a specific act of negligence. The presence of the stone in the bun was *prima facie* evidence of negligence, and threw on the defendant the onus of rebutting it. *Chaproniere v. Mason*, 21 T. L. R. 633—C.A.

Brazier, Unfenced, on Public Road—Injury to Child.—A contractor used a lighted brazier in connection with public works on an open road. The brazier, which was placed on the footpath, was neither fenced nor watched, and a child five years old, going too near it, sustained injuries by burning. It was proved that the use of such braziers in such a way was customary:—*Held* (LORD YOUNG dissenting), that the contractor was not liable in damages for the injury sustained by the child, inasmuch as no negligence was attributable to him. *M'Lelland v. Johnstone*, 4 F. 459—Ct. of Sess.

Gun left Loaded by Defendant on his Own Land—Intervening Act of Third Party—Proximate Cause of Injury.—The defendant left a gun loaded and at full cock standing inside a fence on his land, beside a gap from which a path led over the defendant's land from the public road to his house. The defendant's son, aged between fifteen and sixteen, coming from the road through the gap on his way home, found the gun. He went back with it to the public road, and, not knowing that it was loaded, pointed it, in play, at the plaintiff, who was on the road.

The gun went off and the plaintiff was injured:—*Held*, that the defendant was liable in respect of the injury. *Sullivan v. Creed*, [1904] 2 Ir. R. 317—C.A.

Motor Car left Unattended—Horses Shying at.] The driver of a motor car drew up his car at the side of the road, leaving ample room for traffic to pass, stopped the engine, and left the car there unattended while he paid a visit of fifteen minutes to a house near by. While he was away the horses of a passing waggonette shied at the motor car, got out of control, and damage was done to the waggonette and the horses. In an action by the owner of the waggonette against the owner of the motor car,—*Held*, that the accident had not resulted from the car being left unattended, but through the shying of the horses and the inability of the driver to control them, and that the defender was not liable. *Macfarlane v. Colam*, [1908] S.C. 56—Ct. of Sess.

Rope Defective—Supply of by Shipowners to Stevedore—Liability of Shipowner to Stevedore's Workman.]—In an action of damages against shipowners arising out of an accident to a stevedore's labourer it was averred that the injuries sustained were due to a defect in a rope supplied, as was the custom, by the shipowners to the stevedore for the purpose of being used in the discharge of the ship; that this defect could have been discovered by a proper inspection or test of the rope by the shipowners; that they did not inspect or test it, and that it was their duty to do so; that the stevedore was entitled to rely on the sufficiency of the rope so supplied to him, and that its defective condition was not known by him, and could not have been discovered by him by an ordinary examination:—*Held*, that these averments were relevant. *Heaven v. Pender* (52 L. J. Q.B. 702; 11 Q.B. D. 503), as explained in *Caledonian Railway v. Mulholland* (67 L. J. P.C. 1; [1898] A.C. 216), commented on. *Traill v. Actieselskabet Dalbeattie, Lim.*, 6 F. 793—Ct. of Sess.

Rope Sling Defective—Liability of Stevedore—Claim of Relief against Shipowner Supplying Sling—Defective Plant.]—A firm of stevedores contracted with a shipowner to unload his vessel. In the course of unloading, a workman, employed by the stevedores, was injured by the breaking of a rope sling which was being used in the process of unloading. The workman sued the stevedores under the Employers' Liability Act, and recovered damages from them on the ground of their negligence in failing to inspect the sling. The stevedores then sued the shipowner to recover the amount of damages in which they had been found liable; and in that action it was found that it was the duty of the shipowner to supply, and that he did supply, rope slings for the discharge of the cargo; that as the rope slings were not part of the permanent apparatus of the ship, the shipowner's duty was not absolutely to warrant that the rope slings would be fit for the work, but was merely to supply rope slings to the satisfaction of the stevedores; that the rope sling which broke was not fit for the purpose for which it was being used; and that its defect could have been easily ascertained on inspection:—*Held*, that the shipowner was not liable on the

grounds—first, that, as the shipowner's duty was merely to supply rope slings to the satisfaction of the stevedores, he was not liable in respect of injury caused by the breaking of the defective sling; and secondly, that in any event, as the sole ground on which the stevedores had been held liable in damages was their own negligence in failing to inspect the sling, they could not have an action of relief against the shipowner based on breach of contract. *Mowbray v. Merryweather* (65 L. J. Q.B. 50; [1895] 2 Q.B. 640) considered. *Wood v. Mackay*, 8 F. 625—Ct. of Sess.

Steam Roller on Highway—Damage to Gas Pipes—Explosion—Personal Injury.—An explosion was caused through the gas mains under a roadway being damaged owing to the pressure thereon of a steam roller used by the highway board. The pipes were at such a depth as to be uninjured by ordinary traffic. By the explosion the plaintiff sustained personal injury:—*Held*, that the highway board was liable. *Driscoll v. Poplar Board of Works*, 62 J. P. 40—D.

Tinned Salmon—Retailer of—Liability to Customer where Contents of Tin are Poisonous.—In an action for damages on account of the death of his son, the pursuer averred that the son had died of ptomaine poisoning caused by eating tinned salmon purchased from the defender, a retail grocer; that the salmon as sold by the defender was unfit for human food; that the tin containing it had no label on it, and was dented in as if it had been knocked about; that "it was the duty of the defender to examine all tins containing foods which he was selling to the public in order to satisfy himself that these were air-tight and in order. He should have taken reasonable and proper precautions to prevent such an occurrence as that before condoned on. He did not make any such examination of the foresaid tin, nor did he take any such precautions, and in these respects he failed in his duty, and caused the death of the said" son:—*Held*, that the action was irrelevant. *Gordon v. McHardy*, 6 F. 210—Ct. of Sess.

Ship at Quay—Accident to Visitor through Insufficient Plank Used as a Gangway.—The wife of the chief officer of a steamship which was lying in harbour at the quay loading coals came on board to spend some hours with her husband before the vessel started. When she was going to leave the vessel, and while her husband was speaking to the pilot, a rigger temporarily in the employment of the shipowner took a plank (used to protect deck skylights), which was lying on deck, laid it from the ship to the quay, and proceeded to lead her across by it. When both were on the plank it broke, being rotten, and she fell into the water and sustained injuries. In an action of damages at her instance,—*Held*, that the shipowners were not liable, in respect—first, that the pursuer was on board the ship by permission merely, and not by invitation; and secondly, that they were not responsible for the rigger having taken it upon himself outwith the scope of his employment to use the plank for a purpose it was never intended to serve. *O'Brien v. Arbib*, [1907] S. C. 975—Ct. of Sess.

7. DANGEROUS PREMISES.

Barge—Berth—Representation—Liability of Person Using River Bank for Purpose of Discharging Cargo from Barge.—The defendants had entered into a contract for a supply of stone to be delivered alongside a landing-place at Iken Cliff, on the river Alde, in Suffolk, and the seller of the stone employed the plaintiff's barge to carry the stone. The defendants had no interest in or right to use the bank of the river at Iken Cliff except by permission of the owner obtained before they entered into the contract. At Iken Cliff there was no wharf or quay, or even bank, alongside which a barge could discharge, and there was no fixed or defined berth; but the landing-place at Iken Cliff was a place at which barges such as the plaintiff's could safely discharge by means of planks laid upon trestles from the barge to the bank of the river. Upon arrival at Iken Cliff, the master of the barge, by the advice of her pilot and a man in a fishing boat, selected a place as near the bank as her draught would permit, at which the barge was moored. She lay upon uneven ground, and was damaged:—*Held*, that the defendants were not liable to the plaintiff for the damage, upon the ground that there was no representation, expressed or implied, by the defendants that any particular spot was a proper place to take the ground, or to lie in for discharging; and that it was for the master of the barge, knowing his own barge and her draught, to select the place where he would lie to discharge. He had no reason to expect that the bed of the river would be free from all inequalities, and there was nothing of which the defendants were bound to give any warning to him. *The Moorcock* (14 P. D. 64; 58 L. J. Adm. 73) distinguished. *Parker v. Plomesgate Rural Council*, 9 Com. Cas. 107—Walton, J.

Injury to, Hired by Wharfowner to Deliver Cargo at Wharf—Obstruction in Bed of River—Liability of Wharfowner.—The defendants, who were lessees of a wharf in a tidal river, hired a barge of the plaintiff to carry goods to the wharf at a place where the barge must necessarily ground at low water. The defendants had no control over the bed of the river. A block of hardened cement had fallen off the quay into the river; it was visible at low water, but its existence was not known to the defendants. The plaintiff's barge, while alongside the wharf for the purpose of discharging its cargo, grounded on the block of cement when the tide fell, and was injured. In an action for damages for the injury,—*Held* (HOLMES, L.J., dissenting), that the defendants, having invited the plaintiff to discharge the goods at the wharf, where bound to take reasonable care to ascertain that the berthage was reasonably safe, and, not having discharged this duty, were liable for the injury. *The Moorcock* (58 L. J. P. 73; 14 P. D. 64) followed. *Butler v. McAlpine*, [1904] 2 Ir. R. 445—O.A.

Building Materials—Deposit of, against Wall Separating Street from Pond—Safety of Children.—In an action for damages on account of the death of a child seven years of age, the pursuer averred that the defender was engaged in building operations adjoining a public street; that the street on one side was separated from a mill pond ten feet deep by a stone wall eight

feet high; that the defender deposited a large heap of building material close to this wall and reaching to within thirty inches of its top; that the child, while playing with other children on the top of this heap, fell over the wall into the pond and was drowned; that the defender in heaping up the material close to the wall made the pond a practically unprotected source of danger to the public; that he knew that children were in the habit of playing on the top of the heap; and that in depositing the heap and failing to take precautions for the safety of children playing on it, the defender was guilty of gross negligence, in consequence of which the child lost its life. THE COURT dismissed the action as irrelevant. *Horsburgh v. Sheach*, 3 F. 268—Ct. of Sess.

Game Playing on Ground where there is Obvious Danger.—If grown men choose to play a game on ground where they are permitted to do so, but where there is a danger openly and obviously before them, the owner of the ground is not liable for injuries caused by such danger to one of the players. *Giles v. London County Council*, 68 J. P. 10; 2 L. G. R. 326—Kennedy, J.

Hole on Private Ground—Liability of Owner.—If the public enter upon private ground without invitation they take the risk of injury; but if there is a hole or pit near a public road there may be a duty on the owner or occupier to fence it. *Devlin v. Jeffray's Trustees*, 5 F. 180—Ct. of Sess.

Key to View given by House agent—Invitation—Owner's Liability.—The plaintiff had obtained the key of some premises which were to be let from a house agent, in order that he might look over the premises and possibly become tenant of them. The front doorsteps gave way when he went to the premises, and in consequence he received injury:—*Held*, that the landlord was liable for the want of repair. *Wright v. Lefever*, 51 W. R. 149—C.A.

Machinery, Unfenced, on Waste Ground near Public Road—Use of Waste Ground by Children as Playground.—In an action against the owners of a colliery for damages on account of injuries to the pursuer's child, a boy eight years old, the pursuer averred that for the purpose of hauling waggons in connection with their colliery the defenders used a horizontal wheel which was situated on waste ground belonging to the defenders; that this wheel was about three and a-half feet in diameter and turned upon a post at a height of about eighteen inches from the ground, with a groove round its circumference into which was fitted a wire rope for haulage; that the wheel was not fenced or protected in any way; that it was generally stationary, but was used for short periods about five times a day, and was set in motion, without any warning, by means of a drum at the pit-head about seventy yards from the wheel; that the wheel was about eighteen yards from the public road and about fifty yards from the terrace in which the pursuer and his son lived; that the waste ground was not fenced off from the public road, and was used as a playground by children "with the sanction and approval of the defenders"; that on a day specified, when the pursuer's child was playing close to the

wheel, it was set in motion without warning and the child's leg was caught between the rope and the wheel and severely injured; that "it was gross fault on the part of the defenders to have such an unprotected wheel, which was set in motion several times a day, at various times, for short periods, and without notice, in ground adjoining a public road, and known by them to be the daily resort of children and others for the purposes of play. Their said fault was the direct cause of the injuries to the pursuer's son":—*Held*, that the pursuer's averments were irrelevant. *Cummings v. Darnagavil Coal Co.*, 5 F. 513—Ct. of Sess.

Oyster Beds Laid Down by Trespasser in Tidal River—Grounding of Ship without Negligence—Standard of Care and Skill Required in Avoiding Damage to Property of Trespasser.—Oyster beds were laid down in a tidal river by a person who in so doing was a trespasser. A screw steamer, while proceeding down the river, accidentally grounded where the oysters were laid down, and her bow stuck in the ruins of an old beacon. It was two hours after high water, and she lay there till the return of high water. Shortly before the return of high water the captain got her off, and in doing so he used the propeller as well as a hawser attached to a post on the opposite shore. The captain deposed that he was ignorant of the existence of the oyster beds, but it was proved that at low water a portion of the vessel was high and dry, and the oysters were visible all around her. The oysters were damaged very considerably by the vessel in taking the ground, and still more so in getting her off:—*Held*, that the captain, although bound not to recklessly or carelessly injure the oysters, was entitled to get off his ship by any reasonable exercise of seamanship that his own reasonable knowledge might suggest; and there being no sufficient evidence of recklessness or gross negligence on his part, the owner of the oysters was not entitled to recover in respect of the injuries to them. *Petrie v. Rostrevor (Owners)*, [1898] 2 Ir. R. 556—C.A.

Railway Station—Overcrowded Platform—Injury Due to Overcrowding—Regulation of Crowd.—The pursuer in an action for damages for personal injury against a railway company alleged that the defenders were in fault in respect that they had, knowingly, and without taking any steps to prevent it, permitted a greater crowd of intending passengers, of whom the pursuer was one, to congregate in a station than its platforms could accommodate, and had failed to provide a sufficient staff of servants to cope with the crowd, and that in consequence, by the pressure of the crowd, the pursuer had been carried along and hurled from the platform on to the railroad and injured:—*Held*, that the pursuer had stated a relevant case. *Fraser v. Caledonian Railway*, 5 F. 41—Ct. of Sess.

Vehicles left in Position and Condition which may become Dangerous—Risk known to Railway Company—Interference with Vehicles by Trespassers—Consequent Injury to Third Person—Liability of Railway Company.—A railway company is not responsible for injury to a person using a highway caused by a brake-van which the interference of trespassers has sent

running down an inclined siding on to the highway, where the danger of such interference as a probable cause of injury to persons using the highway was not known to the railway company, and where, independently of such interference, the brake-van was in a position and condition not at the time dangerous. *McDowall v. Great Western Railway*, 72 L. J. K.B. 652; [1903] 2 K.B. 331; 88 L. T. 825—C.A. And see *RAILWAY*, *infra*.

Ship—Loading—Invitation to Come upon Premises for Business Purposes—Duty of Occupier—Charterer of Ship—Injury to Stevedore's Workman.]—A person who intends that others shall come upon property of which he is the occupier or controller, for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and the appliances upon it, which it is intended shall be used in the work, are fit for the purpose to which they are to be put; nor does he discharge this duty by merely contracting with competent people to do the work for him. *Marney v. Scott*, 68 L. J. Q.B. 736; [1899] 1 Q.B. 986; 47 W. R. 666—Bigham, J.

The defendant, having chartered a ship under a charterparty which represented that she was tight, staunch, and strong, and fit for the service for which she was chartered, and provided that she should be maintained in that condition by the owners, contracted with a stevedore to stow her cargo. The plaintiff, who was one of a gang of men employed by the stevedore for that purpose, went on board the vessel about two hours after she had been placed at the defendant's disposal, and was proceeding to the main hold, where his work lay, when, owing to the defective state of the ladder by which he had to descend, and without any negligence on his part, he fell into the hold and was injured:—*Held*, that the defendant ought to have made some examination of the tackle and appliances of the ship which were to be used by the stevedore's workmen, and that, as the defect was one which a slight examination would have revealed, the defendant was liable to the plaintiff in damages for the injuries which he had sustained. *Ib*.

—Open and Unlighted Hatch on—Liability of Employers.]—A workman, who was accustomed to take chipping and scaling jobs, was engaged to execute chipping work on a ship which was undergoing repairs in a shipbuilding yard. In going to the place on board the ship where his work was to be done he fell into an open hatchway on the middle deck and was injured. He sued the shipbuilders for damages on the ground that the accident was due to their negligence in not having the hatchway covered or sufficiently lighted or fenced. It was proved that the pursuer had gone from broad daylight to the middle deck, where the light was dim, but sufficient to enable the pursuer to see the hatchway if he had proceeded cautiously:—*Held*, that the accident was not due to negligence on the part of the defenders, but was due to want of care on the part of the pursuer. *Burns v. Henderson*, 7 F. 697—Ct. of Sess.

Truck left in Road—Carriage of Licensee by

Licensor—Danger in the Nature of a Trap.]—The plaintiff, an inspector in the employment of the engineer engaged upon the construction of a tube or underground railway, when returning from his work along a wooden platform erected by the side of the excavated tunnel for the purpose of allowing the work of inspection to be done, was invited by a superintendent in the employment of the defendant, the contractor who was constructing the railway, to ride upon a small engine used for drawing the trucks filled with excavated material along a temporary line of railway laid down in the tunnel. The engine, while the plaintiff was riding upon it, ran into a truck standing upon the temporary line of railway and the plaintiff was injured. The place where the truck was standing was dark, but at the time of the accident the engine ought not to have been used at all over the part of the line where the truck was, and where repairs were going on. In an action by the plaintiff to recover damages for the personal injuries caused by the alleged negligence of the defendant's servants, the jury found that the plaintiff at the time of the accident was on the engine with the permission of the defendant's superintendent, but for the plaintiff's own convenience, and that the accident was due to the negligence of the defendant's servants. Judgment was given for the plaintiff:—*Held*, upon an application by the defendant for judgment or a new trial, that the judgment must be affirmed, because, first, even assuming the standard of the defendant's liability were the same as in the case of a bare licensee passing through the premises of the licensor, there was evidence on which the jury might have found that the danger was such as to be in the nature of a trap; but secondly, because the measure of duty towards a bare licensee is different where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and there was evidence on which the jury might find, as they must be taken to have done, that there was on the part of the defendant's servants a failure of the ordinary care due from one who undertakes the carriage of another gratuitously. *Harris v. Perry*, 72 L. J. K.B. 725; [1903] 2 K.B. 219; 89 L. T. 174—C.A.

Wharf—Damage to Vessel Lying in Berth—Liability of Wharf-owners.]—The plaintiffs' vessel, which was found to be in a fit condition to take the ground for the purpose of unloading a cargo of iron ore, was damaged through straining, by reason of her lying on an uneven bottom in the defendants' wharf. THE COURT held the defendants to blame in not keeping the berth in a fit and proper condition to receive the vessel, and held the plaintiffs entitled to recover such damages as were assessed by the Registrar and merchants. *The Ville de St. Nazaire*, 52 W. R. 68—C.A.

8. ELECTRICITY.

Explosion in Electric Main—Insufficient Ventilation—Personal Injuries to Passer-by—Nervous Shock.]—An explosion took place in an electric main belonging to a local authority who were carrying on an electric-lighting undertaking under statutory powers, with the result that a woman who was passing by, though not actu-

ally struck by anything thrown up by the explosion, experienced a nervous shock of such a character as to injure her. In a County Court action brought by the woman against the local authority expert evidence was called to shew that the explosion was due to gas in the main, and would not have occurred had the main been properly ventilated; but the County Court Judge nonsuited the plaintiff on the ground that there was no evidence of negligence to go to the jury:—*Held*, that there was evidence of negligence which should have been left to the jury, and that the case could not properly be withdrawn from them merely because the injury was due to nervous shock only. *Solomons v. Stegney Borough Council*, 3 L. G. R. 912; 69 J. P. 360—D. *And see* NUISANCE.

Overhead Electric Wires—Failure to Insulate Wires — Evidence.]—The respondents were authorised by Act of Parliament “to enter upon and construct under or over the streets and public highways” of Montreal “all such pipes, lines, conduits, and other constructions as may be necessary for the purposes of its business.” The appellant’s husband was killed by a current of electricity in consequence of contact of the derrick on which he was at work with the overhead wires of the respondents:—*Held*, that, as the Act conferred alternative powers of constructing overhead or underground wires, there was no obligation on the respondents, on the ground of affording greater protection to the public, to lay their wires underground and not overhead. *Held*, also, in the absence of evidence that such a precaution would have been efficient, that there was no negligence in the respondents in not insulating or guarding the wires. *Dumphy v. Montreal Light, Heat, and Power Co.*, 76 L. J. P.C. 71; [1907] A.C. 454; 97 L. T. 499; 23 T. L. R. 770—P.C.

9. FLOOD.

Retaining Wall Built by Local Authority—Flood Caused by Wrongful Act of Third Party—Liability of Local Authority.]—The plaintiffs were the owners of a house adjoining the Y. Road, within the district of the defendants. There was a channel at the side of this road for the purpose of carrying off surface-water from the road. On a certain occasion, after a heavy rain, the water coming down this channel broke through it, and forced its way into the cellar of the plaintiff’s house, thereby doing damage. The plaintiffs alleged that the damage occurred owing to a retaining wall which the defendants had built on the Y. Road when raising the level of another street running into it, their contention being that it might have been anticipated that on occasions water would be diverted on to their land by the way in which the wall was placed. On the facts found by the Judge at the trial, the wall in no way interfered with the ordinary flow of water down the channel, even when caused by heavy rain; but the flood on the day in question was caused by water running into the channel owing to the wrongful act of the owners of adjoining land in allowing a conduit on their land to become blocked:—*Held*, that the defendants were not liable for the damage to the plaintiffs’ house, there being no negligence on their part in not building their

retaining wall in such a way as to prevent its interfering with an unusual flow of water caused by the wrongful act of other persons. *Ely Brewery Co. v. Pontypridd Urban Council*, 2 L. G. R. 40; 68 J. P. 3—C.A.

10. RAILWAY COMPANY.

Fire caused by Sparks from Engine.]—A railway company is not liable for damage resulting from a fire caused by sparks from an engine running on their line, in the absence of negligence in the construction or use of such engine. *Canadian-Pacific Railway v. Roy*, 71 L. J. P.C. 51; [1902] A.C. 220; 86 L. T. 127; 50 W. R. 415—P.C. *And see* RAILWAY.

Carriage Doors—Failure of Railway Servants to Close.]—An action of damages for personal injuries brought against a railway company by a passenger who had been knocked down by an open carriage-door as a train was leaving a station dismissed as irrelevant, where the only averment of negligence against the railway company was that they had failed to close the carriage doors before setting the train in motion. *Toal v. North British Railway*, [1908] S.C. 48—Ct. of Sess.

Level Crossing—Liability to Public using Crossing for Safe Condition of Rails—Negligence.]—A public road crossed a railway by means of a level crossing. A horse which was being taken over the level crossing was injured through one of its feet being caught between one of the rails and a chair on which the rail rested, owing to the wooden wedge which kept the rail in position not being completely driven in. In an action by the owner of the horse against the railway company it was proved that the line, including the level crossing, was regularly inspected by platelayers twice a day for the purpose, *inter alia*, of seeing that the wedges, which were liable to be displaced by trains passing along the line, were properly driven in; that the crossing had been so inspected within an hour before the accident, and that two trains had passed along the line after the inspection and before the accident:—*Held*, that the railway company had taken all usual and reasonable precautions to keep the level crossing in a safe and proper condition; that the accident was not due to their fault; and that they were not liable in damages to the pursuer. *Bell v. Caledonian Railway*, 4 F. 431—Ct. of Sess.

Platform — Passenger Alighting — Distance from Carriage to Platform—Evidence as to Other Stations—Admissibility.]—The plaintiff, who was a passenger on the defendants’ railway, when alighting from the train at a station injured herself. The height of the footboard of the carriage in which the plaintiff was travelling above the platform of the station was twenty-two inches, and the plaintiff alleged that this was an unreasonable height, and that the defendants were negligent in not providing reasonably fit and safe facilities for her to alight. In an action to recover damages the defendants tendered evidence that the platforms at a large number of their other stations in the district were as low as the one in question and that no accident had happened. The Judge admitted

the evidence, and the jury found a verdict for the defendants:—*Held*, that the evidence was admissible. *Manning v. London and North-Western Railway*, 23 T. L. R. 222—C.A.

Siding near Cottages—Failure to Fence—Engine-driver Killing Own Child.—An engine-driver, in the course of backing some trucks down a siding, ran over and killed his own son, a child two years old, who was playing with other children in the siding. He brought an action for *solatium* against his employers, in which he averred fault in respect that they had failed to provide a shunter to assist him in backing the trucks, and had left the siding unfenced, although there were houses belonging to them and let to their workmen immediately adjoining, and the only access to a bleaching-green used in connection with these houses was across the siding:—*Held*, that the action was relevant. *Innes v. Fife Coal Co.*, 3 F. 835—Ct. of Sess.

Truck—Defect in—One Company Using the Trucks of Another—Breach of Implied Duty.—The respondent's husband, who was a servant of the G. Railway, was killed in consequence of the defective condition of a truck belonging to the appellants, which had been lent, in the ordinary course of railway exchange, to the G. Railway for the conveyance of goods to one of the latter's customers:—*Held*, that the appellants were under no liability to the respondent. *Heaven v. Pender* (52 L. J. Q.B. 702; 11 Q.B. D. 503) distinguished. *Caledonian Railway v. Mulholland*, 67 L. J. P.C. 1; [1898] A.C. 216; 77 L. T. 570; 46 W. R. 236—H.L. (Sc.)

Sudden Stoppage of Express—Injury to Passenger in Train.—The plaintiff was injured by reason of the sudden pulling up of the express train in which he was travelling. The train was pulled up suddenly because a man who had just arrived by a down train had found his way on to the line by an access which was under the control of the railway company. The defendants proved that it was necessary to stop the train, and that the driver acted reasonably and properly in stopping it as he did. The passenger for whose safety the train was stopped was not called. The jury having found a verdict for the plaintiff, *Held*, that there was evidence upon which the jury could find that the defendants had not established that the cause which led to the necessity of stopping the train was not brought about by any negligence on their part. *Angus v. London, Tilbury, and Southend Railway*, 22 T. L. R. 222—C.A.

Vehicles left in Position and Condition which may become Dangerous—Risk Known to Railway Company—Interference with Vehicles by Trespassers—Consequent Injury to Third Person—Liability.—A railway company who for their own convenience in shunting operations leave a brake-van or other vehicle in a position and condition not at the time dangerous to other persons, but which to their knowledge may become so if interfered with by trespassers, and who also know that there is a risk of such interference and consequent danger to others, will, if they might have guarded against the danger by the exercise of reasonable care, be liable for any injury the occurrence of which

is materially and effectively caused by their want of reasonable care and skill in keeping and placing the vehicle in such a condition and position. *McDowall v. Great Western Railway*, 71 L. J. K.B. 830; [1902] 1 K.B. 618; 86 L. T. 558—Kennedy, J.

Nervous Shock resulting from Fright—Railway—Carriage of Passengers—Door of Compartment not properly Secured.—In an action for damages against a railway company, the pursuer, a widow of fifty-six years of age, averred that when travelling on the defendants' line, one of the doors of the compartment in which she was seated swung open, and almost at the same moment the motion of a passing train caused the open door to swing back and forward with great violence against the carriage. That the glass of the window was broken into fragments, and the woodwork of the door was splintered. That it seemed to the pursuer that the passing train had dashed into collision with the other. That by the occurrence the pursuer was greatly alarmed, and her nervous system received a shock, which resulted in lasting injury. That the occurrence was caused by the fault of the defendants' servants in not seeing that the door was properly fastened. The defendants pleaded that the action was irrelevant:—*Held*, that the pursuer had stated a relevant case. *Cooper v. Caledonian Railway*, 4 F. 880—Ct. of Sess.

— **Damages—Remoteness.**—Damages for injuries resulting from a nervous shock caused by fright may be recovered in an action for negligent driving although there has been no actual physical impact upon the plaintiff's person. *Victorian Railways Commissioners v. Coultas* (57 L. J. P.C. 69; 13 App. Cas. 222) discussed and not followed. *Dulieu v. White*, 70 L. J. K.B. 837; [1901] 2 K.B. 669; 85 L. T. 126; 50 W. R. 76—D.

Measure of Damages—Prospective Loss of Earnings—Mode of Estimation by Jury—Practice—New Trial.—In an action for damages for personal injuries sustained by the plaintiff while travelling on the defendants' line the jury gave a verdict for the plaintiff with 3,000*l.* damages; 450*l.* of this represented expenses and loss of income incurred at the date of the trial and 2,550*l.* was compensation for prospective loss in professional earnings. The plaintiff was twenty-eight years of age. He had been trained as a marine engineer, and he had prospects of obtaining the post of superintendent engineer, as he had relations who were shipowners, but at the time of the accident he was in the employment of his father's firm at a salary of between 2*l.* and 3*l.* a week. There was evidence that the plaintiff was competent to perform the duties of a superintendent engineer, but that since the accident he would not be able for physical reasons to do so; that the salary attached to the office of superintendent engineer varied from 600*l.* to 1,000*l.* a year, sometimes amounting to 1,500*l.*; and that the plaintiff had applied to a company for such a post on their staff with a salary of 600*l.* rising annually, and had been refused on account of his injury. The Judge at the trial told the jury that the plaintiff had lost the possibility of such a livelihood as he had expected, but he was able to earn something, though not in

any way equal to what he would have earned but for the accident; that there were the accidents of life and other elements which had to be taken into consideration which ought to prevent the jury giving him such a sum as would be simply for him an investment and enable him to do nothing; still he was entitled to a fair sum considering the position that he was fitted for and the position that he was in:—*Held*, that it could not be said that the amount of the damages was such that no twelve men could have reasonably awarded; that the jury had not been misdirected by the Judge; that it could not be said that the jury had taken into consideration matters which they ought not to have taken into consideration, or had applied a measure of damages which they ought not to have applied; and that there was no ground for a new trial. *Johnston v. Great Western Railway*, 73 L. J. K.B. 568; [1904] 2 K.B. 250; 91 L. T. 157; 52 W. R. 612; 20 T. L. R. 455—C.A.

The principles laid down in *Praed v. Graham* (59 L. J. Q.B. 230; 24 Q.B. D. 53, 55); *Phillips v. London and South-Western Railway* (48 L. J. Q.B. 693, 695; 49 L. J. Q.B. 233; 4 Q.B. D. 407, 409; 5 Q.B. D. 78); and *Rowley v. London and North-Western Railway* (42 L. J. Ex. 153; L. R. 8 Ex. 221) applied. *Ib.* And see *CARRIER*, col. 190.

11. RECKLESS STATEMENTS.

Breach of Duty—Contractual Relation—Reckless Misrepresentation apart from Fraud—Cause of Action.]—The defendant, a professional waterfinder, undertook for reward to indicate a spot upon the plaintiff's land where a supply of water might be found. He came to the plaintiff's land, marked out a spot, and stated definitely that water would be found there at a particular depth from the surface. The plaintiff, on the faith of this statement, bored to a depth exceeding that named by the defendant, but found no water. The plaintiff brought an action in the County Court to recover the expense of boring. The County Court Judge found that the defendant made the statement recklessly, but did not find that he made it fraudulently:—*Held*, that the contractual relation between the parties imposed upon the defendant the duty to refrain from making reckless statements; that the defendant had committed a breach of this duty, and was therefore liable in an action for damages. *Le Lievre v. Gould* (62 L. J. Q.B. 353; [1893] 1 Q.B. 491) distinguished. *Pritty v. Child*, 71 L. J. K.B. 512—D.

Recommending Bankrupt Broker.]—The defendants, the proprietors of a paper called *M.A.P.*, published in that paper a paragraph to the effect that readers desiring financial advice in the columns of the paper should address their queries to the City editor. The plaintiff, a reader of the paper, wrote to the City editor asking for certain advice, and also for the name of "a good stockbroker." The editor recommended one T., an outside broker, who traded as a stock and share dealer, but who to his knowledge was not a member of the Stock Exchange. T. was, in fact, an uncertificated bankrupt, but this was unknown to the

editor, though he could easily have ascertained his financial position by enquiry. As a result of the introduction, the plaintiff sent T. several sums of money for investment, which the latter applied to his own use. In an action brought by the plaintiff against the defendants to recover damages for a breach of duty to them and for negligence,—*Held*, that the defendants' negligence or breach of duty in recommending T. as "a good stockbroker" was the primary and substantial cause of the plaintiff's loss, and that the defendants were liable for the amount of such loss, notwithstanding that T. might have been guilty of a criminal offence in appropriating the plaintiff's money to his own use. *De la Bere v. Pearson, Lim.*, 76 L. J. K.B. 309; [1907] 1 K.B. 483; 96 L. T. 425; 23 T. L. R. 264—Lord Alverstone, C.J.

12. WORK, IN DOING.

Architect Preparing Plans—Plans not used.]

—The plaintiffs employed the defendant to prepare plans for a building to be erected on a site belonging to them. The defendant neglected to measure the site, and, acting on information which was unauthorised by the plaintiffs, prepared plans on the assumption that the site was smaller than it was in fact. The plaintiffs, having paid the defendant for the plans, were unable to raise funds to build on the site, and ultimately parted with it, and then discovered the error in the plans. In an action to recover the money paid for the plans on the ground of a total failure of consideration, or, in the alternative, for damages for negligence,—*Held*, that there had not been a total failure of consideration, but that as the defendant had been negligent the plaintiffs were entitled to damages, although, as they had sustained no loss from his negligence those damages would be only nominal. *Columbus Co. v. Clowes*, 72 L. J. K.B. 330; [1903] 1 K.B. 244; 51 W. R. 366—Wright, J.

Defective Welding of Ring on Buoy—Omission of Adequate Test—Liability of Harbour Commissioners.]—Owing to its defective welding the ring of a buoy broke off, and a ship which was attached thereto by a cable parted from her moorings and sustained damage. The buoy had been in use a short time only; it had been purchased by the harbour commissioners from a first-class manufacturer, and the defect in the welding could not have been discovered by inspection or by the ordinary test of hammering. It is not usual for manufacturers to submit such rings to any test unless required to do so by the specification; but if so required (which is frequently but not universally done), they are tested by a public department in a well-known and recognised manner analogous to the testing of cable chains. This precaution had not been taken by the harbour commissioners:—*Held*, that the omission was actionable negligence rendering the commissioners responsible for the result of the accident. *Burrell v. Tuohy*, [1896] 2 Ir. R. 271—Q.B. D.

Negligent Repair by Wheelwright—Injury to Servant of Van-owner—Right of Action.]—By a contract between a firm of mineral-water manufacturers and the defendant, a wheelwright, the latter agreed to keep in repair for

a specified time a number of vans belonging to the firm. The defendant failed to keep a certain van in repair, the result being that the wheel came off the van while it was being driven by the plaintiff, a servant of the firm, and the plaintiff was injured:—*Held*, that the plaintiff could not maintain an action against the defendant. *Heaven v. Pender* (52 L. J. Q.B. 702; 11 Q.B. D. 503) discussed. *Winterbottom v. Wright* (11 L. J. Ex. 415; 10 M. & W. 109) followed. *Earl v. Lubbock*, 74 L. J. K.B. 121; [1905] 1 K.B. 253; 91 L. T. 830; 53 W. R. 145; 21 T. L. R. 71—C.A.

Laying of Sewer—Want of Reasonable Care by Contractor.—The plaintiffs' premises having been damaged by the defendants in constructing a sewer, and as it appeared that the defendants had not exercised reasonable care and skill in carrying out the work, whereby the damage was occasioned, the plaintiffs were held entitled to recover damages in respect thereof. *London General Omnibus Co. v. Tilbury Contracting and Dredging Co.*, 71 J. P. 534—Neville, J.

Valuation of Property—Valuer—Exercise of Reasonable Care and Skill.—C., a solicitor, was applied to by V., who was not his client, but who owned a mineral-water factory and three licensed houses, to find some one who would advance money on the premises. C. knew that R., another solicitor, who represented the plaintiff, under a power of attorney, had money to advance, and at an interview between C. and R. it was arranged that an advance, to be guaranteed by an insurance society, should be made to V., but no stipulation for an independent valuation of the premises was then made. C., with authority to conduct the mortgage on these lines, requested an insurance society to insure the mortgage, knowing that the society usually employed the defendant, a local valuer of repute. C. applied to the society for a copy of the defendant's valuation, and this application was ultimately acceded to by them, they saying that on future occasions when C. was acting for the mortgagee he should have a copy. The society repudiated responsibility for the defendant's fee, which was afterwards paid by V. through C. The society instructed the defendant to value the premises, and he reported to them by a valuation written on their printed form. C. relied to the knowledge of the defendant on his valuation in making the advance on mortgage to V.:—*Held*, that no contractual relation of principal and agent between the plaintiff and the defendant was established; that the defendant never agreed to value for the use of the plaintiff; and that therefore the plaintiff had not established any duty on the part of the defendant towards him to exercise reasonable care and skill in and about the valuation. *Love v. Mack*, 93 L. T. 352—C.A.

13. ON HIGH SEAS.

Jurisdiction—Alien—Death on High Seas by Negligence of British Subject—Action for Damages by Representative of Deceased—Representative Domiciled and Resident in Foreign Country.—The representative of an alien whose death on the high seas has been caused by the negligence of a British subject cannot maintain an

action for damages under the Fatal Accidents Act, 1846, known as Lord Campbell's Act, when such representative was domiciled and resident in a foreign country. *Adam v. British and Foreign Steamship Co.*, 67 L. J. Q.B. 844; [1898] 2 Q.B. 430; 79 L. T. 31; 8 Asp. M.C., 420—Darling, J.

— The representative of an alien whose death on the high seas has been caused by the negligence of a British subject can maintain an action for damages under the Fatal Accidents Act, 1846 (known as Lord Campbell's Act), when such alien was and his representative is resident in a foreign country. *Adam v. British and Foreign Steamship Co.* (67 L. J. Q.B. 844; [1898] 2 Q.B. 430) dissented from. *Davidsson v. Hill*, 70 L. J. K.B. 788; [1901] 2 K.B. 606; 85 L. T. 118; 49 W. R. 630; 9 Asp. M.C. 223—D.

14. OTHER MATTERS.

Acceptance of Money in Full Discharge.—See ACCORD AND SATISFACTION.

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— **Defective Cistern.**—See *Blake v. Woolf*, 67 L. J. Q.B. 813, *ante*, LANDLORD AND TENANT.

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See also LOCAL GOVERNMENT; MASTER AND SERVANT; PRINCIPAL AND AGENT.

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English Company—Debenture Payable to Bearer—Transfer by Delivery—Mercantile Usage.—Where a mercantile usage to treat as negotiable the debentures of an English company has been proved, the Court will give effect to such usage, notwithstanding that it

may be of recent origin only. *Crouch v. Credit Foncier of England* (42 L. J. Q.B. 183; L. R. 8 Q.B. 374) discussed and questioned. *Bechuanaland Exploration Co. v. London Trading Bank*, 67 L. J. Q.B. 987; [1898] 2 Q.B. 658; 79 L. T. 270—Kennedy, J.

Debenture Payable to Bearer—Transfer—Mercantile Usage.—Where a mercantile usage to treat as negotiable the debentures of an English or foreign company has been proved, the Court will give effect to such usage notwithstanding that it may be of recent origin only. *Edelstein v. Schuler*, 71 L. J. K.B. 572; [1902] 2 K.B. 144; 87 L. T. 204; 50 W. R. 493; 7 Com. Cas. 172—Bigham, J.

Judicial Notice.—It is no longer necessary to tender evidence as to the negotiability of bearer bonds, foreign or English. The existence of the usage has been so often proved that it must now be taken to be part of the law of which the Courts ought to take judicial notice. *Ib.*

The decision of KENNEDY, J., in *Bechuanaland Exploration Co. v. London Trading Bank* (67 L. J. Q.B. 986; [1898] 2 Q.B. 658), approved of and followed. *Ib.*

Assignment of Debt—Notice.—See ASSIGNMENT.

Share Warrant to Bearer—English Company.—A share warrant to bearer issued by a company registered in England under the Companies Clauses Act, 1867, the warrant certifying that the bearer is entitled to one share in the company, is by mercantile usage a negotiable instrument. *Rumball v. Metropolitan Bank* (2 Q.B. D. 194) followed. *Webb, Hale & Co. v. Alexandria Water Co.*, 93 L. T. 339; 21 T. L. R. 572—D.

NEUTRALITY.

See INTERNATIONAL LAW.

NEWSPAPER.

Sale of—"Publishing"—"Sporting" Paper.—Where an agreement for the sale of a newspaper provided that the vendors would not print or publish any "sporting paper or periodical" within certain limits of space, it was held that, within the meaning of this agreement, a paper was "published" when and where it was offered to the public by the proprietor, and that when copies of the paper were offered for sale or distribution at more than one office, the paper was "published" at each office. *Held, also*, that a paper, being merely a record of amateur sports and deliberately excluding all racing and betting intelligence, was not a "sporting paper" within the meaning of the agreement, although devoted to "sports" in one sense of the term. *McFarlane v. Hulton*, 63 L. J. Ch. 408; [1899] 1 Ch. 884; 80 L. T. 486; 47 W. R. 507—Cozens-Hardy, J.

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NOTARY.

Appointment of—Discretion of Master of Faculties as to Appointments in Colonies—Practice—Costs.—The jurisdiction of the Court of Faculties to appoint notaries public in the colonies is derived from the statute 25 Hen. 8, c. 21, and neither that nor any other statutory enactment prescribes any qualifications to be possessed by applicants, who in all cases are appointed in the discretion of the Master of the Faculties. Where, therefore, a chartered accountant, holding the appointments of official assignee of insolvent estates in the State of Victoria and commissioner for taking affidavits in the Supreme Courts of several States of the Australian Commonwealth, applied to be appointed a notary public for the State of Victoria and supported his application by an influential memorial and the usual certificate of personal fitness, the Master of the Faculties, though the more recent practice had been to appoint solicitors, thought fit in the special circumstances of the case to grant the applicant a faculty for his appointment as prayed. Circumstances which guide the Master of the Faculties in fixing the number of notaries public to be appointed in any particular place where the appointments are made in his discretion. *Bailleau v. Victorian Society of Notaries*, [1904] P. 180; 20 T. L. R. 251—Court of Faculties.

Striking off Roll—Jurisdiction.—The Master of the Court of Faculties has inherent jurisdiction to strike the name of any notary public off the roll of notaries public for misconduct. *Champion, In re*, 75 L. J. P. 45; [1906] P. 86; 22 T. L. R. 264—Court of Faculties.

NOTICE.

Secretary of Two Companies—Knowledge in One Character—Presumption of Notice in Other Character.—Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to

him as secretary of the other company from the mere existence of the common relationship. In order to make it notice, it must be shewn that it was his duty to the first company to communicate his knowledge to the second company. *Fenwick, Stobart & Co., In re; Deep Sea Fishery Co.'s Claim*, 71 L. J. Ch. 321; [1902] 1 Ch. 507; 86 L. T. 193; 9 Manson, 205—Buckley, J.

Assignment, of.]—See ASSIGNMENT; MORTGAGE, col. 1707.

Meeting of Shareholders, of.]—See COMPANY, col. 402.

Mortgage or Charge, of.]—See MORTGAGE, col. 1707.

Quit, to.]—See LANDLORD AND TENANT, col. 1206.

Treat, to.]—See LANDS CLAUSES ACTS.

Trial, of.]—See PRACTICE AND PLEADING.

NOVATION.

See PARTNERSHIP.

NUISANCE.

Collection of Crowd—Injury to Neighbouring Property—Interlocutory Injunction.]—A large number of workmen were employed by the defendants on certain works, in going to and from which the workmen committed several acts of trespass on adjoining land which was not fenced off from the road leading to the works:—Held, that no case had been made out for an interlocutory injunction against the defendants. *Chase v. London County Council*, 62 J. P. 184—Stirling, J.

Electricity—Escape of—Non-Natural User of Property—Leakage—Statutory Powers.]—The principle of *Rylands v. Fletcher* (32 L. J. Ex. 161; L. R. 3 H.L. 330), that an owner, even apart from wilfulness or negligence, who brings on his land something which is itself dangerous and may become mischievous if not kept under control, is liable to a neighbour who is damaged thereby, is not inconsistent with the Roman Dutch law of the Cape Colony, but cannot be so extended as to impose liability when the injury done is in part the consequence of the neighbour's using his own property in a manner which creates a special susceptibility to the damage done. *Eastern and South African Telegraph Co. v. Cape Town Tramways Companies*, 71 L. J. P.C. 122; [1902] A.C. 381; 86 L. T. 457; 50 W. R. 657—P.C.

Disturbances were caused in the working of the appellants' submarine cables by electricity, stored by the respondents for the propulsion of their tramcars, which had from time to time left the tramway system and caused pecuniary loss to the appellants. There was no defect in the respondents' apparatus, and the escape was the necessary result of its working in accordance with the statutory powers of the respondents:—Held, that the respondents were not liable in damages to the appellants, the escape not being a "leak" which under their Act the respondents were called upon to remedy. *Ib.*

— Vibration and Noise — Electric-Light Station—Ordinary and Reasonable User of Property—Temporary or Occasional Annoyance—Injunction.]—An electric-light company will be restrained by injunction from so using their generating station as to cause serious annoyance, by vibration, noise, and smell, to occupiers of adjoining premises. Such an annoyance is not to be excused on the ground that the defendant is making an ordinary and reasonable use of the land, nor on the ground that the annoyance is temporary and occasional. *Knight v. Isle of Wight Electric Light and Power Co.*, 73 L. J. Ch. 299; 90 L. T. 410; 68 J. P. 266; 2 L. G. R. 390; 20 T. L. R. 173—Joyce, J.

— Injury to Fabric—Temporary Nuisance—Local Authority—Injunction.]—A local authority in London which under a provisional order, containing a clause that the undertakers shall not be exonerated from any action or proceedings for nuisance, has erected works for the supply of electricity, and by vibration and otherwise has caused a nuisance in law materially interfering with the comfort of neighbouring owners and occupiers of houses, is, although a public authority, liable to an injunction to restrain it from carrying on the works at all unless or until it can do so without occasioning a nuisance to the neighbouring owners and occupiers. *Broder v. Saillard* (45 L. J. Ch. 414; 2 Ch. D. 692) and *Bamford v. Turnley* (31 L. J. Q.B. 286; 3 B. & S. 62) applied. *Harrison v. Southwark and Vauxhall Waterworks Co.* (60 L. J. Ch. 630; [1891] 2 Ch. 409) distinguished. *Colwell v. St. Pancras Borough Council*, 73 L. J. Ch. 275; [1904] 1 Ch. 707; 90 L. T. 153; 52 W. R. 523; 68 J. P. 286; 2 L. G. R. 518; 20 T. L. R. 236—Joyce, J.

— Statutory Monopoly—Combination of Two Undertakings—Condition Imposed on One Undertaking—Application of Condition to the Other Undertaking.]—The appellants were incorporated by the Demerara Electric Ordinance, 1899, and by an order of 1899, which authorised them to "supply energy for all public and private purposes," they were not to be exonerated from any proceedings for nuisance. On the same day as that on which the order was obtained, the appellants were granted a licence under the Tramways Ordinance, 1899, for the supply of electricity as a motive and lighting power, "anything in any Ordinance of the Colony notwithstanding." The two undertakings were combined into one system and under one roof:—Held, that the appellants were not relieved by the words "anything in any Ordinance of the Colony notwithstanding" from the obligation imposed by the contemporaneous instrument, the Order of 1899, which applied to the production of electricity for every purpose, motive power as well as lighting and heating. *Demerara Electric Co. v. White*, 76 L. J. P.C. 54; [1907] A.C. 330; 96 L. T. 752—P.C.

Fence Adjoining Highway Defective—Injury by Fence Falling on Child Climbing upon it.]—The plaintiff, a boy of the age of four years, while passing along a highway, climbed upon a fence situate upon the defendant's adjoining land and separating it from the highway, for the purpose of looking at other boys at play on the further side of the fence, and not for the

purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell upon the plaintiff and injured him:—*Held*, in an action to recover damages for the injury, that, as the plaintiff in climbing upon the fence was merely indulging the natural instinct of a boy of his age, and doing an act which the defendant ought to have contemplated as likely to be done by children using the highway, the defendant was not entitled to avail himself of the defence that the injury was caused by the plaintiff's own act, and that the plaintiff was entitled to recover. *Harrold v. Watney*, 67 L. J. Q.B. 771; [1898] 2 Q.B. 320; 78 L. T. 788; 46 W. R. 642—C.A. See also LOCAL GOVERNMENT; METROPOLIS.

Heat—Flat—Alteration of Premises—Reasonable User.—The Court, in determining whether the user by a person of a building occupied by him constitutes an actionable nuisance to his neighbour, must have regard to the question whether he is using the building in a reasonable and usual manner for the ordinary purposes for which it was intended. *Dicta* of Kekewich, J., as to reasonable user, in *Reinhardt v. Mentasti* (58 L. J. Ch. 787, 789; 42 Ch. D. 685, 690), dissented from. *Sanders-Clark v. Grosvenor Mansions Co.*, 69 L. J. Ch. 579; [1900] 2 Ch. 373; 82 L. T. 758; 48 W. R. 570—Buckley, J.

Molestation—Watching and Besetting Workmen.—Watching and besetting workmen will support an action for nuisance at common law, to which proof that the watching and besetting was for the purpose of peaceful persuasion would be no defence. *Lyons v. Wilkins*, 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339—C.A.

Noise—Working Machinery—Neighbouring Houses—District where Noisy Trades Prevalent—Substantial Addition to Noise—Injunction.—The plaintiff had for about seventeen years resided with his family in a house in Gough Square, Fleet Street, and had carried on in a shop on the ground-floor his business of a dairyman. In September, 1904, the defendants, who were printers and publishers, went into occupation of an adjoining house, and set up and worked there machinery for the purpose of their business. The plaintiff alleged that the noise produced by the working of this machinery penetrated into his house at night as well as in the daytime, and caused a nuisance, and he claimed an injunction. The defendants denied the plaintiff's allegations, alleged that their machinery was of the most modern type and was properly fixed, and also that the plaintiff's premises were situated in the heart of a district which was almost entirely devoted to the printing and allied trades. The evidence was that there were printing works in the neighbourhood of the plaintiff's house at some of which work was done at night, but that until the defendants occupied their house no noise came from that house. The Judge at the trial found that, although in the daytime the plaintiff must always have been subject to noise from printing works in his neighbourhood, no disturbance at night was so caused; that, as regards ordinary working hours in the daytime he had not proved such a substantial addition to pre-existing noises as would amount to a legal

nuisance; but the night working of the defendant's machinery (which was carefully and properly worked) caused a serious disturbance to the plaintiff and his family such as had not previously been experienced by them:—*Held*, that the plaintiff was entitled to an injunction to restrain the defendants from so carrying on their printing works at the house in question as by reason of noise to cause a nuisance to the plaintiff as occupier of the adjoining house, or to his family. The principles laid down in *St. Helens Smelting Co. v. Tipping* (35 L. J. Q.B. 66, 72, 73; 11 H.L. C. 642, 650, 653) and *Sturges v. Bridgman* (48 L. J. Ch. 785, 791; 11 Ch. D. 852, 865) applied. *Crump v. Lambert* (L. R. 3 Eq. 409) discussed by VAUGHAN WILLIAMS, L.J. *Rushmer v. Polsue & Alfieri, Lim.*, 75 L. J. Ch. 79; [1906] 1 Ch. 234; 93 L. T. 823; 54 W. R. 161; 22 T. L. R. 139—C.A.

Per STIRLING, L.J., and COZENS-HARDY, L.J. —A person who resides in a neighbourhood devoted to a particular trade must put up with a certain amount of noise caused by that trade being carried on, and the standard of comfort must vary according to the situation of the property and the class of persons who inhabit it; but there may be such an addition to the noise as with the noise already existing will be more than a person can be reasonably expected to endure even in the particular district, and which will amount to a legal nuisance; and it would be no answer to say that the neighbourhood is noisy and the machinery which caused the additional noise was first-class machinery and properly worked. *Id.* On appeal to the HOUSE OF LORDS, THE HOUSE dismissed the appeal, being of opinion, as a matter of fact, that the appellants' machinery added so greatly to the noise as to constitute a nuisance. *Polsue & Alfieri v. Rushmer*, 76 L. J. Ch. 365; [1907] A.C. 121; 96 L. T. 510; 23 T. L. R. 362—H.L. (E.)

Injunction—Amount of Damages.—Where a plaintiff in an action for nuisance by noise and vibration claims an injunction which, or its equivalent undertaking, is granted by the Court, and also asks for general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something, not as compensation, but acknowledgment of the wrong he has suffered. *Lipman v. Pulman*, 91 L. T. 132—Kekewich, J.

Noxious Fumes—Reasonable Use of Property—Injunction.—A "reasonable" nuisance has no existence in law. *Att.-Gen. v. Cole*, 70 L. J. Ch. 148; [1901] 1 Ch. 205; 83 L. T. 725; 65 J. P. 88—Kekewich, J.

If a man so carries on his business as to create a nuisance he is acting unreasonably, and ought to be restrained by injunction. *Reinhardt v. Mentasti* (58 L. J. Ch. 787; 42 Ch. D. 685) explained. *Id.*

Overhanging Branches of Trees—Damage.—An action for an injunction will lie against a person who allows the branches of his trees to overhang his neighbour's land, whereby his neighbour's trees are damaged. *Smith v. Giddy*, 73 L. J. K.B. 894; [1904] 2 K.B. 448; 91 L. T. 296; 53 W. R. 207; 20 T. L. R. 596—D.

Pigs—Keeping—Public Nuisance—Abatement—Costs.—The defendants kept some hundreds of pigs in a farmstead contiguous to a village street, feeding them partly on wash from London hotels. Residents within two hundred yards of the farmstead having complained of noxious smells alleged to arise from the pigs and their food, an action to restrain a public nuisance was brought, on the relation of the local authority. Witnesses for the defence, some of whom lived on the premises, attributed the smells wholly to defects in the sewer in the street, and experts testified to the careful manner in which, since action brought, the pigs had been kept:—*Held*, that a public nuisance had been created by the defendants, but had been abated; that no injunction nor leave to apply for one in case of recurrence should be granted; and that both parties should pay their own costs. *Att.-Gen. v. Squires*, 5 L. G. R. 99—Swinfen Eady, J.

Pollution of Water by Gas—Evidence.—The plaintiffs were the owner and occupiers of two houses which obtained their water supply from a well by means of a pipe laid in the main road and belonging to the owner of the houses. The defendants were a gas company incorporated under Acts of Parliament, and owned gas mains and pipes which were laid in the same road. In an action by the plaintiffs to restrain the company from polluting the water supply with gas escaping from their pipes, which the plaintiffs alleged to be defective,—*Held*, that the defendants had no statutory authority to create a nuisance, and that there was a nuisance; as, however, it had ceased after action brought, there would be no injunction, but a declaration that the defendants were not entitled to pollute the plaintiffs' water. *Held* also, that evidence was inadmissible on the following three points raised by the defendants—first, that their pipes were well laid and they had a statutory right to do what they did, some escape of gas being unavoidable; secondly, that the plaintiffs' water pipe was defective; thirdly, that the plaintiffs' water supply was otherwise unfit for domestic purposes. *Batcheller v. Tunbridge Wells Gas Co.*, 84 L. T. 765; 65 J. P. 680—Farwell, J.

Pollution of Oyster Beds by Sewage—Right to Drain into the Sea—Injuring Oyster Bed—By-law of Local Fisheries Committee.—At common law there is no right to discharge sewage into the sea so as to cause nuisance to another, neither does any such right exist under the Public Health Act, 1848, or the Public Health Act, 1875. If the sewage pollutes an oyster bed in a fishery this amounts to an injury to the bed within section 53 of the Sea Fisheries Act, 1868; and where a local fisheries committee have made a by-law under the Sea Fisheries Regulation Act, 1888, prohibiting the deposit or discharge of any substance detrimental to sea fish or sea fishing, such pollution is also illegal as a breach of the by-law. *Hobart v. Southend-on-Sea Corporation*, 75 L. J. K.B. 805; 94 L. T. 337; 54 W. R. 454; 70 J. P. 192; 4 L. G. R. 757; 22 T. L. R. 307—Buckley, J. Compromised in C.A., 22 T. L. R. 530.

Prescriptive Right to Discharge Sewage into Existing Sewers—Injunction.—Even if householders have a prescriptive right to dis-

charge their sewage into existing sewers, an injunction may, notwithstanding *Harrington (Earl) v. Derby Corporation* (74 L. J. Ch. 219; [1905] 1 Ch. 205), be granted to restrain a nuisance by pollution arising from the sewage if, on the facts of the case, it does not appear that any interference with such rights will result from the injunction. *Ib.* See also *FISHERY*.

Pollution by Sewage from Houses Discharged on to Land—Permission by Owner of Land to Corporation to Discharge Surface-water on to Land—Injunction—Costs.—By permission of the plaintiff the Corporation of C. had for many years discharged surface-water from a public road into a pond on the plaintiff's land through a drain belonging to the corporation. Subsequently, as the drain became offensive, the water was at the plaintiff's request diverted into a cesspool made by the corporation on his land. By direction of the corporation the defendant H. connected some newly built houses belonging to him with the drain, and the sewage from these houses was accordingly discharged into the plaintiff's lands through the drain. No permission was given by the plaintiff for this to be done:—*Held*, that the plaintiff was entitled to an injunction against the corporation and H., restraining them from discharging the sewage on his land, and to a mandatory injunction to disconnect the houses from the drain, but that the corporation should pay the costs both of the plaintiff and H. *Gibbings v. Hungerford*, [1904] 1 Ir. R. 211—C.A.

Racecourse—Sunday Racing—Noise and Disturbance to Residents and Worshippers in Churches.—Injunction granted to restrain horse races from being held on Sunday on a racecourse adjoining a residential locality, it being shewn to the satisfaction of the Court that the quiet and comfortable enjoyment of their houses by the inhabitants in the neighbourhood was interfered with, and the services in churches in the locality interrupted, by the shouting and cheering of the crowds collected on the course and the cries of the bookmakers, and also that the public thoroughfares leading to the racecourse were obstructed by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fares. *Dewar v. City and Suburban Racecourse Co.*, [1899] 1 Ir. R. 345—V.C.

Smallpox Hospital—Apprehended Danger—Quia Timet Action—Aërial Convection—Empirical Opinions—Evidence—Admissibility.—In a *quia timet* action to restrain the use of a building as a smallpox hospital, the plaintiffs, relying on evidence in support of the theory of aërial convection and on the empirical opinions of experts founded upon other cases of smallpox hospitals, attempted to establish the proposition that all smallpox hospitals necessarily constituted a serious danger to the health of persons resident, working, or passing by within a certain radius of the hospital. The defendants called evidence to rebut both the contentions of the plaintiffs:—*Held*, that, in the absence of a consensus of expert opinion upon the questions in dispute, the theory of aërial convection was not proven, and that the inference which the Court was asked to draw from what had happened in other cases was destroyed by the negative instances adduced by

the defendants, and that consequently the plaintiffs' claim failed. *Att.-Gen. v. Nottingham Corporation*, 73 L. J. Ch. 512; [1904] 1 Ch. 673; 90 L. T. 303; 52 W. R. 231; 63 J. P. 125; 2 L. G. R. 698; 20 T. L. R. 257—Farwell, J.

Quære, whether the admission of evidence-in-chief of what had happened with other hospitals, although allowed in deference to the opinion expressed in *Hill v. Metropolitan Asylum District Managers* (42 L. T. 212; 47 L. T. 29), is not wrong in principle as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties. *Ib.*

— **Residential District—Conflicting Evidence.**—The defendants had commenced to erect a smallpox hospital. Within a quarter of a mile of the building there were 137 houses with about 753 inhabitants, and within half a mile there were 422 houses with about 2,321 inhabitants and four public institutions with about 361 residents. There was nothing to shew that the defendants were precluded from selecting a site outside their respective districts, if necessary, or that they had attempted to do so. There was conflicting expert evidence as to the suitability of the site selected, and as to the risk of the spread of smallpox from a small-pox hospital by reason of the possibility of the disease being carried, without actual contact, through the air for a considerable distance:—*Held*, that an injunction to restrain the erection of a smallpox hospital should not be granted. *Att.-Gen. v. Rathmines and Pembroke Hospital Board*, [1904] 1 Ir. R. 161—C.A.

Subsidence of Neighbouring Land—Causing Soil and Water.—Beneath the surface where were the plaintiff's houses and the defendants' works was a stratum of running silt, and the land on which the plaintiff's houses stood was supported by this stratum of silt, and the earth above and below it. The defendants in excavating their own land for the purpose of their works reached down to and cut through this stratum of silt, with the result that the land under the plaintiff's houses subsided and the subsidence caused damage. There was a conflict of evidence as to how far this running silt was liquid rather than solid—that is, whether it was muddy water or wet sand:—*Held* (*dissentiente* VAUGHAN WILLIAMS, L.J.), that the damage to the plaintiff's houses was caused by the withdrawal of sand or soil in the shape of silt from under his land owing to the acts of the defendants on their land, and what the defendants had done was an actionable nuisance at common law. *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692—C.A.

Held, by VAUGHAN WILLIAMS, L.J., that the subsidence of the plaintiff's land had been caused merely by the withdrawal of water support produced by the excavations of the defendants on their own land, that the plaintiff had no right to support by water, and what the defendants had done was not actionable. *Ib.*

Per LINDLEY, M.R., and RIGBY, L.J.—Whether *Popplewell v. Hodgkinson* (38 L. J. Ex. 126; L. R. 4 Ex. 246) is an authority that

under no circumstances can there be a right to support to land from underground water, *quære. Ib.*

Per VAUGHAN WILLIAMS, L.J.—*Popplewell v. Hodgkinson* is a clear authority that there is so such right, and that a landowner is under no obligation at common law so to deal with his land as not to withdraw water support from the land of another person. *Ib.*

Black Smoke, &c.]—See LOCAL GOVERNMENT, col. 1367; and METROPOLIS, col. 1633.

Fishery, to.]—See FISHERY.

Order for Abatement.]—See LOCAL GOVERNMENT.

Powers of Local Authorities.]—See LOCAL GOVERNMENT; METROPOLIS.

Smoke-emission by Locomotives.]—See RAILWAY.

Statutory Powers—Electric Supply.]—See STATUTE.

Traffic on Highway.]—See WAY. *See also* LOCAL GOVERNMENT and METROPOLIS.

NULLITY.

See HUSBAND AND WIFE.

OATHS.

See EVIDENCE.

OBSCENITY.

See CRIMINAL LAW, col. 644.

ORDERS.

See JUDGMENT; PRACTICE—APPEAL.

OVERSEERS.

See POOR LAW.

OYSTERS.

See FISHERY and NUISANCE.

PARISH.

Council.]—See LOCAL GOVERNMENT, col. 1306.

Ecclesiastical.]—See ECCLESIASTICAL LAW.

PARLIAMENT.

- Statute.]—5 Edw. 7 c. 5 is *Mr. Speaker's Retirement Act*, 1905.

Railway—Parliamentary Deposit—Abandonment without Act of Abandonment—Payment out.]—Parliamentary deposits made to secure the completion by any company of any undertaking authorised by Parliament, or by any certificate issued under the authority of an Act of Parliament, will be paid out of Court on petition under the Parliamentary Deposits and Bonds Act, 1892, on evidence of the abandonment of the undertaking, without the previous obtaining from Parliament of a special Act of abandonment. *Torrington and Okehampton Railway Bill, In re*, 76 L. J. Ch. 175; [1907] 1 Ch. 186—Neville, J. And see *Hoare v. Plymouth & North Devon Railway*, 21 T. L. R. 165.

Selling Intoxicating Liquor without Licence—House of Commons Bar—Sale by Servant—Liability.]—A servant of the House of Commons who, while serving at a bar within the precincts of the House, sells intoxicating liquor to a person who is not a member of the House, is not liable to be convicted under section 3 of the Licensing Act, 1872, of selling by retail intoxicating liquor without being duly licensed. But *semble* that the Licensing Acts are applicable to the Houses of Parliament. *Williamson v. Norris*, 68 L. J. Q.B. 31; [1899] 1 Q.B. 7; 79 L. T. 415; 19 Cox C.C. 203—D.

Registration of Voters.]—See ELECTION LAW.

Right of Peer to Vote.]—See PEERAGE.

PARTICULARS.

Claim, of.]—See PRACTICE.

Sale, on.]—See VENDOR AND PURCHASER.

PARTIES.

See PRACTICE.

PARTITION.

Action—Conversion—Order for Sale—Sale at Request of all Parties.]—Where a sale of freehold lands in which an infant is interested is ordered in a partition action, but the order for sale is not founded on the infant's interest, there is no conversion of his share, and in the event of his death under age his share of the proceeds of sale will devolve as realty and not as money. It is immaterial that the infant has joined with the other persons interested in requesting a sale in lieu of partition. *Norton, In re; Norton v. Norton*, 69 L. J. Ch. 31; [1900] 1 Ch. 101; 81 L. T. 724; 48 W. R. 140—Byrne, J.

— **Form of Judgment—Permanent Improvements.]**—Minutes of judgment approved by the Court in a partition action directing an account and enquiry as to expenditure in per-

manent improvements. *Williams v. Williams*, 68 L. J. Ch. 528—Kekewich, J.

— **Payment to Persons Absolutely Entitled—Trustees with Power of Sale with Consent.]**—An order in a partition action ordering payment of the proceeds of sale of real estate to trustees with power of sale with the consent of the tenant for life of the hereditaments sold, and made in the presence of the trustees and the tenant for life, is a payment to persons "becoming absolutely entitled," and the proceeds of sale subsequently devolve as personality. *Hobson's Trusts, In re* (47 L. J. Ch. 310; 7 Ch. D. 708), followed as binding on a Court of first instance, notwithstanding the criticisms in *Smith, In re* (58 L. J. Ch. 108; 40 Ch. D. 386). *Morgan, In re; Smith v. May*, 69 L. J. Ch. 735; [1900] 2 Ch. 474; 48 W. R. 670—Stirling, J.

Legal Mortgage of Share by one Co-owner—Mortgagor in Possession of the Entirety—Occupation Rent—Set-off as against Mortgagee.]—Where one co-owner of real property executed a legal mortgage of his share and remained in possession of the entirety of the property, but not as tenant or bailiff of his co-owners, and in a partition action the chief clerk, in answer to an enquiry directed by the judgment, found that a certain sum was due from the co-owner for rent in respect of his occupation of the premises, and the property was sold, such sum cannot be set off as against the co-owner's share of the proceeds to the prejudice of his mortgagee. *Heckles v. Heckles* (W. N. (1892), p. 188) commented on. *Hill v. Hickin*, 66 L. J. Ch. 717; [1897] 2 Ch. 579; 77 L. T. 127; 46 W. R. 137—Stirling, J.

Sale in Lieu of Partition—Tenant of Undivided Moiety.]—An order for sale in lieu of partition can be made under the Partition Acts where the plaintiffs are the owners of one undivided moiety of the premises and the sole defendant is the lessee of the other undivided moiety under a lease for seven years granted by the owner of that moiety. *Mason v. Keays*, 78 L. T. 33—C.A.

Sale—Mortgages on Shares—One Set of Costs in respect of each Share—Discretion.]—In an action for sale and distribution of the proceeds in lieu of partition, it appeared from the chief clerk's certificate that six persons were beneficially interested in the property, and that some had mortgaged their shares. The property was sold and the proceeds paid into Court to the credit of the action, and invested in New Consols. Upon the further consideration of the action, the question was raised whether each mortgagee who had been served with notice of the proceedings and attended ought to be allowed a separate set of costs out of the fund in Court before distribution thereof, or whether only one set of costs should be allowed out of the fund in respect of each share:—*Held*, that only one set of the costs should, as a general rule, be allowed out of the fund in respect of each share, but that the Court had a discretion in the matter. *Vase, In re; Langrish v. Vase*, 84 L. T. 761—Cozens-Hardy, J.

— **Infants Entitled to Undivided Share—**

Trustees for Purchaser—Direction as to Conveyance—Form of Order.]—Where an action was brought by infants to obtain a sale in lieu of a partition of certain freeholds of which they were entitled to one undivided third, the Court made an order declaring that upon any sale being made such of the parties interested as were infants would be trustees for the purchaser, and appointing the next friend of the infants to convey their share or shares to the purchaser. *Davis v. Ingram*, 66 L. J. Ch. 386; [1897] 1 Ch. 477—Kekewich, J.

Sale not Claimed—Defendant's Objection to Partition—Costs to Date of Hearing.]—The owners of five equal undivided twelfth shares in certain freehold properties brought a partition action against the owners of the remaining seven-twelfths, but did not ask for a sale. The defendants objected to partition. An order for partition with the usual enquiries having been agreed to, the question arose as to how the costs up to the date of the hearing should be borne, it being agreed that subsequent costs must be shared rateably between plaintiffs and defendants:—*Held*, that, having regard to the circumstances of the case, there should be no order as to costs up to the date of the hearing of the action. *Hills v. Archer*, 91 L. T. 166—Farwell, J.

Costs—Enquiries—Discretion of Court.]—In a partition action the property long ago had been served in moieties, one of which was held by the defendant for life with remainders over, and the other had to be divided among a great number of persons. The parties representing the different aliquot parts appeared in chambers. Subsequently, a partition action was brought, and an ordinary judgment directed with one special enquiry:—*Held*, that, since the Partition Act the usual practice had been to give the costs of all parties out of the proceeds of sale. That Order LXV. rule 14 (b) was not inapplicable to such a case, and that it did not appear that the plaintiffs would suffer any injustice if the ordinary practice were departed from. But that in all the circumstances the usual order as to costs would be made. *Graham v. Clinton (Lord)*, 81 L. T. 717—Stirling, J.

Allowance for Permanent Improvements.]—A tenant in common claiming partition is entitled to be allowed for permanent improvements. *Kenrick v. Mountstephen*, 48 W. R. 141—Cozens-Hardy, J.

PARTNERSHIP.

1. *Statute*, 1768.
2. *Creation of*, 1768.
3. *Articles of*, 1768.
4. *Nomination of New Partner under Articles*, 1771.
5. *Purchase by Partner*, 1771.
6. *Fraud or Wrongful Act of Partner*, 1771.
7. *Profits*, 1773.
8. *Books of Accounts*, 1773.
9. *Share in Partnership*, 1773.
10. *Debts of Partnership*, 1775.
11. *Death of Partner*, 1776.
12. *Goodwill*, 1776.

13. *Dissolution*, 1778.

14. *Name*, 1781.

15. *Action against Firm*, 1782.

16. *Other Matters*, 1782.

1. STATUTE.

7 Edw. 7 c. 24 is the *Limited Partnerships Act*, 1907.

2. CREATION OF.

Advances to Business—Control—Provision that Person Making Advance, &c. is not to be Deemed a Partner.]—The defender let certain premises to A for a term of years, the defender agreeing to advance a large sum for fitting up the premises for the purpose of the business to be carried on therein; the fittings, &c. at the termination of the lease to be the property of the defender in the absence of payment of loan. By a contemporaneous agreement the defender, in addition to the sums to be advanced under the lease as aforesaid, agreed to advance a further sum, the total amount of the advances to be placed to the credit of the defender on loan capital account in connection with the business, and on which he should receive interest at 7½ per cent. per annum, payable monthly. A was, with the consent of the defender, to engage assistants for the business; he was to keep proper books and accounts, devote his whole time to the business, charge same with a certain salary, which might be raised from time to time with the defender's consent. The receipts were to go in paying salaries and current charges, and in payment of interest on the defender's outlays on the loan capital account; and any surplus was to be divided between A in name of profit and the defender in name of extra interest. The defender could in certain events appoint a cashier (whose salary should be paid by A), who should collect all sums and make all payments in connection with the business. The agreement further provided that the defender should not be or be held to be a partner in the business, or liable for its debts or obligations: *Held*, that the defender was a partner in the business, and liable for its debts. *Stewart v. Buchanan*, 6 F. 15—Ct. of Sess.

Holding Out—Name of Individual same Name as Firm.]—Where a person carries on business in the name of an individual with the addition of the words "and Co.," and employs that individual as manager of the business, to whom the entire management of the business is left, that does not amount to a holding out of that person as the sole owner of the business. It may amount to a holding out that he is a partner in the business. *Bevan v. National Bank*, 23 T. L. R. 65—Channell J.

3. ARTICLES OF.

Trading Firm—Auctioneers—Acceptance of Bill of Exchange by One Partner—Adventure outside Partnership Business.]—A firm of auctioneers is not a trading partnership so as to confer upon one partner the power to bind another partner by accepting a bill of exchange, without authority, in the firm name, in respect of an adventure outside the scope of the partnership business. *Wheatley v. Smithers*,

75 L. J. K.B. 627; [1906] 2 K.B. 321; 95 L. T. 96; 54 W. R. 537; 22 T. L. R. 591—D.

Construction — “Professional misconduct” — Dentist — Order of General Medical Council Erasing Names from Register—Report of Dental Committee—Admissibility in Evidence—Judgment in Rem.]—Where two persons, being registered dentists, entered into three separate partnerships with three other persons for carrying on the profession of dentists, under articles which provided respectively that if either partner should be guilty of professional misconduct, or of any act calculated to injure the partnership business, the other partners respectively might determine the partnerships by notice in writing, and the names of those two persons were erased from the Dentists Register by an order of the General Medical Council under the Dentists Act, 1878, upon the ground that, on facts found by the Dental Committee (on whose report the council act), they had been proved guilty of conduct which was “infamous or disgraceful in a professional respect” within section 13 of the Act, they having appeared before the council and having by their counsel admitted that they had been guilty of professional misconduct, and the other partners thereupon gave notices determining their respective partnerships, and actions were brought, in one of which the two persons were defendants and in the other two were plaintiffs, to determine the validity of such notices,—it was *held* by COZENS-HARDY, M.R., and BUCKLEY, L.J., that the order of the General Medical Council was admissible as *prima facie* evidence of conduct which was “infamous or disgraceful in a professional respect,” and, no rebutting evidence having been given, that the statutory misconduct was proved—SIR GORELL BARNES, P., doubting whether the order was admissible as evidence of the existence of professional misconduct, but considering that such misconduct had been proved by the admissions and evidence; and it was further *held* by all the members of the COURT OF APPEAL that no distinction could be drawn between conduct which was disgraceful in a professional respect and professional misconduct within the meaning of the respective articles of partnership, and that consequently the notices were valid. Decision of WARRINGTON, J., in *Clifford v. Timms* (76 L. J. Ch. 265; [1907] 1 Ch. 420) reversed. *Hill v. Clifford*; *Clifford v. Timms*, 76 L. J. Ch. 627; [1907] 2 Ch. 236; 97 L. T. 266; 23 T. L. R. 601—C.A.

Agreement not to Transact Business with “original clients”—Action for Injunction.]—In July, 1880, the plaintiff and the defendant entered into partnership as solicitors. Clause 7 of the partnership agreement provided: “Either party is to be at liberty to transact any business in his own name (if he wishes, to do so), and also to transact any business for any private friends, or poor persons, without charge, he in such case paying all office out-of-pocket expenses.” Clause 8 provided: “Either party is to be at liberty to terminate this agreement by three months’ notice in writing at any time, and in such case neither is to transact any business for, or in any way to influence business with any clients who were original clients of the other.” No notice was given to terminate the partnership, but it was dissolved by mutual consent on August 10, 1889. The plaintiff now

moved for an injunction:—*Held*, that, notwithstanding no notice was given, the eighth clause of the agreement came into operation when the partnership was dissolved on August 10; that “original clients” comprised those who were clients of either plaintiff or defendant before they became partners, and also those for whom the plaintiff or defendant, in pursuance of clause 7, transacted business as for private friends or poor persons. *Badham v. Williams*, 83 L. T. 141—Kekewich, J.

Partnership Continued after Period Fixed for Determination — Pre-emption Clause — Whether Applicable to Partnership at Will.]—In an action for declaration that the partnership between the plaintiff and defendant was dissolved by the issue of the writ, and that the plaintiff was entitled to exercise the rights conferred by clause 25 of the partnership articles for the purchase of the interest of the defendant, it appeared that by the articles the partnership was fixed for ten years from January 1, 1889, unless sooner determined as therein provided. By clause 25 the plaintiff was to be at liberty to determine the partnership by giving the defendant six months’ notice, and whether so determined or by effluxion of time she should have the right to purchase the share of the defendant at a valuation. Since January 1, 1899, the partnership had been carried on on the like terms, as a partnership at will. At the hearing the defendant contended that the continued partnership was not a partnership at will, and that in any event clause 25 was now inapplicable:—*Held*, that such continued partnership was a partnership at will, under section 27 of the Partnership Act, 1890, and that clause 25 was not inconsistent with a partnership at will, and that accordingly the plaintiff was entitled to the declaration as asked. *Brooks v. Brooks*, 85 L. T. 453—Farwell, J.

Auctioneers — Trading Firm — Bill of Exchange—Authority to Bind Firm—Partner to Sign Bills Specified in Partnership Deed — Acceptance by other Partner — Liability to Holder of Bill of Exchange.]—The COURT OF APPEAL, without expressing any opinion as to whether or not the decision of the Divisional Court (75 L. J. K.B. 627; [1906] 2 K.B. 321) that auctioneers are not traders was right, allowed the appeal upon the ground that, as the terms of a certain partnership deed between the defendants shewed that it was contemplated that bills of exchange would be drawn, accepted, and indorsed in the course of carrying on a partnership business of auctioneers, a holder in due course of a bill of exchange accepted by one of the partners in the name of the firm—although by the terms of the deed the other partner only was to sign bills—was entitled to recover in an action upon the bill of exchange. *Wheatley v. Smithers*, 76 L. J. K.B. 900; [1907] 2 K.B. 684; 97 L. T. 418; 23 T. L. R. 585—C.A.

Bill Granted by all Partners of a Firm—Presumption.]—*Semble*, When all the partners of a firm which carries on its business under a descriptive name grant a bill, the presumption is that it is granted for the purposes of the firm, but the contrary may be proved. *Rosslund Cycle Co. v. McCreadie*, [1907] S. C. 1203—Ct. of Sess.

4. NOMINATION OF NEW PARTNER UNDER ARTICLES.

Rights of Person Nominated.]—Where articles of partnership contain power for one partner to nominate and introduce into the firm a person for the whole or any part of his share in the business and the profits thereof, that is a consent by the other partners to admit into partnership any person who is willing to be introduced into the firm and to observe the conditions of his admission; and the nominee, on accepting his nomination, becomes in the eye of the Court a partner, and entitled as against the other partners to such relief as Courts of equity are in the habit of granting to persons who stand in the relationship of partners to others. *Lovegrove v. Nelson* (3 L. J. Ch. 108; 3 Myl. & K. 1, 20) and *England v. Curling* (8 Beav. 129) applied. *Byrne v. Reid*, 71 L. J. Ch. 830; [1902] 2 Ch. 735; 87 L. T. 507; 51 W. R. 52—*per Stirling, L.J.*

5. PURCHASE BY PARTNER.

Purchase without Consent of other Partners—Right of Excluded Partner to Share—Scope of Partnership.]—A partner who on his own account makes a purchase of a property or business which is not within the scope of the partnership and is neither in rivalry or in any way connected with the partnership, and who acts on information not acquired by reason of his position as partner, is not liable to account to his co-partners. *Cassels v. Stewart* (6 App. Cas. 64) followed. *Trimble v. Goldberg*, 75 L. J. P.C. 92; [1906] A.C. 494; 95 L. T. 163; 22 T. L. R. 717—P.C.

Purchase of Freehold by Firm—Misdescription of Purchasers' Name—Evidence of Identity—Legal Estate.]—William Wray carried on business under his own name at Laurel House, North Hill, Highgate, in partnership with his sons and another person. He died in 1885, and his widow was admitted as a partner in his place. The business was carried on as before and under the same name. In 1890 the partners bought a house and paid for it out of the partnership assets. The conveyance was made between the vendor of the one part and "William Wray, of Laurel House, Highgate," of the other part, and the property was conveyed to William Wray in fee-simple:—*Held*, that the legal estate passed by the conveyance to the four partners as joint tenants. *Maugham v. Sharpe* (34 L. J. C.P. 19; 17 C. B. (N.S.) 443) followed. *Wray v. Wray*, 74 L. J. Ch. 687; [1905] 2 Ch. 349; 93 L. T. 304; 54 W. R. 136—Warrington, J.

6. FRAUD OR WRONGFUL ACT OF PARTNER.

Liability of Firm for Partner by Unlawful Means Obtaining Information of Transactions of Competing Trader—Bribery of Trader's Clerk—Partner Acting in Ordinary Course of Business of Firm—Scope of Authority.]—A partner in a firm, carrying on a business similar to that carried on by the plaintiff, bribed a clerk in the employment of the latter to disclose information as to transactions connected with certain contracts of purchase and sale entered into with some of

the plaintiff's customers, and the clerk also abstracted from the plaintiff's office the customers' contract book and disclosed its contents to the partner. In an action against the firm to recover damages for the acts of the partner in inducing the clerk to commit a breach of his contract with the plaintiff not to divulge or make known the secrets of his employer's business, the jury found, *inter alia*, that it was in the course of the business of the firm to obtain by legitimate means information in regard to contracts made and tendered for by competing firms; that the moneys paid to the clerk were paid in consideration of such information and were moneys of the firm, which profited by what the partner had done:—*Held*, that as the partner was acting within the scope of his authority in obtaining the information, although he made use of unlawful means in doing so, the firm were liable for his acts. *Hamlyn v. Houston*, 72 L. J. K.B. 72; [1903] 1 K.B. 81; 87 L. T. 500; 51 W. R. 99—O.A.

— Assignment of Book Debts—Deed Executed by One Partner—Other Partner's Name Added without Knowledge or Consent.]—One of the partners of a firm executed a deed assigning the book debts specified in a schedule to the deed to a creditor of the firm to secure his debt. The deed appeared to be executed by both partners, but the signature of the other partner had been added to the deed without his knowledge or consent, and he had no knowledge of the assignment. The deed was accepted in good faith by the creditor, who gave notice of the assignment to the scheduled debtors. Subsequently a receiving order was made against the firm, and both of the parties became bankrupt:—*Held*, that, whether or not the assignment was a valid deed, it was by virtue of section 6 of the Partnership Act, 1890, effective as an equitable assignment of the book debts, being a document relating to the business of the firm and executed in a manner shewing an intention to bind the firm by a person thereto authorised. *Briggs & Co., In re; Wright, ex parte*, 75 L. J. K.B. 591; [1906] 2 K.B. 209; 95 L. T. 61—Bigham, J.

— Fraud—Contract with Individual before Partnership—Novation—Election to Abide by Contract with Individual.]—Where A has a contract with B, and B takes C into partnership and gives A notice, A has an option whether he will abide by his contract with B alone or accept the liability of the partnership. If he elect to abide by his contract with B, C is not liable for a fraud committed by B against A in respect of the contract, though B was acting within the scope of the partnership business. *British Homes Assurance Corporation v. Paterson*, 71 L. J. Ch. 872; [1902] 2 Ch. 404; 86 L. T. 826; 50 W. R. 612—Farwell, J.

A solicitor who enters into partnership with another solicitor during the negotiation of a mortgage, for which the latter has been specially retained and of which the former was unaware, cannot be made liable for the fraud of his partner in misappropriating the mortgage-money without his knowledge, unless the client, upon learning of the change in the constitution of the firm, has elected to adopt the new firm as his solicitors for the completion of the mortgage. *Ib.*

— **Matter outside Partnership.**—Where a secretaryship held by one partner is included in the partnership business, the partners of the secretary are not liable for fraud committed by him outside his duties as secretary. It is no part of the duties of the secretary of a company to accept conveyances of the company's real estate in his own name. *Tendring Hundred Waterworks Co. v. Jones*, 73 L. J. Ch. 41; [1903] 2 Ch. 615; 52 W. R. 61—Farwell, J.

7. PROFITS.

How Ascertained.—In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received and paid in that year without reference to when the work is done in respect of which the moneys are received. *Badham v. Williams*, 86 L. T. 191—Kekewich, J.

8. BOOKS OF ACCOUNT.

Right of Partners to Inspection by an Agent.—The ordinary right of inspection of partnership books conferred on a partner by articles of partnership, or under the Partnership Act, 1890, s. 24, sub-s. 9, may be exercised by an agent to whom no personal objection can be made, as well as personally. *Bevan v. Webb*, 70 L. J. Ch. 536; [1901] 2 Ch. 59; 84 L. T. 609; 49 W. R. 548—C.A.

9. SHARE IN PARTNERSHIP.

Purchase of—Vendor's Right to Indemnity.—A contract to purchase a share in a partnership implies a contract by the purchaser to indemnify the vendor against the liabilities of the partnership, although the contract is silent on the point and although the purchaser is, under the Partnership Act, 1890, s. 31, not entitled to become a partner. *Dodson v. Downey*, 70 L. J. Ch. 854; [1901] 2 Ch. 620; 85 L. T. 273; 50 W. R. 57—Farwell, J.

Mortgage of—Action by Mortgagee for Account.—One partner, W. S. W., mortgaged his share in the partnership to the knowledge of the other partner, D.:—*Held*, that the partner W. S. W. could not, on the dissolution of the partnership, sell his share to the other partner D. without the consent of the mortgagee. *Watts v. Driscoll*, 82 L. T. 255—Farwell, J. Affirmed, 49 W. R. 146—C.A.

Sale by one Partner to Co-partner—Fiduciary Relation—Duty to Disclose Assets—Action to Set Aside Sale—Consent Order—Confirmation of Sale—Election.—In a transaction between co-partners for the sale by one to the other of a share in the partnership business there is a duty resting on the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows. Unless such information has been furnished the sale is voidable. *Law, In re; Law v. Law*, 74 L. J. Ch. 169; [1905]

1 Ch. 140; 92 L. T. 1; 53 W. R. 227; 21 T. L. R. 102—C.A.

After the sale by one partner to his co-partner of his interest in the partnership business the selling partner discovered that certain partnership assets had not been disclosed to him at the time of the sale, and brought an action for misrepresentation against the purchasing partner. This action was settled by a consent order, by which all charges of fraud were withdrawn and a sum was paid to the selling partner in discharge of every claim between the plaintiff and defendant. The selling partner alleged the subsequent discovery of further assets of the partnership, and brought an action to set aside the sale and the consent order:—*Held*, that the plaintiff had elected not to avoid the transaction, and that the sale could not, after the consent order, be re-opened. *Clough v. London and North-Western Railway* (41 L. J. Ex. 17; L. R. 7 Ex. 26) followed. *Ib.*

Assignment of Share to Stranger—Payment of Salaries to Partners—Right of Assignee to Interfere—"Management or administration of partnership business."—The effect of section 31 of the Partnership Act, 1890, is to substitute the assignee of a share in a partnership for the assignor as the person entitled to such profits as the assignor would have received if there had been no assignment by him of his share, but it gives to the assignee no right to interfere with anything done in the management or administration of the partnership business. *Garwood's Trusts, In re; Garwood v. Paynter*, 72 L. J. Ch. 208; [1903] 1 Ch. 236; 51 W. R. 185—Buckley, J.

Although under section 24 of the Act partners are *prima facie* prohibited from receiving any remuneration for acting in the partnership business, yet where a partner has assigned his share in the partnership assets a *bona fide* arrangement subsequently made between the partners for the payment to themselves of salaries for work done in connection with the partnership business may be supported as against the assignee of the share as an act done in the "management or administration of the partnership business" under section 31, sub-section 1 of the Act. *Ib.*

Partnership at Will—Assignment by Partner of his Share—No Notice.—An agreement between three persons for a partnership at will contained a clause that "in the event of any partner . . . desiring to retire, he shall give one calendar month's notice to allow his shares to be purchased by the remaining partners. . ." The defendant, who was one of the partners, without giving notice as provided by the above clause, sold his share to one of the partners without the knowledge of the other, who only heard of it subsequently. A creditor who did work for the firm after the sale sued the defendant as a partner:—*Held*, that, as the defendant had not complied with the above clause in the partnership agreement, he remained a partner, the mere assignment of his share to one of his co-partners not operating as a dissolution of the partnership. *Sturgeon v. Salmon*, 22 T. L. R. 584—D.

Where at the date of the dissolution the

partnership account with the firm's bank is overdrawn and the account is subsequently continued by the surviving partner in the partnership name, the bank are, in the absence of evidence to the contrary, entitled to assume that the account was continued for the purpose of realisation, and that sums paid into and drawn out of that account by the surviving partner are paid in and drawn out for the purposes of the partnership. The rule in *Clayton's Case* (1 Mer. 572) has no application, and an equitable mortgage by the deposit of the title-deeds of certain real property belonging to the late partnership given by the surviving partner to the bank to secure an overdraft existing at the date of the equitable mortgage is entitled to priority over the lien of the executors of the dead partner. *Ib.*

— **Effect of Assignment of Share.**—Whether in a partnership at will in which there are more than two members an assignment by one of the partners of his share in the partnership to another partner effects a dissolution of partnership, *quære*. *Emanuel v. Symon*, 76 L. J. K.B. 147; [1907] 1 K.B. 285; 96 L. T. 231; 23 T. L. R. 94—Channell, J.

10. DEBTS OF PARTNERSHIP.

Goods Ordered before but Delivered after Death of one Partner—Moneys Received by Surviving Partner and not Accounted for—Liability of Deceased's Estate—"Obligation."—Where F. & Co., a firm of commission agents, in 1894 procured an order for certain goods, and the order was executed by E. & Co., and the goods delivered subsequently to the death of one of the partners in the firm, but in ignorance of his death, and the purchase-money was received by the surviving partner and not accounted for, no "obligation" was incurred by the estate of the deceased partner within section 9 of the Partnership Act, 1890. *Friend, In re; Friend v. Friend*, 66 L. J. Ch. 737; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139—Stirling, J.

— **Liability of Estate of Deceased Partner—"Obligation."**—An action for goods sold and delivered will not lie against the personal representative of a deceased partner to recover the price of goods ordered by the partnership before but not delivered till after the death of the partner. *Bagel v. Miller*, 72 L. J. K.B. 495; [1903] 2 K.B. 212; 88 L. T. 769; 8 Com. Cas. 218—D.

Security by Partner for—Death of Mortgagor—Partnership Assets Sufficient to Pay Joint Debts—Exoneration of Land Charged.—Real estate belonging to a partner and mortgaged by him to secure a partnership debt is not primarily liable to be applied in payment of the mortgage debt. If at the time of the death of that partner the joint assets are sufficient to pay the joint debts in full, no liability in respect of the mortgage falls on his estate. A dispute between the legatees of his personalty and the devisee of the mortgaged land as to the incidence of the liability is therefore not a dispute between "persons claiming through or under the deceased person," within the meaning of Locke-

King's Act, and the legatees cannot call upon the devisee to discharge the mortgage. *Ritson, In re; Ritson v. Ritson*, 68 L. J. Ch. 77; [1899] 1 Ch. 128; 79 L. T. 455; 47 W. R. 213—C.A.

Will of Partner—Specific Devise of Part of Partnership Property—Solvent Partnership—Validity of Devise.—A partner specifically devised his share of certain lands and hereditaments forming part of the partnership property to his executors upon trust for sale and to divide the proceeds amongst certain persons:—*Held*, that this specific devise was valid, and that, the partnership being solvent, the legatees were entitled to take the proceeds of the share so devised free from the partnership debts and liabilities. *Farguhar v. Haddon* (41 L. J. Ch. 260; L. R. 7 Ch. 1) distinguished. *Holland, In re; Brettell v. Holland*, 76 L. J. Ch. 449; [1907] 2 Ch. 88; 97 L. T. 49—Neville, J.

11. DEATH OF PARTNER.

Lien of Executors of Dead Partner—Overdraft at Firm's Bank—Partnership Real Estate—Equitable Mortgage by Surviving Partner—Priority.—Where a partnership between two persons is dissolved by the death of one of the partners, in the absence of anything to the contrary in the partnership articles it is the duty as well as the right of the surviving partner to realise the partnership property, and he may for that purpose not only sell the partnership assets, but he may also mortgage them or any part thereof to secure a partnership debt whether incurred before or after the dissolution, and in this respect there is no difference between real estate held for partnership purposes and personal estate. *Bourne, In re; Bourne v. Bourne*, 75 L. J. Ch. 779; [1906] 2 Ch. 427; 95 L. T. 131; 54 W. R. 559—C.A.

The lien of the executors of the deceased partner in respect of his interest in the partnership does not attach to each particular property belonging to the partnership so as to affect that property in the hands of any person dealing in good faith with the surviving partner, but it is a general lien upon the surplus assets after realisation. *Ib.*

12. GOODWILL.

Death of Partner—Brokers on London Stock Exchange.—There is no objection in law to the existence of a goodwill in a partnership business of brokers on the London Stock Exchange, and, unless provision is made to the contrary in partnership articles, the value of the goodwill must be included among the assets of the partnership. *Wilson v. Williams* (29 L. R. Ir. 176) explained. *Hill v. Fearis*, 74 L. J. Ch. 237; [1905] 1 Ch. 466; 53 W. R. 457; 21 T. L. R. 187—Warrington, J.

Mode of Valuation.—Where under articles of partnership a surviving partner takes over a deceased partner's share at a valuation, the valuation should proceed on the footing that the business is being sold, so that as against the purchaser the surviving partner would be at liberty to carry on a rival business, but not to use the firm name—that name not being iden-

tical with his own—nor to solicit the old customers of the firm. *Jennings v. Jennings* (67 L. J. Ch. 190; [1898] 1 Ch. 378) considered and followed. *David and Matthews, In re*, 68 L. J. Ch. 185; [1899] 1 Ch. 378; 80 L. T. 75; 47 W. R. 813—Romer, J.

Trustee Partner—Employing Assets in Business—Account of Profits.—Under articles of partnership entered into in 1872, C. N. and his brothers E. N. and G. N., with two other persons, became partners for a term of ten years for the carrying on of an already existing business consisting of the manufacture and sale of isinglass, gelatine, and glue. Under the provisions of the articles as modified by a declaration of trust executed by the brothers N. in March, 1877, the capital of any one of the brothers dying during the term was to remain in the business till the expiration of the term, and was then to be held by the survivors on trust to dispose of it as his will should direct. C. N. died in August, 1877, having by his will of the preceding March appointed E. N., G. N., and another executors, and bequeathed to them his capital and shares of profits of the business. Until the expiration of the partnership term the shares of profits were to be divided between testator's children, with provisions for maintenance and accumulation, and thereafter the capital and shares of profits were to be held by the executors on trust to enter into such arrangements as they might think desirable for carrying on the business in partnership with such persons as they might think proper. The testator declared his ultimate object to be the introduction of one or more of his sons into the business, but made provision for the division of the profits on his share among all his children. He left numerous children, most of whom were infants at his death, and on the determination of the partnership in 1882 his share, with accumulations, amounted to about 30,000*l.* The two surviving brothers N. formed a new partnership with another person, and until 1887 employed the testator's share in the business, paying his children interest thereon at 10 per cent. The profits made were much larger. In 1887 the business was converted into a limited company, and the children were allotted 10 per cent. preference shares to the value of the 30,000*l.* at par. In an action by the children of C. N. against E. N. (G. N. having died) claiming a declaration that the defendant was bound to make good the profits made between 1882 and 1887 attributable to the share of C. N. employed in the business and also claiming a share in the goodwill,—*Held*, that the plaintiffs were not entitled to anything in respect of goodwill, and that, with regard to the former part of the claim, the case was not materially different from *Vyse v. Foster* (44 L. J. Ch. 37; L. R. 7 H.L. 318), and that the plaintiffs were not entitled to more than the 10 per cent. which they had received. *Smith v. Nelson*, 92 L. T. 313—Joyce, J.

Soliciting Customers.—Upon the expiration of a partnership between two persons, the partner who has purchased the goodwill and assets of the business under the terms of the articles of partnership can restrain his former partner from soliciting the customers of the old firm, although the articles contain a proviso that nothing therein contained "shall prevent

either partner from starting a similar business in the neighbourhood after the expiration of the partnership." Such a proviso only expresses what the law would have implied. *Trego v. Hunt* (65 L. J. Ch. 1; [1896] A. C. 7) followed. *Pearson v. Pearson* (54 L. J. Ch. 32; 27 Ch. D. 145) explained. *Gillingham v. Beddow*, 69 L. J. Ch. 527; [1900] 2 Ch. 242; 82 L. T. 791; 64 J. P. 617—Cozens-Hardy, J.

13. DISSOLUTION.

Termination by Notice—Arbitration—Sufficiency of Notice—Stay of Proceedings.—Where articles of partnership provide that if any of the partners should be guilty of immorality the other partners may by notice in writing determine the partnership, and that any question whether such a case has happened should be referred to arbitration, and the articles also contain a general clause referring all matters in dispute to arbitration, a question of the sufficiency of a notice to determine the partnership on the ground of immorality is one which should be decided by the Court and not by arbitration, and a stay of proceedings will not be ordered under section 4 of the Arbitration Act, 1889, where such sufficiency is in question in an action. *Barnes v. Youngs*, 67 L. J. Ch. 263; [1898] 1 Ch. 414; 46 W. R. 332—Romer, J.

Validity.—A notice of dissolution of the partnership given under such a power is insufficient if the offending partner has not previously been informed of the cause of complaint and given an opportunity of explaining. *Ib.*

Action for—Professional Misconduct—Dentist.—The publication of statements by a dentist expressed in terms of profuse self-praise and of disparagement of other practitioners held to constitute "professional misconduct" such as to justify a partner, under the terms of a partnership deed, in demanding the dissolution of the partnership. *Clifford v. Timms*, 77 L. J. Ch. 91; [1908] A.C. 12; 98 L. T. 64—H.L. (E.)

—Order by Consent for Sale of Assets to one Partner—No Stipulation as to Goodwill—"Assets"—Right of Vendor to Canvass Old Customers.—On a sale by one of two partners of all his interest in the partnership assets to the other partner, goodwill not being expressly mentioned, the vendor is under an obligation not to canvass the old customers of the firm. *Jennings v. Jennings*, 67 L. J. Ch. 190; [1898] 1 Ch. 378; 77 L. T. 786; 46 W. R. 344—Stirling, J.

Where an action for dissolution of a partnership was compromised on the terms that judgment should be entered for the plaintiff for a particular sum of money, that the partnership should be dissolved, and that the defendant should retain the "assets," but goodwill was not mentioned, the Court in a subsequent action held that the judgment amounted to a sale of the goodwill, and granted an injunction restraining the plaintiff in the previous action from canvassing the old customers of the firm. *Gray v. Smith* (59 L. J. Ch. 145; 43 Ch. D. 208) and *Pearson v. Pearson* (54 L. J. Ch. 32; 27 Ch. D. 145) distinguished. *Ib.*

Receiver and Manager—Management—Interference—Injunction.—Two brothers carried on a business in partnership for some years, when the business began to fail, and one brother brought an action for dissolution of the partnership against the other, to whose mismanagement he attributed the failure. The plaintiff obtained an order appointing a receiver and manager of the business, who dismissed the defendant from the management, and afterwards an order was made for the dissolution of the partnership, the taking of the partnership accounts, and the realisation of the partnership effects. The defendant set up and managed a rival business under a similar name, which he alleged belonged to his sons as partners, and for which his wife and her sisters advanced the capital. On a motion by the plaintiff for an injunction to restrain the defendant from interfering with the management of the old business by the receiver and manager, it was proved that the defendant had spread rumours to the effect that the old business would shortly be closed and sold by auction, and had induced some of the employees of the old business to leave, after giving due notice, and to enter the employment of the new business, and also had attempted to obtain from the landlord the tenancy of a field which had long been in the occupation of the old partnership, and used in the old business:—*Held*, that any act calculated to injure property under the control of the receiver and manager was an interference with the management of the receiver and manager, whom the Court was bound to protect; and an injunction was granted restraining the defendant from interfering with the management of the receiver and manager. *Dixon v. Dixon*, 89 L. T. 272—Swinfen Eady, J.

Action for Partnership Accounts—Partner Appointed Receiver—Debt Due from Receiver as Partner—Inability to Pay—Money in Receiver's Hands—Receiver's Remuneration and Costs—Right to Deduct.—In an action for the usual partnership accounts, the defendant, who was the surviving partner, was appointed receiver on the usual terms to collect and get in the partnership assets. Upon taking the accounts, it appeared that the sum of 1,392*l.* 12*s.* 8*d.* was in the defendant's hands as receiver, and that the defendant was indebted to the partnership to the extent of 1,457*l.* 19*s.* 5*d.*, which he was quite unable to pay. The creditors had received 10*s.* in the pound, and the Master had fixed the defendant's remuneration as receiver at 280*l.* and his costs at 48*l.* 1*s.* 6*d.* On further consideration,—*Held*, that, inasmuch as the receiver was an officer of the Court, and had entered into an arrangement with the Court to do certain work for remuneration, the honour of the Court was involved to see that the arrangement was carried out, and that as the receiver had done his work properly he was entitled to deduct his remuneration and costs out of the money in his hands as receiver, and not merely to set them off against the amount of his indebtedness to the partnership. *Davy v. Scarth*, 75 L. J. Ch. 22; [1906] 1 Ch. 55; 54 W. R. 155—Farwell, J.

Losses and Deficiencies of Capital—Unequal Shares—Distribution of Assets between Partners on Final Settlement of Accounts.—Where partners agree to provide capital in unequal shares,

but to divide net profits equally, and where, on dissolution, there is a deficiency of capital, the true principle as to the distribution of assets available for the partners is, under section 44 of the Partnership Act, 1890, that each partner contribute to the assets an equal share of the deficiency of capital, and that the assets be then applied in paying to each rateably what has been found due to him in respect of capital. *Garner v. Murray*, 73 L. J. Ch. 66; [1904] 1 Ch. 57; 89 L. T. 665; 52 W. R. 208—Joyce, J.

Ascertaining Deceased Partner's Share—Annual General Account—Goodwill—Inclusion in Account.—Articles of partnership provided that a full and general annual account and valuation of all the capital, stock-in-trade, property, profits, moneys, credits, and effects whatsoever of the partnership should be made, and that if a partner should die before the expiration of the partnership his executors, administrators, and assigns should be entitled to such sum of money as his share of the capital and property of the partnership should upon the last general annual account amount to. A partner died during the continuance of the partnership, and his executors claimed that in ascertaining the amount of his share they were entitled to have a sum for the goodwill of the partnership business, which was of considerable value, included in the account and valuation. The articles contained no express provision as to the goodwill. On a summons taken out to determine whether they were entitled to have a sum for the goodwill included,—*Held*, that there was no material difference between the present case and *Stewart v. Gladstone* (10 Ch. D. 626), and, the principle of that decision being that, where the accounts from which the sum to be paid is to be ascertained are accounts for the purpose of ascertaining profits, the goodwill is not to be included, a sum for the goodwill ought not to be included in the account. *Scott v. Scott*, 89 L. T. 582—Joyce, J.

Mortgage of Partner's Share—Purchase of Mortgaged Share by Partner—Rights of Mortgagee—Account.—Under sub-section 2 of section 31 of the Partnership Act, 1890, the assignee of a share in a partnership business is entitled upon a dissolution of the partnership to receive the actual share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and to an account for the purpose of ascertaining that share. Therefore, where partners have knowledge of an assignment of a share, any arrangement between them for a dissolution of the partnership upon the terms of the share of the assigning partner being purchased by the other partner at a price agreed upon between them, would not be binding upon the assignee if made without his consent. *Watts v. Driscoll*, 70 L. J. Ch. 157; [1901] 1 Ch. 294; 84 L. T. 97; 49 W. R. 146—C.A.

Expulsion Clause—Conduct Detrimental to Partnership or Flagrant Breach of any Duties of a Partner—Travelling without a Ticket—Conviction at Police Court—Injunction to Restrain Expulsion.—Three persons carried on business as general drapers under a deed of partnership which empowered the managing partner, in the event of either of the other partners being addicted to conduct detrimental

to the plaintiff's business, or being guilty of any flagrant breach of any of the duties of a partner, to remove the offending partner from the partnership, on giving him not less than six days' notice in writing, and the partnership, as regards such partner, was to determine on the expiration of the notice. One of the partners was convicted for travelling on a railway without a ticket with intent to avoid payment, and the managing partner having thereupon given him formal notice determining the partnership, he brought an action against the managing partner for a declaration that the notice of dissolution was void:—*Held*, that the case was exactly within the expulsion clause, and that there was ample justification for the notice of dissolution. *Carmichael v. Evans*, 73 L. J. Ch. 329; [1904] 1 Ch. 486; 90 L. T. 573; 20 T. L. R. 267—Byrne, J.

Action Against, on Dissolution.—See *Wenham, In re*, 69 L. J. Q.B. 803, *ante*, BANKRUPTCY.

14. NAME.

Covenant by Partner against Trading after Determination of Partnership—Assignment of Goodwill—Benefit of Covenant.—A covenant by a man with his partner that he will not after the determination of the partnership carry on a similar business within certain limits, is incident to the business and constitutes an asset of the partnership, and the benefit of the covenant will pass on an assignment by the partners of their respective shares in the goodwill of the business, so that the covenantee cannot afterwards restrain the covenantor, who ultimately purchases the goodwill from the assignee, from carrying on the business or using the trade name of the original partnership. *Townsend v. Jarman*, 69 L. J. Ch. 823; [1900] 2 Ch. 698; 83 L. T. 366; 49 W. R. 158—Farwell, J.

A company incorporated under the Companies Act, 1862, does not by the addition of the word "limited" to the trade name of a business purchased and subsequently carried on by the company prejudice the company's power to transmit to a purchaser from it the right to the original trade name. *Ib.*

Grantor's Name on Freehold—Right to Compel Erasure.—A trader who assigns the goodwill of his business and conveys his freehold business premises to a purchaser unconditionally cannot afterwards compel the purchaser to erase from the freehold the name of the trader carved thereon, notwithstanding that the purchaser is not trading under that name, and that the name was not the trade name of the original business.

Solicitors—Right to Use Firm Name.—On dissolution of a partnership between solicitors, in the absence of express stipulation, each partner is entitled to use the old firm name, provided such use does not expose the other partners to liability or risk. Risk for this purpose means appreciable risk in a business sense. *Burchell v. Wilde*, 69 L. J. Ch. 314; [1900] 1 Ch. 551; 82 L. T. 576; 48 W. R. 491—O.A.

A firm of solicitors carried on business as "Burchell & Co." The firm consisted of two

persons named Burchell and W. In 1899 the partnership was dissolved by consent, it being agreed that the existing business should be divided between the Burchells and W., but nothing in terms was said as to the use of the firm name. The Burchells were carrying on business as "Burchells & Co.," and W. carried on business in partnership with his son—first, as "Burchell & Co.," and now as "Burchell, W. & Co."—*Held*, that the Burchells were not entitled to restrain W. and his son from practising under the style of "Burchell & Co.," or any other style of which "Burchell" formed part. *Ib.*

15. ACTION AGAINST FIRM.

Action in Firm Name—Execution of Judgment—Claim to Issue Execution "against any other person as being a member of the firm"—Issue to Determine Liability of such Person—Liability of Person by having held Himself out as a Partner.—Where the plaintiff in an action brought against partners in the firm name, who has obtained judgment against the firm, claims to be entitled under Order XLVIII.A, rule 8, to issue execution against a person, who has not been served with the writ in the action, as being a member of the firm, and an issue is directed to try the liability of such person, the plaintiff is entitled upon the trial of such issue to shew that such person is liable to the plaintiff by reason of his having held himself out as a partner. *Davis v. Hyman*, 72 L. J. K.B. 426; [1903] 1 K.B. 854; 88 L. T. 284; 51 W. R. 598—C.A.

Receiver—Judgment Order in Subsequent Action against Firm—Charging Order.—By a judgment in an action in the Chancery Division the partnership carried on under the name of S. & Co. was dissolved, and a receiver and manager was appointed. Subsequently D., a creditor, without knowledge of these proceedings, sued the firm in the King's Bench Division on certain bills of exchange accepted by the firm for partnership purposes, and served one partner only, who entered an appearance, and obtained judgment for the sum due and costs. D. then having become aware of this action, applied in it for leave to issue execution, notwithstanding the possession of the receiver, which leave was accordingly granted, and a charging order obtained. On a motion on behalf of the partner not served with the writ in the action in the King's Bench Division to discharge the charging order for irregularity,—*Held*, that the motion was, in effect, to obtain a declaration that the judgment of the King's Bench Division was void, and that there was no jurisdiction to so hold; that Order XLVIII.A, rules 1 and 3, were intended for the protection of the individual partner, and not of the assets of the firm; that, therefore, the order previously made in chambers following the terms of that in *Kewney v. Attrill* (55 L. T. R. 805) would stand, and the motion be refused with costs. *Brand v. Sandground*, 85 L. T. 517—Farwell, J.

16. OTHER MATTERS.

Action against.—See PRACTICE (PARTIES).

Authority of Partner to Receive Payment of

Debt.—See *Powell v. Brodhurst*, 70 L. J. Ch. 587, *ante*, MORTGAGE.

Bankruptcy—Proof in.—See BANKRUPTCY.

Contribution — Gaming Transaction.—See GAMING.

Death of Partner—Effect on Contract.—See CONTRACT.

Hackney Carriage — Metropolis — Registered Proprietor—Liability of Partner.—See HACKNEY CARRIAGE.

Lease of Partnership Premises—Purchase by Partner of Freehold Reversion—Validity.—See *Bevan v. Webb*, 74 L. J. Ch. 300, *post*, TRUST.

Retirement of Partner—Money Lent to Firm by Trustees.—See TRUST.

Surrender of Interest in Mining Lease.—See *Palmer v. Moore*, 69 L. J. P.C. 64, *ante*, COLONY.

PARTY-WALL.

See BOUNDARIES, LOCAL GOVERNMENT, and METROPOLIS.

PATENTS.

1. *Statutes*, 1783.
2. *Statute of Monopolies*, 1783.
3. *Grant*, 1784.
4. *Validity*, 1785.
5. *Amendment of Specification*, 1787.
6. *Petition for Revocation*, 1788.
7. *Assignment*, 1789.
8. *Infringement*, 1790.
9. *Threatening Proceedings*, 1798.
10. *Prolongation*, 1799.
11. *Secret Process*, 1800.
12. *Patent Agent*, 1800.

1. STATUTES.

Patents.—2 Edw. 7 c. 34 is the *Patents Act*, 1902.

International Arrangements.—1 Edw. 7 c. 18 is the *Patents Act*, 1901.

Patents and Designs.—7 Edw. 7 c. 29 is the *Patents and Designs Act*, 1907.

2. STATUTE OF MONOPOLIES.

Invalid Patent — "Pretext of monopoly" — Action for Treble Damages—Saving Clause as to New Inventions — Construction.—The proviso contained in section 6 of the Statute of Monopolies, 1623, which exempts letters patent for new inventions from the operation of the Act,

is to be construed as including in the exemption letters patent for new inventions which, by reason of some defect in the specification capable of amendment by disclaimer, cannot for the time being, and until the necessary disclaimer has been filed, be enforced. *Peck v. Hindes*, 67 L. J. Q.B. 272—Mathew, J.

Prior User—User not Amounting to Publication—Statute of Monopolies (21 Jac. 1 c. 3), s. 6.—Under section 6 of the Statute of Monopolies there may be a user, not amounting to publication, by a third person of the process for which a patent is claimed so as to render the patent invalid. *Robertson v. Purdey*, 23 T. L. R. 343—Parker, J.

Action for Declaration of Invalidity.—See *North-Eastern Marine Engineering Co. v. Leeds Forge Co.*, 75 L. J. Ch. 178.

3. GRANT.

Opposition—Invention Previously Patented—Opponent not Interested in Prior Patent—Right of Opponent to be Heard.—The question whether a person who has, under section 11, sub-section 1 of the Patents, Designs, and Trade Marks Act, 1883, given notice of opposition to the grant of a patent on the ground that the alleged invention has been patented in this country on an application of prior date, may be heard before the Comptroller-General, is one to be decided ultimately by the law officer of the Crown. *Reg. v. Comptroller-General of Patents; Tomlinson, ex parte*, 68 L. J. Q.B. 563; [1899] 1 Q.B. 909; 80 L. T. 777; 47 W. R. 567—C.A.

Where the Comptroller-General, after consulting the law officer, declined to hear such a person on the ground that he had no interest in the prior patent, the Court refused to compel him by *mandamus* to do so. *Ib.*

"Exercise."—In the grant of letters patent of the sole authority "to make, use, exercise, and vend" an invention, the word "exercise" means "put in practice." *Saccharin Corporation v. Reitmeyer*, 69 L. J. Ch. 761; [1900] 2 Ch. 659; 83 L. T. 397; 49 W. R. 199—Cozens-Hardy, J.

Sale and Delivery Abroad—Contract in England.—The principle laid down in *Elmslie v. Boursier* (39 L. J. Ch. 328; L. R. 9 Eq. 217) and *Von Heyden v. Neustadt* (50 L. J. Ch. 126; 14 Ch. D. 230), that the importation into and sale in England of an article manufactured abroad according to a process protected by an English patent is an infringement of the patent, does not apply to a case where the defendant in an action for infringement has as commission agent entered into an agreement for delivery of the article at a foreign port, but has not himself either imported into or sold in England the infringing article. Such a defendant will not be deemed to have "exercised" the invention. *Ib.*

Grant to Two, their Executors, Administrators, and Assigns—Joint Tenancy—Agreement for Sale—Construction—Covenant by Vendors—Joint or Several.—Certain patents were granted to two persons, their executors, administrators,

and assigns. The patentees entered into an agreement under seal for the sale of the patents to the plaintiff company, and the agreement provided that the vendors should establish a title to the patents, and assign and transfer the same to the company, and that "such assignments respectively shall contain a covenant by the said vendors" that the patents were valid, "and also such other covenants and provisions as may be reasonably required by the said company for giving effect to the sale hereby agreed to be made":—*Held*, that the true construction of the agreement was that the vendors had jointly covenanted to assign the patents, and that such assignments should contain joint and several covenants by them that the patents were valid; and the rights of the company against the personal representative of one of the vendors who had died before any assignment had been made must be ascertained upon that footing. *National Society for the Distribution of Electricity v. Gibbs*, 69 L. J. Ch. 457; [1900] 2 Ch. 280; 82 L. T. 443; 48 W. R. 499—C.A.

4. VALIDITY.

Insufficiency of Specification.—The owners of a patent for a wheel-rim of a particular shape intended to hold a solid indiarubber tyre without pinching or cutting it, and without wires or bands to hold it in its place, claimed the wheel-rim in combination with a tyre fitted into it, but not the tyre without the rim, and brought an action against a firm of indiarubber merchants for infringement of their patent. The specification said that the tyre was to be made so as to "approximately fit" the rim; but it appeared that while the base of the rim was flat the tyre would have to be made convex where it fitted on to the base of the rim, and would also have to be somewhat longer than the base of the rim, and would require to be forced into the rim by machinery:—*Held*, that the specification did not particularly describe and ascertain the nature of the invention, and the manner in which it was performed, and that the patent was therefore bad. *Sirdar Rubber Co. v. Wallington*, 97 L. T. 113—H.L. (E.)

Novelty—Combination—Subject-matter—Supplying and Fitting New Component Part—Repair—Infringement.—Decision of SWINFEN EADY, J. (74 L. J. Ch. 315; [1905] 1 Ch. 451), affirmed on the ground that the plaintiffs' patent was invalid, without deciding whether the fitting by the defendants of a new rubber tyre to an old patent rim of the plaintiffs was merely fair repair and not a repair amounting to a reconstruction so as to infringe the plaintiffs' patent, if it were a valid patent. *Sirdar Rubber Co. v. Wallington*, 75 L. J. Ch. 233; [1906] 1 Ch. 252; 94 L. T. 183; 22 T. L. R. 246—C.A.

Combination of Two Old Machines—Want of Invention—Validity.—The Court held that a patent for the combination of two well-known printing machines, erected end-on with a space between them, and a single or double longitudinal folding machine placed in the space for folding the paper web or webs and passing the same on to any other machine, either for transverse folding, cutting, or delivery, or any two or all three of these operations or processes, was not a valid patent, upon the ground that

such an arrangement, having regard to the state of knowledge at the time, required no substantial exercise of invention, and did not furnish sufficient subject-matter for a patent. *Northern Press and Engineering Co. v. Hoe*, 22 T. L. R. 723—C.A.

Combination of Elements of Mechanism in Prior Use.—In an action by the patentee of a meat-slicing machine against an alleged infringer, it was proved that each element in the mechanism of the machine was known and had been in use prior to the date of the patent, but that the machine, when patented, was the only known and workable meat-slicing machine, and had been a great commercial success:—*Held*, that the patent was valid, in respect that the patentee had shewn inventive skill in combining and adapting known mechanical elements to produce a machine which efficiently attained a result not previously accomplished so effectively. *Van Berkel v. Simpson*, [1907] S.C. 165—Ct. of Sess.

Specification—Claim for Machine and Claim for Parts—Parts not Novel.—A patentee in his specification claimed first for a machine for slicing meat, consisting of a combination of certain specified mechanical parts and movements, and, under subsequent heads of the specification, also claimed certain of the parts and movements "in a slicing machine of the kind described," and "substantially as and for the purposes" described in the earlier portion of the specification. It was proved that the parts and movements so claimed were known and used prior to the date of the patent, and it was maintained that the claims for these component parts and movements rendered the whole specification invalid:—*Held*, first, on a construction of the specification, that the component parts and movements were claimed not substantially or independently as subordinate integers, but merely as subsidiary or appendant to the principal claim (namely, the adaptation and combination of the parts to constitute the machine claimed); and therefore, secondly, that the subsequent claims for component parts were mere surplusage and did not invalidate the specification. *Ib.*

Mechanical Equivalents—Anticipation.—In an action by the patentee of a machine for slicing meat against an alleged infringer, the defendant maintained—first, that his machine was not in fact an infringement of the plaintiff's patent; and secondly, that the plaintiff's whole invention had been anticipated by Kolbe's patent. Kolbe's patent was a machine for cutting bread:—*Held*—first, that the defendant's machine was an infringement of the plaintiff's patent in respect that his machine was substantially similar to that of the plaintiff, and designed to serve the same purpose; and that, in so far as there existed differences between the machines, these differences consisted merely in the use by the defendant of mechanical equivalents of parts of the plaintiff's machine; and secondly, that the plaintiff's patent had not been anticipated by Kolbe's patent, in respect that that patent differed essentially as regards an important part of its mechanism from the plaintiff's patent, and was not designed to perform, or capable of performing, the operation of meat slicing. *Ib.*

"Utility."—"Utility," in patent law, does not mean either abstract utility, or comparative utility, or commercial utility. *Welsbach Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co.*, 69 L. J. Ch. 343; [1900] 1 Ch. 343; 82 L. T. 293; 48 W. R. 362—Buckley, J.

An invention is useful if it provides a thing better in some respects though worse in others than what is already known. Thus, a mode of producing illuminant appliances more durable than those previously known, or which offers to the public a new choice of materials to be used in the production of illuminant appliances, is patentable, although the new appliance is less illuminant than the old one. *Id.*

Costs—Validity of Patent Questioned in Previous Action—Certificate—Solicitor and Client Costs.—An action commenced but not determined at the time a certificate in another action is obtained is not a "subsequent action for infringement" within the meaning of section 31 of the Patents, Designs, and Trade Marks Act, 1883, and the plaintiff cannot claim solicitor-and-client costs on the production of the certificate of the first determined action. *Automatic Weighing-Machine Co. v. Combined Weighing-Machine Co.* (6 Rep. Pat. Cas. 475) followed. *Saccharin Corp. v. Anglo-Continental Chemical Works*, 70 L. J. Ch. 194; [1901] 1 Ch. 414; 48 W. R. 444—Buckley, J.

5. AMENDMENT OF SPECIFICATION.

Application for Leave to Apply to Amend Specification—"Disclaimer"—"Correction or explanation."—The word "disclaimer" in section 19 of the Patents &c. Act, 1883, is to be construed strictly, and is not to be read as extending to "correction or explanation." Where, therefore, proceedings for the revocation of a patent were pending, the Court refused to make an order giving the patentee liberty to apply at the Patent Office for leave to amend his specification by way of correction. *Lang's Patent, In re* (7 Rep. Pat. Cas. 469), and *Gaulard and Gibbs's Patent, In re* (57 L. J. Ch. 209; 5 Rep. Pat. Cas. 192), discussed and distinguished; *Owen's Patent, In re*, 68 L. J. Ch. 63; [1899] 1 Ch. 157; 47 W. R. 180; 79 L. T. 458—Stirling, J.

Petition for Revocation Presented after Application to Amend—Jurisdiction of Comptroller.—Where an application for leave to amend a specification has been made, under section 18 of the Patents &c. Act, 1883, the subsequent commencement of an action for infringement or presentation of a petition for revocation of the patent will, notwithstanding the provisions of sub-section 10 of section 18, not deprive the Comptroller of jurisdiction to allow the amendment. Section 19 of the Act, requiring the leave of the Court or a Judge to an application for leave to amend, does not apply to a case where the application has been made, although not finally dealt with, before litigation. *Woolfe v. Automatic Picture-Gallery, Lim.*, 72 L. J. Ch. 84; [1903] 1 Ch. 18; 87 L. T. 539—C.A. Affirming, 51 W. R. 121—Kekewich, J.

Original Claim Framed in Good Faith and with Reasonable Skill and Knowledge.—Where,

in an action for infringement of their patent, patentees have amended the original specification by way of disclaimer under section 19 of the Patents &c. Act, 1883, and established at the trial their claim for an infringement of the amended specification as it stands, the Court will not, for the purpose of certifying under section 20 that the original specification was framed in good faith and with reasonable skill and knowledge, read the erased portions of the specification; to do so would be in effect to allow the plaintiffs to raise a fresh issue after judgment. *Jandus Arc Lamp Co. v. Arc Lamps, Lim.*, 92 L. T. 447; 21 T. L. R. 308—Kekewich, J.

Terms on which Granted—Discretion of Judge.—Where a Judge who hears a petition for revocation of a patent has in the exercise of his discretion given leave to the patentee, under section 19 of the Patents, Designs, and Trade Marks Act, 1883, to apply for leave to amend the specification by disclaimer on certain terms, the Court of Appeal will not review the discretion thus exercised by the Judge in imposing terms. *Geipel's Patent, In re*, 73 L. J. Ch. 215; [1904] 1 Ch. 239; 90 L. T. 70; 52 W. R. 339—C.A.

6. PETITION FOR REVOCATION.

Disclaimer—Leave to Amend Specification—Terms.—On a petition for revocation of a patent, where the petitioner had made use of such parts of the patent as by disclaimer would become good, leave was given to the patentee to amend the patent by disclaimer, on the terms that he should ask for no injunction in any action brought for infringement of the patent in respect of articles made prior to the date of the leave, unless he should establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. *Deeley v. Perkes* (65 L. J. Ch. 912; [1896] A.C. 496) and *Pitt's Patent, In re; Luddington Cigarette Co. v. Baron Cigarette Co.* (69 L. J. Ch. 321; [1900] 1 Ch. 508), see col. 1795, applied. *Geipel's Patent, In re*, 73 L. J. Ch. 47; [1903] 2 Ch. 715; 89 L. T. 127; 52 W. R. 63—Buckley, J.

Amendment of Specification—Disclaimer—Application for Liberty to Apply—Tribunal to Determine as to Disclaimer.—Upon an application under section 19 of the Patents Act, 1883, for liberty to apply at the Patent Office for leave to amend a specification by way of disclaimer the Court should be informed generally as to the nature of the amendment proposed, and if it sees clearly that it is not an amendment by way of disclaimer it ought not to give leave; but where from a perusal of the specification the Court is not satisfied that the proposed amendment is not one by way of disclaimer it ought not to refuse leave to the patentee to apply at the Patent Office, which is the proper tribunal for determining such a question. The view taken in *Armstrong's Patent, In re; Yates v. Armstrong* (14 Rep. Pat. Cas. 747, 754), and in *Chatwood's Patent, In re* (16 Rep. Pat. Cas. 370), approved. *Alsop's Patent, In re*, 75 L. J. Ch. 184; [1906] 1 Ch. 85; 94 L. T. 38; 54 W. R. 323; 22 T. L. R. 157—C.A.

Evidence as to Prior User—Admissibility of

Evidence.—Where a single instance of prior user is relied on to support a petition for the revocation of a patent, and a witness thereto gives in cross-examination other instances of prior user, evidence cannot be called to disprove these other instances, for, although the result might be to discredit the witness, yet such evidence would be as to matters not relevant to the issue before the Court. *Haggenmacher's Patent, In re*, 67 L. J. Ch. 675; [1898] 2 Ch. 280—Romer, J.

Consent Order — Application in Court.—A petition for the revocation of a patent should be heard in open Court, and not in chambers, even by consent. *Scott's Patent, In re* (20 Rep. Pat. Cas. 604), commented on. *Clifton's Patent, In re*, 73 L. J. Ch. 597; [1904] 2 Ch. 357; 91 L. T. 284; 52 W. R. 629—Buckley, J.

7. ASSIGNMENT.

Agreement for—Notice—Subsequent Licence to Manufacture — Registration — Equities — Priority.—Where the owner of a patent has entered into an agreement to assign it for value, and express notice of such agreement has been given to persons who subsequently obtain a licence from the owner for value, and register it before the registration of the agreement, the fact of such notice will enable the assignees of the patent under the agreement to set up their prior equity against the licensees, by virtue of the proviso in section 87 of the Patents Act, 1883, which proviso keeps open all equities in respect of registered patents, so that they may be enforced in like manner as in respect of other personal property. *New Ixion Tyre and Cycle Co. v. Spilsbury*, 67 L. J. Ch. 557; [1898] 2 Ch. 484; 79 L. T. 229—C.A. Affirming, 46 W. R. 567—Kekewich, J.

Assignment of Provisional Protection—Assignee's Right to Sue.—An assignment of the provisional protection acquired by the application for a patent does not constitute a legal assignment of the patent when granted, but merely confers an equitable right to have the patent assigned. Accordingly, the assignee of a provisional protection cannot, before the patent has been actually assigned to him, sue for infringement of the patent without joining the patentee as a party to the action, either as plaintiff or defendant. *Bowden's Patents Syndicate, Lim. v. Smith*, 73 L. J. Ch. 522; [1904] 2 Ch. 86; 52 W. R. 630—Warrington, J. Appeal dismissed. See s.c. *sub tit.* APPEAL.

Distress for Rent—Patented Chattel—Sale to Purchaser with Notice of Restrictions on User.—The purchaser of a patented article at a sale of a distress for rent does not acquire the right to use the article, in breach of a contract entered into by the tenant with the patentee restricting the right to use the article, if at the time of purchase he has notice of the contract. *British Mutoscope and Biograph Co. v. Homer*, 70 L. J. Ch. 279; [1901] 1 Ch. 671; 84 L. T. 26; 49 W. R. 277—Farwell, J.

Sale in England of Article Manufactured Abroad by Use of Patented Process with Subsequent Use of other Processes.—The importation and sale in England of a chemical product made abroad by

subjecting a body prepared according to a process patented in this country to further chemical treatment so as materially to alter its chemical composition is an infringement of the English patent. *Elmslie v. Boursier* (89 L. J. Ch. 328; L. R. 9 Eq. 217) and *Von Heyden v. Neustadt* (50 L. J. Ch. 126; 14 Ch. D. 230) followed. *Saccharin Corporation v. Anglo-Continental Chemical Works*, 70 L. J. Ch. 194; [1901] 1 Ch. 414; 48 W. R. 444—Buckley, J.

Sale of Patent by Company in Winding-up—Dissolution of Company—Vesting Order.—See *General Accident Assurance Corporation, In re, ante*, COMPANY, col. 483.

9. INFRINGEMENT.

Article made Abroad—Transmission by Post to England—Injunction against Sender—Jurisdiction.—A foreign manufacturer, who manufactures abroad, and sends by post at their request to a firm in England articles which infringe an English patent, does not himself infringe the patent, and is not liable to an injunction restraining infringement in an action by the owner of the English patent. *Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler*, 67 L. J. Ch. 141; [1898] A.C. 200; 77 L. T. 573; 46 W. R. 255—H.L. (E.)

The Court has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country. *Ib.*

Exercise and Vend—Contract in England—Delivery of Goods Abroad.—The respondent contracted in England to sell to a purchaser in England goods manufactured abroad according to an invention protected by the appellants' English patent, and pursuant to the contract completed the sale by delivery of the goods to the purchaser's order in Switzerland. The purchaser afterwards imported the goods into England.—*Held*, that there had been no infringement of the appellant's patent by the respondent. *Badische Anilin- und Soda-Fabrik v. Hickson*, 75 L. J. Ch. 621; [1906] A.C. 419; 95 L. T. 68; 22 T. L. R. 641—H.L. (E.) Affirming, 54 W. R. 174—C.A.

Importation of Patented Articles Before and After the Expiration of Patent—Loss—Measure of Damages.—The plaintiffs were the owners of a patent of the United Kingdom for improvements in the insulation of electric cables. The defendant company entered into a contract during the continuance of the patent with an American company for the supply of cables similar to those protected by the patent, some of which were delivered to the defendant company during the continuance of the patent, the remainder being delivered after its expiration. It was conceded at the trial that the delivery of cables by the American company to the defendants during the continuance of the patent was an infringement.—*Held*, that damages should be awarded only upon the cables actually delivered during the continuance of the patent, and should not be extended to the whole profit which might have been made if the contract had been entered into with the plaintiffs instead of with the American company. *British Insulated Wire Co. v. Dublin United Tramways Co.*, [1900] 1 Ir. R. 287—V.O.

Infringing Articles Bought in England—Articles sent Abroad for Sale There—"Exercise"—"Use"—"Put in practice"—Measure of Damages.]—The defendants purchased in England twenty-seven articles which had been made in infringement of the plaintiffs' patent. They sold seven of them and used another in England. The remaining nineteen they sent to their branch house in France, where the article was not patented, and sold them there to various foreign persons;—*Held*, that there had been an infringement of the plaintiffs' patent in respect of all the twenty-seven articles, and that in estimating the damages the test was what the defendants would have had to pay for the permission to do that which they did wrongfully. *British Motor Syndicate v. Taylor*, 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183—C.A.

Per LORD ALVERSTONE, C.J.—It was not intended in *Minter v. Williams* (5 L. J. K.B. 60; 4 Ad. & E. 251) to lay down as a rule of law that the exposure for sale of a patented article by a person not having a licence from the owner of the patent could not be an infringement of the patent. If the decision could bear that construction it ought to be overruled. *Per* VAUGHAN WILLIAMS, L.J.—It was intended in *Minter v. Williams* to lay down the above rule, and the case was wrongly decided. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—Mere possession of a patented article need not necessarily constitute a user, but acquisition and possession of such an article for trade purposes constitute a user, whatever the nature of the article may be. *Ib.*

Combination—Manufacture and Sale of Component Part—Infringement—Intention.]—The mere manufacture and sale of an article, part of a combination patent, is not an infringement of that patent even if the article has no use except for the purpose of infringement. *Townsend v. Haworth* (48 L. J. Ch. 770n.; 12 Ch. D. 831n.) followed. *Sikes v. Howarth* (48 L. J. Ch. 769; 12 Ch. D. 826) distinguished. *Dunlop Pneumatic Tyre Co. v. Moseley*, 73 L. J. Ch. 417; [1904] 1 Ch. 612; 91 L.T. 40; 52 W. R. 454; 20 T. L. R. 814—C.A.

Combination—Subject-matter—Supplying and Fitting New Component Part—Repair not Reconstruction.]—A patentee by his specification claimed to have invented a wheel rim of a particular shape intended to receive a solid rubber tyre. The merit claimed for the invention was that the rim would hold the tyre without pinching and without the aid of inextensible wires. The patentee made separate claims for the rim, and the rim in combination with the tyre, but made no claim for the tyre itself. The defendants made a new rubber tyre and fitted it to an old patent rim of the plaintiffs, the owners of the patent, to replace a previous tyre which had become worn out. In an action brought by the plaintiffs for infringement,—*Held*, that what the defendants had done was a fair repair, and not a repair amounting to a reconstruction and a new article, and that there was therefore no infringement. *Held*, also, that, assuming the claim for the rim to be valid, the claim for the combination of the rim with the rubber tyre was invalid, inasmuch as that was the

only and obvious manner in which the rim was intended to be used, and that there was no invention or merit in the combination apart from the novelty in the shape of the rim itself. *Sirdar Rubber Co. v. Wallington*, 74 L. J. Ch. 315; [1905] 1 Ch. 451; 92 L. T. 564; 53 W. R. 346; 21 T. L. R. 283—Swinfen Eady, J.

Chemical Process—Use Abroad—Part of Manufacture of Commercial Article—Sale in England—Infringement.]—The sale in England of an article imported from abroad, in the manufacture of which a process patented in this country has been used, is an infringement of the patent, even although the process is only the first part of the manufacture, which also consists of subsequent processes not patented. *Saccharin Corporation v. Anglo-Continental Chemical Works*, 48 W. R. 444—Buckley, J.

Repair of Patented Article—Work Done at Instance of Plaintiff's Agent—Intention to Continue Infringement—Injunction.]—In an action for infringement of a patent, where the infringement complained of is making a new patented article under guise of repairing an old one, the only question is whether the defendant has exceeded the fair limits of repair. The sale of a patented article gives no licence to use its materials separately, and the use of some part of an old purchased patented article in making a new one is no defence, even where the patent is for a combination, in which the old part used is the only novelty. *Dunlop Pneumatic Tyre Co. v. Neal*, 68 L. J. Ch. 578; [1899] 1 Ch. 807; 80 L. T. 746; 47 W. R. 632—North, J.

The accepting in the ordinary way of business of one order to execute repairs amounting to making a new article is evidence of intention to continue doing so, which may justify an injunction. The fact that the act complained of was done on the order of the plaintiff's agent is no defence, unless that agent had authority to order, and did order, the actual work done. *Kelly v. Batchelar* (10 Rep. Pat. Cas. 289) distinguished. *Ib.*

Master or Pioneer Patent—Mechanical Equivalent.]—B. patented an invention for the economy of steam in steam steering-engines by means of a cut-off valve actuated by the control valve. The object of the invention was to prevent the loss of steam during the intervals in steering when the engine was at rest. Prior patentees had used the same and other similar mechanical devices for the economy of steam in engines of various kinds while at work, but the application of this device to an engine at rest was a novelty, and the result attained—the economy of steam while the engine was at rest—had never been achieved before. In a question with the holder of a patent of later date for a device, also designed to prevent the escape of steam from steam steering-engines when the engine was at rest, but using to obtain that result a stop valve worked in unison with the control valve by a steam relay instead of a stop valve worked by the direct mechanical action of the control valve,—*Held*, that B.'s patent was a master or pioneer patent, and that the new patent was an infringement. *Brown v. Hastie & Co.*, 7 F. 97—Ct. of Sess.

Application of Known Principles—Omission in
20—2

Infringing Machine of Material Part of Patent.]

—Where the merit of a patented invention consists in the idea or principle embodied in it, and not merely in the means used to carry the principle into effect, there may be an infringement in the application of the principle by other methods. But where there is no new idea, but only a new combination of old ideas, in the patented article, there is no infringement where some only of the means are used, but a material element is omitted. *Consolidated Car Heating Co. v. Came*, 72 L. J. P.C. 110; [1903] A.C. 509; 89 L. T. 224—P.C.

Restricted Licence to Sell—Purchaser Ignorant of Restriction—Implied Licence—Estoppel—Liability of Purchaser.]

—If a patentee sells the patented article imposing no restriction or condition at the time of sale he cannot impose a condition subsequently, by delivery of the goods with the condition indorsed on them, and unless the purchaser knows of a condition and buys subject to it he has the benefit of an implied licence to use the article free from restrictions. If, on the other hand, the purchaser buys from the holder of a conditional licence, nothing turns on the question whether the purchaser knows of the condition or not, and he is an infringer if he exceeds the limits of the licence, even innocently and ignorantly. *Badische Anilin- und Soda-Fabrik v. Isler*, 75 L. J. Ch. 411; [1906] 1 Ch. 605; 94 L. T. 367; 22 T. L. R. 326—Buckley, J. This decision was affirmed on the facts, the Court holding that the only restrictions on the licence to sell the patented article were those contained in the labels attached to the tins. *Badische Anilin- und Soda-Fabrik v. Isler*, 75 L. J. Ch. 749; [1906] 2 Ch. 443; 95 L. T. 273; 22 T. L. R. 710—C. A.

But the patentee may be estopped from denying that the purchaser is licensed to use the article. *Ib.*

Patentees of certain drystuffs in 1888 agreed to grant to a society a licence to manufacture them and sell them to consumers only, not to persons who sold again. They agreed to grant to the society licences in regard to any further patents for dyes which they might take out. In 1892 they took out such a patent, but never granted any express licence in regard to it. The patentees and the society both sold the dye manufactured under the patent of 1892 with a label stating that purchasers were not licensed to re-sell it except in the unopened original package, in an unchanged condition, and with the labels intact. A dealer procured the dye first from the society, and afterwards from other firms, and re-sold it. He was ignorant that the society's licence was restricted. In an action for infringement brought against him by the patentees, *Held*, that, whatever were the terms between the patentees and the society, the patentees could not, on the doctrine of *Incandescent Gas Light Co. v. Cantelo* (12 Rep. Pat. Cas. 262), set up against the defendant that the licence was other than a licence to sell, subject only to the restrictions in the label; that the implied licence was a licence to the society to sell subject to those restrictions, and to no others; and that the defendant, therefore, had not infringed. *Ib.*

Action—Numerous Separate Patents—Joinder**of Causes of Action—Limitation of Claim.]**

Where an action is brought for the alleged infringement of numerous different letters patent all relating to the same process of manufacture, the order limiting the number of letters patent to be sued upon should not be qualified by the words "in the first instance." *Saccharin Corporation v. White*, 88 L. T. 850—C.A.

— Several Patents Covering every known Mode of Production—Evidence of Infringement—Damages—Injunction.]

Where a plaintiff is entitled to several patents, which between them cover every possible method of production of a particular article, he is entitled to damages for infringement against a person selling such article, on proof that one of the patents must have been infringed, without shewing which. *Saccharin Corporation v. Quincey*, 69 L. J. Ch. 580; [1900] 2 Ch. 246; 82 L. T. 792; 64 J. P. 633—Cozens-Hardy, J.

He is not entitled to an injunction if one of the patents has expired before the hearing. *Ib.*

— Anticipation—Prior Publication—International Convention.]

On February 28, 1894, W. applied in the United States for protection for an invention. On March 16, 1894, M. published in England an invention. On September 1, 1894, W. applied in England for a patent for his invention. On June 20, 1895, he applied, claiming the benefit of section 103 of the Patents, Designs, and Trade Marks Act, 1883, to have his patent dated February 28, 1894. On June 27, 1895, he lodged his complete specification, which was accepted on November 30, 1895, and letters patent were granted dated September 1, 1894. In an action by W.'s successors for infringement, the defendant alleged M.'s publication to be an anticipation of W.'s patent:—*Held*, that W.'s patent was rightly dated September 1, 1894, as W. had not applied for the benefit of section 103 within seven months of his foreign application. But, whether rightly dated or not, the date actually appearing on the letters patent was conclusive that the defendant was entitled to give evidence that M.'s publication was in fact an anticipation of W.'s invention. *Acetylene Illuminating Co. v. United Alkali Co.*, 71 L. J. Ch. 301; [1902] 1 Ch. 494; 50 W. R. 861—Buckley, J.

— Certificate that Validity of Patent had come in Question.]

Where the Court holds that a patent is invalid it will refuse to certify under section 31 of the Act that the validity of the patent came in question. *Haslam Co. v. Hall* (5 Rep. Pat. Cas. 1, 27), not followed on this point. *Ib.*

— Certificate that Particulars of Objections are Reasonable—Costs.]

On an application by a defendant under section 29 of the Patents, Designs, and Trade Marks Act, 1883, for a certificate that the particulars of objections delivered by him are reasonable and proper, the Court will distinguish between what are objections to the validity of the patent and what are merely matters of evidence, and will not allow the costs of the latter. *Ib.*

Appeal by the plaintiff against a decision of Buckley, J., dismissing the plaintiff's action (71 L. J. Ch. 301; [1902] 1 Ch. 494) dismissed.

Acetylene Illuminating Co. v. United Alkali Co.,
72 L. J. Ch. 214—C.A.

— **Application for Inspection of Machines Relied on as Anticipating Plaintiff's Patent.**—In an action for infringement of a patent the Court has power, under section 30 of the Patents &c. Act, 1883, to order inspection of a machine in the possession of the defendant relied on as evidence of publication of the alleged invention within the realm prior to the date of the plaintiff's patent. *Garrard v. Edge* (58 L. J. Ch. 397) discussed. *Van Berkel v. Booth*, [1906] 1 Ir. R. 383—M.R.

— **Prosecuting Action with due Diligence—Motion for Injunction to Restrain Threats.**—On April 19, 1904, the plaintiff issued their writ for an injunction to restrain an alleged infringement by the defendants of their letters patent for improvements in golf balls by selling balls known as Springvale Eagle and Springvale Hawk. On June 8, 1904, the plaintiffs inserted in a golfing paper a statement that it had come to their notice that golf balls known as the Springvale Eagle and Springvale Hawk were being offered for sale "in infringement of letters patent belonging to the Haskell Co."; that actions had been commenced to restrain such infringement; and that the plaintiffs would enforce their rights against all persons buying or selling or otherwise dealing in or using such infringing balls. The plaintiffs were also alleged to have issued circulars to dealers in golf balls. On May 20 the plaintiffs delivered their statement of claim. On June 13 the defendants (who had not yet put in their defence) served notice of motion to restrain the plaintiffs until the trial of the action from representing by advertisement or otherwise that the golf balls made and sold by the defendants as Springvale Eagle and Springvale Hawk were infringements of any patent belonging to the plaintiffs:—*Held*, dismissing the motion, that it could not be said that the plaintiffs had not "with due diligence" commenced and prosecuted their action; and secondly, that the advertisements and circulars were not a contempt of Court. *Haskell Golf Ball Co. v. Hutchinson*, 20 T. L. R. 606—Buckley, J. *And see* THREATENING PROCEEDINGS.

— **Petition for Revocation—Application for Leave to Amend Specification—Terms of Leave—Special Circumstances.**—On application for leave to apply to amend a specification under section 19 of the Patents Act, 1883, it is not a matter of course to put the patentee on terms not to bring any action in respect of the future user of machines already made in alleged infringement of the amended specification. Such terms were imposed in *Deeley v. Perkes* (65 L. J. Ch. 912; [1896] A.C. 496), not as common form, but on the special facts of the case. *Luddington Cigarette Machine Co. v. Baron Cigarette Machine Co.*, 69 L. J. Ch. 321; [1900] 1 Ch. 508; 82 L. T. 173; 48 W. R. 505—C.A.

Section 20 of the Patents Act, 1883, applies to all cases where an amendment has been allowed, whether leave was obtained before litigation under section 18, or after litigation under section 19; but the law officers under section 18, or the Court under section 19, may

impose more onerous conditions on the patentee if sufficient reason is shown. *Ib.*

Where patentees of a patent taken out in 1892 brought an action for infringement in 1899, and, the defendants having presented a petition for revocation, applied under section 19 for leave to apply to amend their specification by omitting twenty out of twenty-two claims, and a large number of expensive machines had been placed on the market by the defendants before the commencement of the plaintiff's action, only two small parts of which were in alleged infringement of the amended specification, liberty to apply for leave to amend was only granted on the terms that the plaintiffs should not bring or maintain any action for infringement in respect of any machines, or parts of machines, made prior to the date of the order. *Ib.*

— **Combined Claim—Particulars—Embarrassment.**—Plaintiffs were owners of twenty-three patents for the manufacture of a substance called "Saccharin," and brought an action in which they claimed that the defendants had by the sale of a certain article infringed some of their twenty-three patents, but stated that they were unable to ascertain which had been infringed. The defendants applied for an order limiting the plaintiffs' claim:—*Held*, that the burden was on the plaintiffs in a patent action, just as in any other action, to prove the infringement of their rights; that their claim under all the twenty-three patents was embarrassing to the defendants, who desired to dispute the validity of the patents they were alleged to have infringed; and that the plaintiffs' claim must be limited to such three of their patents as the plaintiffs might select. *Saccharin Corporation v. Wild*, 72 L. J. Ch. 270; [1903] 1 Ch. 410; 88 L. T. 101—C.A.

Per STIRLING, L.J., and COZENS-HARDY, L.J.
—A consent order made before the hearing of the appeal that one of the defendants should make an affidavit disclosing when he had acquired and what he knew of the manufacture of the substance alleged to be an infringement of the plaintiffs' patents is not to be regarded as a precedent in similar cases. *Ib.*

Per COZENS-HARDY, L.J.—Where an order for the making of such an affidavit is made, the affidavit should be treated as conclusive, and not subject to cross-examination before trial. *Ib.*

— **Particulars of Objection—Certificate.**—Where the defendant fails to prove one of his objections to the plaintiff's patent, but his particulars of that objection are necessary for the purpose of the trial, it is the practice to give him a certificate that the particulars were reasonable and proper, so that he may get the costs of them, although the objection itself has failed. *Castner Kellner Alkali Co. v. Commercial Development Corporation*, 68 L. J. Ch. 402; [1899] 1 Ch. 803; 80 L. T. 476; 47 W. R. 534—C.A.

When in an action for infringement of a patent the plaintiffs offer no evidence and the action is dismissed with costs, the Court will not hear evidence that the defendants' particu-

lars of objections were reasonable and proper, and will not grant a certificate under section 29, sub-section 6 of the Patents, Designs, and Trade Marks Act, 1883, to that effect. *American Steel and Wire Co. v. Glover*, 50 W. R. 284—Farwell, J.

— **Discontinuance—Costs—Certificate as to Particulars of Objections being Reasonable and Proper.**—Where the plaintiffs in an action for the infringement of their alleged letters patent gave notice, after delivery of the defendants' particulars of objections, of discontinuance of the action in consequence of another action against other defendants for infringement of the same alleged letters patent having been decided against them, the Court, having no materials before it to enable it to exercise its discretion as to granting a certificate under section 29, sub-section 6 of the Patents Act, 1883, that the particulars of objections were reasonable and proper, so that the defendants might be entitled to the costs of them on taxation, declined to grant such certificate. *Cooper Patent Anchor Rail Joint Co. v. British Electric Equipment Co.*, 95 L. T. 177—C.A.

— **Summons for Leave to Discontinue—Terms—No other Action to be Brought against Defendant in Respect of same Infringements—Correcting Patent—Rules of Supreme Court, Order XXVI. rule 1.**—In an action to restrain the alleged infringement of a patent, the plaintiff, after delivering a reply, discovered that he ran a risk of failing in the action if it were continued without correcting the patent, and applied for leave to discontinue the action:—*Held*, that the leave ought only to be granted on the terms that the plaintiff should not bring any other action against the defendant in respect of any infringement alleged in the present action; since if this term were not imposed the Court would in substance be allowing the plaintiff to correct his patent pending the action. *Robertson v. Purdey*, 75 L. J. Ch. 685; [1906] 2 Ch. 615; 95 L. T. 330—Buckley, J.

— **Compromise—Action Standing Over Generally—Amendment of Specification—Action Pending—Invalidity of Amendment.**—An action for infringement of a patent which, with a view to a compromise between the parties, has with their consent been ordered by the Judge to stand over generally with liberty to either party to apply to restore, and has been allowed to sleep for some years, is an "action for infringement . . . pending," within the meaning of sub-section 10 of section 18 of the Patents &c. Act, 1883, and will render invalid any amendment of the specification applied for and obtained without the order of the Court or Judge under section 19 of the Act, while such action is still pending. *Brooks v. Lycett Saddle and Motor Accessories Co.*, 73 L. J. Ch. 319; [1904] 1 Ch. 512—Farwell, J.

— **Measure of Damages.**—The defendants bought a motor car which was fitted with certain accessories, the accessories being an infringement of the plaintiffs' patent. In an action to recover damages for the infringement, —*Held*, that the measure of damages was the difference between the value of the car with and its value without the accessories. *Clement*

Talbot, Lim. v. Wilson, 97 L. T. 328; 23 T. L. R. 648—Kekewich, J.

— **Account of Profits—Disclosure of Names of Purchasers of Goods.**—Where a patentee has succeeded in an action for infringement of his patent and has obtained an order for an account of profits made by the defendant by selling, supplying, or using the articles infringing the patent, he is entitled to disclosure by the defendant of the names and addresses of the customers of the defendant to whom the infringing articles have been sold. *Saccharin Corporation v. Chemicals and Drugs Co.*, 69 L. J. Ch. 820; [1900] 2 Ch. 556; 83 L. T. 206; 49 W. R. 1—C.A.

10. THREATENING PROCEEDINGS.

Injunction to Restrain—Threats of Proceedings by Persons other than Person Enjoined—Breach of Injunction.—An order restraining the defendant, his servants and agents, from threatening the plaintiffs or any of their customers with "any legal proceedings or liability" in respect of the manufacture, sale, or purchase of a certain patented article is not disobeyed by the circulation by the defendant of a pamphlet with his name thereon as agent for a third person, containing a notice signed by the third person, and stating that he was the exclusive maker of the article, and it was his intention to prosecute all infringers of his patents (*dissentiente CHITTY*, L.J.). *Ellam v. Martyn*, 68 L. J. Ch. 123; 79 L. T. 510; 47 W. R. 212—C.A.

Held, by CHITTY, L.J., agreeing with ROMER, J., that the injunction was not restricted to threats of proceedings to be taken by the defendant himself, and that the circulation of the pamphlet in question was a breach of the injunction. *Ib.*

Request to Cease Sale—Threat of Liability—Action to Restrain—Action for Infringement—Discontinuance—"Due diligence" in Commencement and Prosecution.—On May 24, 1906, the patent agents of the defendant, a *corsetière*, wrote a letter to P. R. & Co., Lim., who were advertising and selling a corset bodice under a trading arrangement with the plaintiffs, calling attention to her patent for a new corset bodice, and continuing:—"Of which patent the above-named article now being advertised and sold by you is regarded by our client as an infringement. We therefore beg to request you to cease advertising and selling the article in question." P. R. & Co., Lim., ceased for a time advertising and selling the article. Subsequently, on July 11, 1906, the defendant's patent agents admitted that P. R. & Co., Lim., had produced goods to them which were very similar to garments made under her patent. The defendant then gave leave to P. R. & Co., Lim., to advertise and sell the plaintiffs' goods. On July 13, 1906, the plaintiffs brought a threats action grounded on the letter of the patent agents, and on July 18, 1906, the defendant commenced an action claiming an injunction against the infringement, which, after defence and particulars given of numerous other alleged patents for the same invention, was discontinued, and the plaintiffs proceeded with their action:—*Held*, that the letter was more than a mere warning,

and contained a request to discontinue advertising and selling the article intended to be insisted on, amounting to a threat within the meaning of section 32 of the Patents, Designs, and Trade Marks Act, 1883, although it was not added that if the request was not complied with legal liability would be incurred. *Held*, also, that the plaintiffs' right of action was not affected by the proviso to the section, since the defendant could not be said with due diligence to have commenced and prosecuted her action to try the question of the validity of her patent and the infringement of it, since, after the admissions of her agent, that question could not have been tried in it, and it was in that sense a sham action, although there was nothing dishonest or improper in bringing it. *Craig v. Dowding*, 97 L. T. 683—Kekewich, J.

11. PROLONGATION.

Petition by Assignee of Patent—Inventor Dead.]—The merit which entitles a patentee who has been insufficiently remunerated to an extension of his patent differs in kind and degree from that which is enough to sustain a patent. An application for prolongation refused in a case in which there was no special merit and no real invention, in which there was little energy or business capacity displayed in pushing the invention, and the applicant for extension was the assignee of the patent, the inventor having died, and there being no possibility of advantage to him if he had been alive. *Van Gelder's Patent, In re; Thompson, ex parte*, 76 L. J. P.C. 44; [1907] A.C. 174; 96 L. T. 333—P.C.

Application for Extension—Advertisement.]—Section 25, sub-section 1 of the Patents Act, 1883, authorises a patentee, "after advertising" in the prescribed manner, to present a petition to her Majesty in Council for the prolongation of his patent:—*Held*, that it is not competent for the Judicial Committee to entertain a petition for extension of time when there has not been any previous advertisement. *Friese-Greene's Patent, In re*, 76 L. J. P.C. 105; [1907] A.C. 460; 97 L. T. 223—P.C.

Expiration of Foreign Patents.]—Petition for the prolongation of a patent refused on the grounds that the petitioners were assignees and purchasers, and that there was no satisfactory evidence that the inventor had not been adequately remunerated. *Bower-Barff Patent (In re)*, [1895] A.C. 675; *Hopkinson's Patent, In re* (66 L. J. P.C. 38; [1897] A.C. 249), and *Saxby's Patent, In re* (L. R. 3 P. C. 292), followed. *Henderson's Patent, In re*, 70 L. J. P.C. 119; [1901] A.C. 616; 85 L. T. 358—P.C.

The failure of a patentee to push his invention for several years in this country and the expiration of foreign patents for the same invention are also serious obstacles to the success of an application for prolongation. *Ib.*

Adjournment for New Evidence.]—Petition by assignees for extension of a patent refused on the ground that no information was afforded whether the inventor had been remunerated. An adjournment for the purpose of obtaining such information also refused, as

no such application had ever been granted. *Peach's Patent, In re*, 71 L. J. P.C. 98; [1902] A.C. 414; 87 L. T. 153—P.C.

Novel Combination of Parts not Novel—Loss through Want of Business Capacity.]—Prolongation of a patent refused for an invention consisting in the novel application of known principles in which there was no striking or unusual merit, and the inadequacy of remuneration (if any) for which was due in part to defects in the patentee's method of carrying on his business. *Thornycroft's Patent, In re*, 68 L. J. P.C. 68; [1899] A.C. 415—P.C.

Merit of Invention.]—Prolongation for five years granted to a patent of conspicuous merit, by which, in one form of its application both at home and from the foreign patents for the invention, the patentee had, if allowance were made for his services, made little if any profit, and in another application the profit would depend on the success of a company which had not started operations, and the prosperity of which would depend largely on the prolongation of the original patent. *Parsons' Patent, In re*, 67 L. J. P.C. 55; [1898] A.C. 673—P.C.

Loss Incurred by Patentee—Merit of Invention and Difficulty of Introduction.]—A patent of great merit, in the perfecting and introduction of which the patentee had incurred loss, and which could only gradually replace existing machinery, extended for a term of ten years. *Currie and Timmis's Patent, In re*, 67 L. J. P.C. 66; [1898] A.C. 847—P.C.

Insufficiency of Accounts.]—The accounts submitted on an application for the prolongation of a patent must be intelligible and complete, and it is not competent for a petitioner, except perhaps in very special circumstances, to re-cast or supplement the accounts which he has lodged by oral evidence at the hearing. *Wuterich's Patent, In re*, 72 L. J. P.C. 60; [1903] A.C. 206; 88 L. T. 306—P.C.

12. SECRET PROCESS.

Co-owners—User by one Co-owner without Consent of other Co-owners.]—One co-owner of a secret process or invention cannot, in the absence of contract, be restrained by another co-owner from using the knowledge which he possesses for his own benefit. *Heyl-Dia v. Edmunds*, 81 L. T. 579; 48 W. R. 167—Kekewich, J.

13. PATENT AGENT.

Qualification—Right of Person Describing Himself as a Patent Agent before 1888.]—Section 27 of the Patents, Designs, and Trade Marks Act, 1888, which provides that "nothing in this Act shall affect the validity of any . . . right acquired . . . before the commencement of this Act," does not entitle a person who for many years before the Act had practised and described himself as a patent agent to continue to do so after the Act, without being registered as a patent agent in pursuance of its provisions. *Starey v. Graham*, 68 L. J. Q.B. 257; [1899] 1 Q.B. 406; 80 L. T. 185; 47 W. R. 392—D.

Registration—Payment of Fee—Board of Trade Rules—Repeal of Rules—Reviver of Rules.]—Section 101, sub-section 4 of the Patents, Designs, and Trade Marks Act, 1888, provides that rules made in pursuance of the section are to be laid before both Houses of Parliament and advertised twice in the official journal issued by the Comptroller. Section 1, sub-section 2 of the Patents, Designs, and Trade Marks Act, 1888, provides that the Board of Trade is to make such rules as are required for giving effect to the section, and that the provisions of section 101 of the Act of 1888 are to apply to all rules so made as if they were made in pursuance of that section. In 1889 rules were duly made under section 1 of the Act of 1888. Rules made in 1890 purported to repeal the Rules of 1889. In 1891, rules duly made under that section provided that the Rules of 1889 should "have effect" subject to certain modifications:—*Held*, that the Rules of 1889, assuming them to have been repealed by those of 1890, were revived by those of 1891, although a copy of them was not a second time laid before the Houses of Parliament; and consequently that a fee prescribed by them to be paid on the registration of a patent agent might still be demanded. *Id.*

Designs.]—See DESIGNS and COPYRIGHT.

PATRIOTIC FUND.

Statute.]—3 Edw. 7 c. 20 is the *Patriotic Fund Reorganisation Act, 1903.*

PAUPER.

See POOR LAW.

Snag as.]—See PRACTICE.

PAVING EXPENSES.

See LOCAL GOVERNMENT and METROPOLIS.

PAWNBROKER.

Licence — Magistrates' Certificate — Exemption — "Successors."]—By section 39 of the Pawnbrokers Act, 1872, a pawnbroker's licence is not to be granted to any person except upon the production of a certificate granted under the Act, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his . . . assigns, or successors, to obtain such a certificate":—*Held*, that the exemption was confined to "successors" in the particular business carried on by such pawnbroker, and that a person who had succeeded to a pawnbroker's business and had afterwards set up a new business in another town was not entitled to obtain a licence for such second business except upon production of a certificate. *Re v. Inland Revenue Commissioners; Silvester, ex parte*, 76 L. J. K.B. 41; [1907] 1 K.B. 108; 96 L. T. 201; 71 J. P. 86; 23 T. L. R. 83—D.

— **Refusal of Certificate by District Council—Appeal to Quarter Sessions—District Council**

Ordered to Pay Costs of Appeal.]—L. applied to the A. district council for a certificate under section 40 of the Pawnbrokers Act, 1872, authorising the grant to him of a pawnbroker's licence under section 37 of that Act. The district council refused the application, whereupon L. appealed to quarter sessions from such refusal. At the hearing of the appeal, which was allowed, the district council did not appear, but the Court ordered them to pay L.'s costs of the appeal:—*Held*, that the quarter sessions had no power to order the district council to pay those costs. *Re v. Northumberland Justices*, 96 L. T. 700; 71 J. P. 331; 5 L. G. R. 1110—D.

Loss of Article Pledged—Neglect to Deliver — Reasonable Excuse — Liability to Criminal Proceedings.]—A pawnbroker who, acting honestly, has lost the article pledged with him, and is therefore unable to deliver it to the person entitled to have delivery thereof, is not liable to be convicted under section 31 of the Pawnbrokers Act, 1872, of neglecting or refusing to deliver a pledge without reasonable excuse; the fact that the pledge is not in his possession when demanded being a "reasonable excuse" within the meaning of that section. *Allworthy v. Clayton*, 76 L. J. K.B. 934; [1907] 2 K.B. 655; 96 L. T. 31; 71 J. P. 20; 21 Cox C.C. 352—D.

Pawning of Stolen Goods—Conviction of Thief —Order for Restitution—Compensation to Pawnbroker—Order no Bar to Action.]—Certain goods were stolen and pawned. Upon the conviction of the thief, an order was made by the magistrates (but not upon the application of the owner of the goods), under section 30 of the Pawnbrokers Act, 1872, for the delivery up of the goods upon payment to the pawnbroker of the amount of the loan:—*Held*, that this order did not preclude the owner from bringing an action at common law against the pawnbroker for the return of the goods. *Leicester v. Cherryman*, 76 L. J. K.B. 678; [1907] 2 K.B. 101; 96 L. T. 784; 71 J. P. 301; 23 T. L. R. 444—D.

— **Liability of Pledger to Subsequent Proceedings by Pawnbroker.]—**A person wrongfully pawning with a pawnbroker the goods of another person, who subsequently recovers the goods, is liable to proceedings under section 33 of the Pawnbrokers Act, 1872, at the instance of the pawnbroker, notwithstanding that he has previously been convicted of larceny of the goods. *Pickford v. Corsi*, 70 L. J. K.B. 710; [1901] 2 K.B. 212; 84 L. T. 627; 49 W. R. 597; 65 J. P. 628—D.

Purchase at Auction—Right to the Chattel—Property Passing.]—By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 19: "A pledge pawned for above ten shillings shall, when disposed of by the pawnbroker, be disposed of by sale by public auction, and not otherwise. . . . A pawnbroker may bid for and purchase at a sale by auction, made or purporting to be made under this Act, a pledge pawned with him; and on such purchase he shall be deemed the absolute owner of the pledge purchased":—*Held*, that no property was given to the pawnbroker by this section as against the true owner of the pledge. *Burrows v. Barnes*, 82 L. T. 721—D.

PAYMENT.

Appropriation—Payment on Account—Items of Account Stated.]—The rule in *Clayton's Case* (1 Mer. 572) that where there is an account current between parties, and payments are made without appropriation by either debtor or creditor, such payments are to be attributed to the earliest items in the account, does not apply to a case in which debts arise from distinct transactions which are not brought into a common account, and where with respect to the items to which it is sought to appropriate the payments there has been only a temporary abandonment of a remedy *in rem*. *The Mecca*, 66 L. J. P. 86; [1897] A.C. 286; 76 L. T. 579; 45 W. R. 687; 8 Asp. M.C. 266—H.L. (E.)

The appellants supplied necessaries to a ship of the respondents, and bills were drawn by the captain which were dishonoured. Thereupon the respondents offered to pay a sum due to them from third parties if the appellants would hand over dishonoured bills to the same amount. The appellants accepted the offer, and in consideration of the payment agreed to abstain from arresting any of the respondents' ships for three months. The appellants subsequently delivered an account of moneys due on various transactions to them from the respondents, giving credit for the amount received from the third parties. Two of the items of this account were of the same date, and the first in order was in respect of the ship. The appellants subsequently arrested the ship for the balance due:—*Held*, that the delivery of the account did not constitute an appropriation of the sum received from the third parties to the earliest items in the account, and the appellants were therefore justified in their arrest of the ship for the balance. *Ib*.

The principle of *Clayton's Case* cannot apply to two transactions of the same date.—*Per* LORD HALSBURY, L.C. *Ib*.

— **Dentist — Consideration.]** — The Dentists Act, 1878, s. 5, prevents an unqualified person from recovering any fee or charge for dental operations or dental attendance or advice, but there is nothing in the Act which renders the contract to do such work illegal, and notwithstanding section 5 an unqualified person can recover in respect of mechanical work done or materials supplied in the course of such dental operations or attendance. Where, therefore, money has been paid to the unqualified person on general account of services partly within and partly without the scope of section 5, he may appropriate it to the payment of the fees and charges which he could not recover under that section, and maintain an action for the balance which is not within the scope of section 5. *Seymour v. Pickett*, 74 L. J. K.B. 418; [1905] 1 K.B. 715; 92 L. T. 519; 21 T. L. R. 302—C.A.

Where the debtor makes no appropriation at the time of payment the creditor has the right to appropriate up to the very last moment, and may exercise his right in the witness-box after action brought, provided that there has been no proceeding in the action amounting to a previous exercise or determination of his right,

and that nothing else has happened to prevent him from so doing. *Ib*.

The Mecca (66 L. J. P. 86; [1897] A.C. 286) followed and applied; and *Friend, In re; Friend v. Friend* (66 L. J. Ch. 737; *sub nom. Friend v. Young*, [1897] 2 Ch. 421), and *Smith v. Betty* (72 L. J. K.B. 853; [1903] 2 K.B. 317) distinguished. *Ib*.

— **Creditor's Intention.]**—A mortgaged his lands of B to secure 500*l*. After his death this mortgage was assigned to an insurance company. His widow was a party to the assignment, and covenanted to pay the mortgage debt and interest. Under A's will the lands of B were devised in trust for sale for payment of legacies. His widow raised these legacies from the insurance company by several mortgages, and she personally covenanted to pay the principal and interest thereon. She died, and her estate, which was insolvent, was administered in the Court of Chancery. The insurance company proved for the mortgage debts, under the personal covenants, and received several dividends thereon. The lands of B were sold in the Land Judge's Court. The insurance company claimed the right to appropriate these dividends towards the subsequent mortgages and to be paid the sum of 500*l*. out of the proceeds of the sale of the lands:—*Held*, that as they had proved in the action for the 500*l*. they could not appropriate. *Broune's Estate, In re*, [1903] 1 Ir. R. 245—Ross, J.

— **Banker's Account.]**—The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital. *Parr's Banking Co. v. Yates*, 67 L. J. Q.B. 851; [1898] 2 Q.B. 460; 79 L. T. 321; 47 W. R. 42—C.A. And see *Egg v. Craig, ante*, CONTRACT.

— **Cheque—Sale of Business—Book Debts, Contracts, and Securities—Uncashed Cheque or Bill in Hands of Vendor.]**—A cheque or bill of exchange given for a debt is a conditional payment and, if the cheque or bill is subsequently honoured, then as between the payee and a purchaser from him of book and other debts due to the vendor, and of securities for debts, contracts, engagements, rights, and privileges of the vendor in relation to his business, there has been a payment to the vendor as from the date of the giving of the cheque or bill, and the debt does not pass to the purchaser under the contract for sale. *Felix, Hadley & Co. v. Hadley*, 67 L. J. Ch. 649; [1898] 2 Ch. 630; 79 L. T. 299; 47 W. R. 238—Byrne, J.

— **By Bearer Cheque.]**—A, in payment for certain shares which he had instructed a firm of stockbrokers to buy for him, sent by post to the firm, or handed to B, their clerk, a cheque payable to the stockbrokers or "bearer." B cashed the cheque and appropriated the proceeds. In an action by A against the stockbrokers for delivery of the share certificates or for the value of the shares, the stockbrokers pleaded that they had never received payment:—*Held*, that sending an uncrossed bearer cheque was not a remittance in ordinary course of business, and consequently that the stockbrokers, not

having received the cheque, were entitled to judgment in their favour. *Robb v. Gow*, 8 F. 9—Ct. of Sess.

—Statute of Limitations—Option of Creditor to Appropriate—Limit on Exercise of Option—Set-off—Solicitor and Client—Solicitor's Bill—Sum Received on Account of Client.—The executor of a deceased solicitor brought an action in 1902 to recover costs alleged to be due to his testator's estate from the defendant, of which a bill had been delivered to the defendant, together with a cash account, on December 2, 1899. The items of the bill extended over a period from 1878 to 1899, and, the Statute of Limitations being pleaded, the Judge at the trial gave judgment for the defendant in respect of all items prior to 1893, as being statute-barred. He referred the rest of the bill to a Master for taxation, and to take the cash account from 1893, directing that credit should be given to the defendant for all sums of money received by the plaintiff's testator for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed. Upon taxation the defendant brought in a surcharge in respect of a sum of 66*l.*, which had been received by the plaintiff's testator, as the defendant's solicitor in an action brought by the defendant, in 1894, and not accounted for to the defendant. No cash account had been delivered by the plaintiff's testator to the defendant except the account of December 2, 1899, which, through an inadvertence, contained no entry of the said sum of 66*l.* The plaintiff claimed that this sum should be treated as appropriated to payment or satisfaction of items which had accrued due from the defendant to the plaintiff's testator prior to 1893:—*Held*, that the said sum of 66*l.* could not be set off against the statute-barred items under the statutes of set-off; and that, assuming that the plaintiff's testator would have had a right to appropriate the said sum to these items, yet, there having been no such appropriation, it was not, having regard to the terms of the judgment of the learned Judge at the trial, open to the plaintiff so to appropriate the said sum subsequently to that judgment; and therefore that the surcharge in respect of the said sum of 66*l.* must be allowed. *Smith v. Betty*, 72 L. J. K.B. 853; [1903] 2 K.B. 317; 89 L. T. 258; 52 W. R. 197—C.A.

Bankruptcy of Agent—Following Trust Money—Banking Account—Appropriation of Payments—Rule in Clayton's Case.—A firm of stockbrokers had two accounts with their bankers—namely, an ordinary current account and a loan account. The firm became bankrupt, and the bankers thereupon closed the current account, and transferred both the balance thereon, being 1,362*l.*, and an indebtedness on the loan account of 7,500*l.*, to a special liquidation account. They, however, did not require to appropriate the 1,362*l.* to meet the loan account, and repaid themselves by selling securities wrongfully deposited with them by the bankrupts for the purposes of the loan:—*Held*, that, as there had been no appropriation by the bankers of the cash balance, the rule in *Clayton's Case* (1 Mer. 572, 585) did not apply, and that there was no equity entitling *cestuis que trust* of the deposited securities, as against *cestuis que trust* whose money formed

part of the current account, to be paid out of the cash balance. *Mutton v. Peat*, 68 L. J. Ch. 668; [1899] 2 Ch. 556; 48 W. R. 62—Byrne, J.

Creditor Abroad—Direction to Pay Bank within Jurisdiction.—The defendant agreed to pay to the plaintiff during her life a yearly allowance, payable quarterly on the usual quarter days. Before the quarter's allowance became due on December 25 the plaintiff, who was about to go abroad, by a written authority directed the defendant to pay the quarter's allowance to her account at a London bank. The plaintiff was abroad when the quarter's allowance became due, and the defendant, desiring to obtain her indorsement, and thus to ascertain that she was alive, sent to her solicitors a cheque for the amount drawn to the plaintiff's order. The solicitors returned the cheque, and issued a writ for the amount of the quarter's allowance:—*Held*, that the direction to pay the amount to the plaintiff's account at the bank was a valid direction, it being in effect a direction to pay to her at the bank, and the plaintiff was entitled to have the amount paid there. *Shrewsbury v. Shrewsbury*, 23 T. L. R. 277—Kennedy, J.

Mortgage—Voluntary Deed—Marshalling Securities.—Lands were subject to incumbrances ranking in priority as follows: (a) mortgage for 2,000*l.* vested in A; (b) 1,500*l.* portions for the younger children of the owner; (c) mortgage for 1,000*l.* vested in A; (a) and (c) were collateral securities for a larger mortgage debt of 4,000*l.* The charge (b) was created by a voluntary post-nuptial deed which contained no covenants for title. By deed made between the owner, his eldest son, and trustees, to which A was not a party, certain policies of insurance were assigned in trust to pay the proceeds when realised in discharge of (a) and (c) described in the deed as "3000*l.* part of said sum of 4000*l.*," so as to relieve the inheritance of the lands. The amount secured by some of the policies having been received by some of the trustees, they paid 1,000*l.* thereout to A on account of his demand, without any express appropriation. Six months afterwards A appropriated this sum to payment of (c), which would not be reached by sale of the estate:—*Held*, first, that A was entitled to make such appropriation; and secondly, that the younger children of the owner were not entitled to marshal the securities against A. *Lysaght's Estate, In re*, [1903] 1 Ir. R. 235—Ross, J.

Breach of Trust.—See *Oatway, In re*; *Hertslet v. Oatway*, 72 L. J. Ch. 575, *post*, TRUST.

Joint Creditor, to—Authority of Partner.—See MORTGAGE.

Mistake—Payment by.—See MISTAKE, col. 1639.

Presumption of—Bond by Husband to Wife's Trustees.—See HUSBAND AND WIFE.

Wife of Lunatic—Payment to—Claim of Guardians.—See INDUSTRIAL SOCIETY.

PEERAGE.

Jurisdiction of Courts of Law.—Questions connected with a peerage cannot be tried by

a Court of law, but are only cognisable by a Committee for Privileges of the House of Lords. *Cowley v. Cowley*, 70 L. J. P. 83; [1901] A.C. 450; 85 L. T. 254; 50 W. R. 81—H.L. (E.)

Surrender of Peerage to the King—Re-grant of Same Peerage to Another Person—Subsequent Creations.]—A peer of the realm cannot surrender his dignity to the King so as to affect the rights of his descendants therein. The resolutions of the House to this effect in the *Grey de Ruthyn Case* in 1640 and in *Viscount Purbeck's Case* in 1678 are retrospective in their operation and still binding on the House. Accordingly, the surrender to King Edward 1 by Roger de Bygod of the Earldom of Norfolk in 1302, and the re-grant of the same earldom in 1312 to Thomas de Brotherton, were invalid, and the claim to that peerage through descent from Thomas de Brotherton made by Lord Mowbray disallowed. *The Norfolk Earldom*, 76 L. J. P.C. 9; [1907] A.C. 10; 95 L. T. 682; 23 T. L. R. 114—H.L.

A writ commanding attendance in Parliament was sufficient to confer a peerage, but not to confer a particular rank in the peerage, and the mere naming of the person summoned as an earl did not operate to create him an earl. *Ib.*

Peer—Right of, to Vote—University Election.]—A peer of Parliament is not entitled to vote at an election for members of the House of Commons for a university. So *held*, following *Beauchamp (Earl) v. Madresfield Overseers* (42 L. J. C.P. 32; L. R. 8 C.P. 345). *Bristol (Marquis) v. Beck*, 96 L. T. 55; 71 J. P. 99; 23 T. L. R. 224—Bray, J.

—Right of Audience at the Bar of House of Lords.]—A peer is entitled to appear as counsel in an appeal to the House of Lords, but not before a committee of the House, or before the House when sitting for the trial of a peer on a criminal charge as the Court of the Lord High Steward. So *resolved* by a Committee for Privileges. *Kinross (Lord)*, *In re*, 74 L. J. P.C. 137; [1905] A.C. 463—H.L. (Sc.)

PENALTY.

1. *Penalty or Liquidated Damages*, 1807.
2. *Amount*, 1809.
3. *Recovery*, 1810.

1. PENALTY OR LIQUIDATED DAMAGES.

Contract—Delay in Fulfilment—Sums Payable in Proportion to Duration of Delay.]—Where under a contract a sum is made payable for the breach of a stipulation, and the amount is proportioned to the extent of the breach, such sum must *prima facie* be regarded as liquidated damages and not as penalty. *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda*, 74 L. J. P.C. 1; [1905] A.C. 6; 91 L. T. 666; 21 T. L. R. 58—H.L. (Sc.)

The appellants contracted for the construction of vessels of war for the Spanish Government, each of which was to be completed at a

given date. In the event of non-completion they were to pay 500*l.* in respect of each ship for every week's delay. There was considerable delay:—*Held*, that the sums stipulated were liquidated damages payable in full and not a penalty. *Ib.*

Retention Moneys on Non-fulfilment.]—Under a stipulation in a contract the criterion whether a sum—described either as penalty or liquidated damages—is truly liquidated damages, and as such not to be interfered with by a Court, or a penalty which covers, but does not assess the damage, lies in the ascertainment whether the sum stipulated for can or cannot be regarded as “a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation,” or is a sum liable to fluctuation in amount according to circumstances. *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda* (74 L. J. P.C. 1; [1905] A.C. 6) followed. *Public Works Commissioner v. Hills*, 75 L. J. P.C. 69; [1906] A.C. 368; 94 L. T. 833; 22 T. L. R. 589—P.C.

Word “penalty” used in Contract—Amount Recoverable.]—By a contract for electric lighting installation it was provided that the work should be “completed in all respects on or before the 26th Nov. 1898, subject to a penalty of 15*l.* a day, and the plant by the 10th Dec., subject to a penalty of 3*l.* per day for every day the work remains unfinished to the satisfaction of the authorities or engineers”:—*Held*, that, although the word “penalties” was used, the amounts accrued owing to the default of the contractor were in fact “liquidated damages.” *White and Arthur, In re*, 84 L. T. 594; 50 W. R. 81—D.

Breach—Several Provisions.]—By an agreement W. agreed to purchase a public-house of B. and the fittings, and to take the stock to a certain amount and pay for the same; B. agreed to assign the licences and pay certain rates and taxes and give possession, and not carry on the business of a licensed victualler within one mile, W. further agreeing to pay the purchase-money and produce references. It was further provided “that if either of the said parties should neglect to perform or refuse to comply with any part of this agreement” the party refusing or neglecting should pay the other 25*l.* as liquidated damages:—*Held*, that this was a penalty. *Bradley v. Walsh*, 88 L. T. 737—D.

Bond for Lump Sum—Condition to Refrain from Several Acts.]—In an action to recover 100*l.*, money due upon a bond for that amount, the condition of which was that the defendant should, in obedience to an injunction of the High Court, refrain from trespassing on certain lands or the walls, gates, or fences thereof, and pulling down or removing, or otherwise injuring the same, or inciting others to commit any such trespasses, it appeared that the bond was executed by the defendant upon his release from imprisonment for disobedience to the injunction, which was in the same terms as those set out in the condition of the bond:—*Held*, that the sum payable by the bond became payable on a single event only—namely, on disobedience to the injunction—and was therefore liquidated damages, and not a penalty, and consequently

the plaintiff was entitled to proceed by writ specially indorsed under Order III. rule 6, and to apply for final judgment under Order XIV. rule 1. *Strickland v. Williams*, 68 L. J. Q.B. 241; [1899] 1 Q.B. 382; 80 L. T. 4—C.A.

Deposit to be Forfeited on Breach of any one of several Stipulations—Stipulations of Different Degrees of Importance—Intention of Parties.]—Although the general principle of law is that where, in a contract containing a variety of stipulations of different degrees of importance, one large sum is made payable on breach of performance of any one of them, such sum is to be treated as a penalty and not as liquidated damages, the Court is entitled to look at all the circumstances in which the contract came into existence, at what the parties did and at the language they have used, in order to ascertain whether they meant the sum mentioned to be treated as a penalty or as liquidated damages. The fact that one party has deposited with the other the sum in question, and agreed that it shall be forfeited on the breach by him of any one of the several conditions as and by way of liquidated damages, is one of the circumstances so to be taken into consideration in ascertaining their intention. The words used by the parties in describing a sum in the contract as "liquidated damages" are only to be disregarded in plain cases where the sum is obviously intended to be a penalty. *Pye v. British Automobile Commercial Syndicate*, 75 L. J. K.B. 270; [1906] 1 K.B. 425; 22 T. L. R. 287—Bigham, J.

Sale for Shipment by Instalments—"Penalty for non-execution of contract"—Fixed Sum Payable on Portion of Contract not Executed.]—The defendants by a contract, made in Glasgow, contracted to supply 10,000 tons of coal to the plaintiff at Lübeck, to be delivered by five specified monthly shipments. The coal was to be partly small steam coal and partly screened steam coal, and the prices varied according to the quality of coal and the month of shipment. The contract contained the following clause: "Penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted and the amount of proved loss, if any, on freight actually arranged by us":—*Held*, upon failure by the vendors to deliver one of the monthly shipments, that the damages which the buyer could recover was the amount stipulated for in the clause in the contract, which must be construed as liquidated damages, and not as a penalty. *Diestel v. Stevenson*, 75 L. J. K.B. 797; [1906] 2 K.B. 345; 96 L. T. 10; 12 Com. Cas. 1; 22 T. L. R. 673—Kennedy, J.

Penalty Clause in Act of Parliament—Action for Damages.]—See STATUTE.

2. AMOUNT.

Shortage of Water.]—The Huddersfield Water Act, 1869, which provides, *inter alia*, that in case of neglect on the part of the corporation to deliver the statutory quantity of compensation water, the corporation shall, for every day on which the neglect occurs, pay to the occupiers of each of the mills and works affected thereby, who may sue for the same, the sum of 5*l.*, and also make compensation for any damage sus-

tained by such occupiers, or any of them, in respect of which such penalties are an insufficient compensation:—*Held*, that the liability of the corporation to penalties was not limited to one penalty of 5*l.* for each day during which the shortage of water continued; but that they were liable in that sum for each day to each of the plaintiffs. *Lewis v. Swansea Corporation* (4 Times L. R. 122, 706) distinguished. *Beaumont v. Huddersfield Corporation*, 1 L. G. R. 118; 67 J. P. 57—C.A.

3. RECOVERY.

Alternative Remedy—Election.]—The plaintiffs appointed the defendant their agent under an agreement by which he agreed that, if he should cease to act for the plaintiffs under the agreement, he would not give information about the plaintiffs' connections, or interfere, directly or indirectly, with their business, or represent any other corporation doing a similar business within a certain radius from the place to which he should be appointed, within one year at least from the date of his ceasing to receive remuneration from the plaintiffs. In case of breach of the agreement the defendant was to pay to the plaintiffs 100*l.* by way of liquidated damages. The defendant having committed breaches of the agreement,—*Held*, that the plaintiffs were not entitled to an injunction as well as to the 100*l.* liquidated damages, but were bound to elect between the two remedies. *General Accident Assurance Corporation v. Noel*, 71 L. J. K.B. 236; [1902] 1 K.B. 377; 86 L. T. 555; 50 W. R. 381—Wright, J.

Waterworks—Compulsory Taking of Water—Compensation Water—Neglect to Supply—Penalty for Neglect.]—Under a local water Act a corporation were bound to supply certain compensation water, as compensation for the waters taken by them for the purposes of the Act, and in case of neglect to supply the same they were, for every day on which such neglect occurred, to "forfeit and pay to the occupiers of each of the mills and works affected thereby, who may sue for and recover the same, the sum of five pounds," and were in addition to make compensation for any loss sustained by such occupiers in respect of which the penalties were not a sufficient compensation, and such compensation might be sued for in any Court of competent jurisdiction. The provisions of sections 140 and 145 of the Railways Clauses Act, 1845, which provided that every penalty or forfeiture, the recovery of which was not otherwise provided for, might be recovered by summary proceedings before two Justices, were incorporated with the local Act:—*Held*, that an action in the High Court could be maintained for the recovery of the penalties for the neglect of the corporation to supply the compensation water, and that the incorporated sections of the Railways Clauses Act as to the recovery of the penalties before two Justices did not apply, as the section of the local Act itself had "otherwise provided" for the recovery of the penalties. *Meltham Spinning Co. v. Huddersfield Corporation*, 89 L. T. 403; 67 J. P. 445; 2 L. G. R. 32—C.A.

Bond, in.]—See BOND.

Common Informer—Right of to Share—Magistrate's Discretion.—See *Hawke v. Mackenzie*, ante, JUSTICE OF THE PEACE, col. 1165.

Contract for Work and Labour, in.—See WORK AND LABOUR.

PENSION.

Receiver of.—The Court has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary. The proper form of such an order settled. *Manning v. Mullins*, [1898] 2 Ir. R. 34—C.A.

Bankruptcy—Application of, in.—See *Young*, In re, ante, BANKRUPTCY, col. 106.

Police, in Case of.—See POLICE.

Public Officer—Right of to.—See PUBLIC OFFICER.

PERJURY.

See CRIMINAL LAW.

PERPETUITIES.

Annuity Charged on Land—Option to Purchase Annuity at a Time Unlimited.—Lands were in 1887 conveyed by a grantor to a trustee in fee, in trust, *inter alia*, to pay and apply 90l. per annum out of the rents of the lands for the support of the Protestant religion, provided, however, that the persons for the time being beneficially interested in the lands as the representatives of the grantor should, if they should think fit, in lieu of the said 90l., pay the interest on eighteen Russian Imperial bonds for 100l. each to and for the aforesaid purpose:—*Held*, that the proviso was void under the rule against perpetuities, and that the annuity of 90l. could not be redeemed by assigning eighteen Russian Imperial bonds in lieu thereof. *Tyrrrell's Estate*, In re, [1907] 1 Ir. R. 292—C.A.

Rentcharge—Chattel Interest—Terms of Five Hundred Years—Proviso for Redemption at Fixed Price—Remoteness.—J. granted an annuity or rentcharge of 80l. (Irish) a year, for a term of five hundred years to trustees upon certain trusts, and charged same on leasehold premises, with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the five hundred years, to purchase or redeem the annuity for 300l. (Irish), which was then to determine and be void:—*Held*, that the proviso for redemption of the annuity did not infringe the rule against perpetuities, and was not void for remoteness. *Switzer v. Rochford*, [1906] 1 Ir. R. 399—M.R.

Appointment—Limitation to Unborn Persons Equally during their Respective Lives—Remainder to Survivor for Life—Vested Remainder—Contingent Remainder.—Every vested interest must be one which may vest in possession. By a will exercising a special power of appointment under a settlement, real estate

was limited to two persons unborn at the date of the settlement equally during their respective lives, and on the death of either to the survivor for life:—*Held*, that there could not be two vested life estates in remainder, since one or other of them could never vest in possession; and that the remainder, limited to the survivor, was therefore contingent, and void for remoteness. *Whitby v. Lueddecke*, 75 L. J. Ch. 359; [1906] 1 Ch. 783; 94 L. T. 432; 54 W. R. 415—Buckley, J.

Special Power of—Exercise by Will—Validity.—In exercise of a special power of appointment in favour of an appointee living at the date of the creation of the power "and his present and future issue of whatever degree . . . within the limits of remoteness allowed by law," the testatrix by will appointed the property the subject of the power in trust for the appointee for life with remainder in trust for all his children "who being male have attained or shall attain the age of 25 years if born in my lifetime or 21 years if born after my decease, or being female have attained or shall attain the age of 25 years if born in my lifetime or 21 years if born after my decease, or shall being female be previously married, and if more than one such child in equal shares." The appointee had nine children, all of whom had attained twenty-five before the death of the testatrix:—*Held*, that the appointment was a valid exercise of the power and not void under the rule against perpetuities, because upon the appointment coming into force—that is, at the death of the donee of the power—it was absolutely certain that within the prescribed period of a life or lives in being at the creation of the power and twenty-one years after not only would the persons to take be ascertained, but their interests would be vested and the amount or number of their aliquot shares be fixed. *Von Brockdorff v. Malcolm* (55 L. J. Ch. 121; 30 Ch. D. 172) and *Hallinan's Trusts*, In re ([1904] 1 Ir. R. 452), followed. *Thompson*, In re; *Thompson v. Thompson*, 75 L. J. Ch. 599; [1906] 2 Ch. 199; 95 L. T. 97; 54 W. R. 613—Joyce, J.

Gift to Maintain Monument—Conditional Devise—Direction to Apply Moneys in Maintaining Monument on Part of Devised Real Estate.—A testator by his will devised two freehold farms to his nephew on condition that he should set apart the rents and profits thereof for the term of five years "for the use and purpose of erecting on some portion" (suggesting a particular situation) a monument to the memory of John Locke, and at the expiration of the five years he directed that his nephew should enjoy three-fourths of the rents and profits, but should devote the balance or remaining one-fourth towards the maintenance and keeping in order of the monument:—*Held*, that the erection of the monument was not intended as a mode of enjoyment of the property by the devisee, and that the application of one-fourth of the rents and profits was intended to perpetuate the memory of John Locke, and, therefore, as to such one-fourth there was an intestacy. *Jones*, In re; *Parker v. Lethbridge*, 79 L. T. 154—Stirling, J.

Gift of Leasehold Houses to Officers of Regiment.—Gift of leasehold houses for old officers

of a regiment at a small rent during their life held void for perpetuity. *Good, In re; Harington v. Watts*, 74 L. J. Ch. 512; [1905] 2 Ch. 60; 92 L. T. 796; 53 W. R. 476; 21 T. L. R. 450—Farwell, J.

Gift to Charity.—An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain; while, on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent. *Swain, In re; Monckton v. Hands*, 74 L. J. Ch. 354; [1905] 1 Ch. 669; 92 L. T. 715—C.A.

Where, subject to a prior life interest, a testator's residuary real and personal estate is by the will devoted to charity as from the testator's death, a direction to postpone the payment of the charitable gift until the formation of a reserve fund, directed without any limit of time to be accumulated out of income as an increment to the charitable fund, is not a condition precedent to the charitable gift coming into effect so as to render the gift void as a perpetuity. *Martin v. Maugham* (13 L. J. Ch. 392; 14 Sim. 230) and *Chamberlayne v. Brockett* (42 L. J. Ch. 368; L. R. 8 Ch. 206) followed and applied. *Id.*

Married Woman—Restraint on Anticipation—Severance of Class.—A restraint on anticipation imposed by a general clause in a will upon all the shares of daughters of the testator's children is good as to the shares of daughters who are born in the testator's lifetime, though void for perpetuity as to the shares of those who are born afterwards. *Herbert v. Webster* (49 L. J. Ch. 620; 15 Ch. D. 610) followed. *Michael's Trusts, In re* (46 L. J. Ch. 651), and *Ridley, In re; Buckton v. May* (48 L. J. Ch. 563; 11 Ch. D. 645), not followed. *Ferneley's Trusts, In re*, 71 L. J. Ch. 422; [1902] 1 Ch. 548; 86 L. T. 413; 50 W. R. 346—Swinfen Eady, J.

— **Validity—Severance of Class.**—A testator directed his trustees to stand possessed of a fund upon trust for his daughter for life and after her death upon trust for her children who should attain twenty-one, or if daughters marry, "as to the share of any girl for her separate use without power of disposing of the income or capital otherwise than by will":—*Held*, that the restraint on anticipation was valid as to the shares of granddaughters born in the testator's lifetime. *Game, In re; Game v. Tennent*, 76 L. J. Ch. 168; [1907] 1 Ch. 276; 96 L. T. 145—Warrington, J.

Herbert v. Webster (49 L. J. Ch. 620; 15 Ch. D. 610) and *Ferneley's Trusts, In re* (71 L. J. Ch. 422; [1902] 1 Ch. 548), followed. *Ridley, In re; Buckton v. May* (48 L. J. Ch. 563; 11 Ch. D. 645), not followed. *Russell, In re; Dorrell v. Dorrell* (64 L. J. Ch. 891; [1895] 2 Ch. 698), applied. *Id.*

Power to Appoint Life Estate to Surviving

Husband—Ultimate Gift—Independent and Alternative Trusts.—A testatrix directed her executors to stand possessed of an aggregate principal sum in trust as to a certain specified share thereof for each of her four nieces for life with power to appoint a life or any less interest to any husband who might survive her, and subject thereto in trust for such nieces' children at twenty-one, with a proviso for accruer to the other shares of the share of any niece dying without leaving either husband or children who should take an interest in her share; and in case neither of her nieces should have any child who should become entitled to her share under the trusts aforesaid, then the testatrix directed the aggregate principal sum to be held in trust for such of her nephews, sons of a deceased sister, as should be living at the time of the determination of the trusts aforesaid, or the issue then living of any of her said nephews who might be then dead leaving issue, as the last surviving of her said four nieces, might by her will appoint. None of the nieces ever had any children, or exercised her power of appointment in favour of a husband, and the survivor duly appointed the fund to objects of the power. On the death of the survivor the question arose whether the ultimate gift or power was not void for remoteness, because the husbands to whom the nieces had power to appoint life interests need not necessarily have been born in the testatrix's lifetime, and consequently the period for ascertaining the class to take under the ultimate gift might have been postponed beyond the period prescribed by the rule against perpetuities:—*Held*, that this was a case of independent and alternative gifts, and that the ultimate gift or power to appoint in favour of the testatrix's nephews and their issue was not void for perpetuity, and that the appointment in their favour was valid. *Bowles, In re; Page v. Page*, 74 L. J. Ch. 338; [1905] 1 Ch. 371; 92 L. T. 556—Farwell, J.

Personal Property—Rule against "a possibility on a possibility."—The ancient rule against "a possibility on a possibility" does not apply to limitations of personal property. *Bowles, In re; Amedroz v. Bowles*, 71 L. J. Ch. 822; [1902] 2 Ch. 650; 51 W. R. 124—Farwell, J.

Trust to Accumulate During Minority—Minor Who, if of Full Age, would be entitled to the Rents and Profits—Minor Born after Testator's Death.—Section 1 of the Accumulations Act, 1800, renders void any direction by a settlor or testator for the accumulation of the income arising from a fund for a longer term than (*inter alia*) during the minority of any person who would for the time being, if of full age, be entitled to the income of the fund. Under this provision a testator may validly direct accumulation during the minority of a person not born until after his death. The *dictum* to the contrary in *Haley v. Bannister* (4 Madd. 275, 277) disapproved. *Cattell, In re; Cattell v. Cattell*, 76 L. J. Ch. 242; [1907] 1 Ch. 567; 96 L. T. 612; 23 T. L. R. 331—Neville, J.

In determining the validity of a direction to accumulate, the Court is not concerned to consider what might have happened under it, but only whether the direction has caused or is about to cause accumulation for a longer term than is allowed by the Accumulations Act,

1800. Observations of KAY, J., in *Jagger v. Jagger* (53 L. J. Ch. 201, 204; 25 Ch. D. 729, 734) discussed. *Ib.*

Will—Devise—Limitations—Unborn Persons—Successive Life Estates—Contingent Interest in Remainder to Survivor—Legal Contingent Remainder—Determination of Settlement by Beneficiaries.]—Legal contingent remainders are subject not only to the rule that an estate for life to an unborn person cannot be followed by an estate to the child of such unborn person, but also, equally with contingent equitable limitations of real estate and all contingent limitations of personalty, to the rule against perpetuities. *Ashforth's Trusts, In re*; *Ashforth v. Sibley*, 74 L. J. Ch. 361; [1905] 1 Ch. 535; 92 L. T. 534; 53 W. R. 328; 21 T. L. R. 329—Farwell, J.

A testatrix devised her real estate to her trustees and their heirs upon trust to pay the rents and profits unto her three children and the survivors and survivor of them during their lives and the life of the survivor, and after the death of the survivor upon trust to pay and divide the rents and profits as soon as conveniently could be after Lady day and Michaelmas Day in each year unto and equally amongst all such of the children born in her lifetime or within twenty-one years after her death of her said three children who should be living on the Lady Day or Michaelmas Day preceding such payment and division; and after the death of all such grandchildren except one she devised her said real estate to such surviving grandchild and the heirs of his or her body in tail, with remainder over. Of the testatrix's three children, all of whom survived her, two died without issue, and the third died leaving three children, the plaintiffs, who desired, in the events which had happened, to determine the settlement. Upon a summons for the determination of the question whether any of the above trusts or limitations were void for remoteness,—*Held*, that the contingent estates tail in remainder were void inasmuch as they would not become indefeasibly vested in any person necessarily ascertainable within the limits prescribed by the rule against perpetuities, and that therefore the plaintiffs could not by combining to release or destroy the right of survivorship render themselves presently entitled to the property in fee-simple, because, the contingent interests being void, there was no present estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing would be left but the three life estates of the grandchildren. *Ib.*

Held also, that as the rule against perpetuities is applicable to legal contingent remainders, the fact that the limitation in question was a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren did not avail the plaintiffs. *Ib.*

— Gift to the Members of a Class who should Attain Twenty-five—Remoteness.]—A testatrix directed her trustees to divide her residuary estate into two equal parts or shares and to pay one such equal part or share to the children of her niece R. who should live and attain the age of twenty-five years, or the lawful issue of such

children who should have married and predeceased R. and left issue, such issue only to take the share that would otherwise have been payable to their parents; and as to the other equal part or share to pay the same to the children of her nephew C., or their issue, under precisely similar terms and conditions as those under which the children of R. became entitled to take their share. During such suspense of absolute vesting, the trustees were to invest the said moneys and the income thereof for the benefit of such children on their respectively attaining the age of twenty-five years; and the will also contained an advancement clause. One of R.'s children had attained twenty-five at the testatrix's death, but none of C.'s children had attained that age:—*Held*, that there was a good and valid disposition of the moiety of the residue given to R.'s children, not infringing the rule against perpetuities; but that the disposition of the other moiety infringed that rule and was invalid. *Barker, In re*; *Capon v. Flick*, 92 L. T. 831—Joyce, J.

— Child en Ventre sa Mère—Rule as to Assuming Birth—Benefit of Child.]—In applying to the limitations of a will the rule of remoteness, which only admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, the Court for all the purposes of the rule treats an infant *en ventre sa mère* at the date of the testator's death (who is subsequently born) as then existing, and that whether the effect of its so doing is beneficial or prejudicial to the infant. *Wilmer's Trusts, In re*; *Moore v. Wingfield*, 72 L. J. Ch. 670; [1903] 2 Ch. 411; 89 L. T. 148; 51 W. R. 609—C.A.

A testatrix devised real estate to trustees upon trust to pay the income thereof to her daughter for life, and after her death to stand possessed of the real estate upon trust for the second and every younger son of her daughter born or to be born successively during his life, with remainder after the death of each such son upon trust for his first and other sons successively in order of seniority in tail male, with remainders over. And the testatrix provided that if any person other than the eldest son of her daughter should become entitled to the B. estate, then the gift over in remainder should take effect. At the death of the testatrix her daughter had had an eldest son, who died in the lifetime of the testatrix, and a second son who subsequently became entitled to the B. estate, and was thereby precluded from taking under the limitation, and she was pregnant of a third son, who was born shortly afterwards:—*Held*, that the limitations of the will to the first and other sons successively in tail male of the third son of the testatrix's daughter were not, in the events which had happened, void for remoteness. *Ib.*

PETROLEUM.

Jurisdiction — Composition containing Petroleum and giving off Inflammable Vapour.]—A composition used for coating ships' bottoms contained 33 per cent. of petroleum oil and an equal quantity of linseed oil mixed with pigments, gum, &c., so as to form a paint or paste. When the composition was tested in the

manner set forth in Schedule I. to the Petroleum Act, 1879, 25 per cent. of the petroleum oil contained in it gave off an inflammable vapour at a temperature of less than 73° F.:—*Held*, that such oil was "petroleum to which this Act applies," within the meaning of section 3 of the Petroleum Act, 1871, as amended by section 2 of the Act of 1879, notwithstanding that it was mixed with other ingredients; and consequently that the composition could not be kept except in pursuance of a licence given by the local authority. *London County Council v. Holzapfels Compositions Co.*, 68 L. J. Q.B. 886; 81 L. T. 190; 47 W. R. 622; 63 J. P. 615; 19 Cox C.C. 383—D.

PHARMACY.

See MEDICINE.

PHOTOGRAPH.

See COPYRIGHT.

PILOT.

See SHIPPING.

PISTOLS.

Statute.—3 Edw. 7 c. 18 is the *Pistols Act*, 1903.

Pistols—*Air Pistols*—*Sale without Licence*—*Toy or Weapon.*—The *Pistols Act*, 1903, does not apply to the sale of a pistol which is only a toy; and therefore, before a magistrate can convict a person under section 3 for unlawfully selling an air pistol without the production of a licence, he must find that it is a weapon from which a shot, bullet, or other missile can be discharged. *Bryson v. Gamage*, 76 L. J. K.B. 936; [1907] 2 K.B. 630; 97 L. T. 399; 71 J. P. 439—D.

PLATE.

Duty on.—See REVENUE.

PLEADING.

See PRACTICE AND PLEADING.

PLEDGE.

See PAWNBROKER.

POISON.

See MEDICINE.

POLICE.

Metropolitan.—60 Vict. c. 14 is the *Metropolitan Police Courts (Holidays) Act*, 1897.

— 60 & 61 Vict. c. 26 is the *Metropolitan Police Courts Act*, 1897.

— 61 & 62 Vict. c. 31 is the *Metropolitan Police Courts Act*, 1898.

— 62 & 63 Vict. c. 26 is the *Metropolitan Police Act*, 1899.

Borrowing Powers.—60 & 61 Vict. c. 42 is the *Metropolitan Police (Borrowing Powers) Act*, 1897.

Disposal of Property.—60 & 61 Vict. c. 30 is the *Police (Property) Act*, 1897.

Police Commission.—6 Edw. 7 c. 6 is the *Metropolitan Police (Commission) Act*, 1906.

Police Court.—61 & 62 Vict. c. 31 is the *Metropolitan Police Courts Act*, 1898.

Reservists.—2 Edw. 7 c. 10 is the *Police Reservists Act*, 1902.

Superannuation.—6 Edw. 7 c. 7 is the *Police (Superannuation) Act*, 1906.

Pension—*Chief Constable*—*Incapable of appointment*—*Order of Police Authority*—*Survivor Examination*—*Object outside Act.*—The authority have no jurisdiction under the question—sections 1 and 3 of the *Police Act* or power make an order for the medical examination of a pensioner, not really to satisfy to appoint to the state of his health, but to have been outside the Act—namely, to assist frequently receiver in his bankruptcy to execute to take for his arrest for non-attendance at a post-nation in bankruptcy—and the pensioner rule bound to obey such an order. *Reg.* was a *Leigh*, 66 L. J. Q.B. 56; [1897] 1 Q.B. 115, and *Wint* in *again*.]

Cancellation of Pension—*Requisition to retire*—*An order of the police authority, made under section 5, sub-section 4 of the Police Act, 1890, cancelling a police pension upon the ground that the pensioner had failed to attend and be medically examined, is invalid, where no option is given to the pensioner to return to the force; and that is so whether the constable was a chief constable, or any other constable.* *Id.*

Fixing Time and Place of Examination—*Failure of Constable to Attend.*—The fixing in an order for medical examination of the time and place where such examination is to take place does not make the order invalid, for the police authority or the medical practitioner have jurisdiction to fix the time and place; but it is not the substantial part of the order, and consequently a pensioner cannot be treated as having disobeyed such order if he has attended and been examined, though at some other time and place than those named. *Id.*

Basis of Calculation—*Salary*—*Increase Subject to Condition that Increase should not be Reckoned for Pension*—*Resignation.*—In 1901, the salary of the plaintiff, who was the head constable of Liverpool, was increased by the watch committee from 1,400l. to 1,650l., subject to his agreeing that the amount of the increase should not be taken into account for the purpose of pension. In March, 1902, the plaintiff retired, and the watch committee granted him a pension of 933l. 6s. 8d., based on a salary of 1,400l. a year. In the same month the plaintiff was appointed Commissioner of Police of the City of London at a salary of 1,250l. a year. In January,

1903, the Liverpool City Council passed a resolution suspending the payment of 483*l.* 6*s.* 8*d.*, part of the pension granted to the plaintiff, so long as he remained in the service of the City of London Police.—*Held*, first, that whether the plaintiff did agree, or did not agree, in the sense either that he did not in fact or could not in law agree to the condition, the pension must be calculated on the basis that his salary remained at 1,400*l.*; secondly, that the “police authority” of Liverpool under the Police Act, 1890, was the watch committee and not the city council, and that there was, therefore, no existing resolution suspending the pension within section 13, sub-section 1 of the Act; thirdly, that three-fourths of the expenses of the City of London Police being borne by the rates, the commissionership was an office remunerated out of a borough rate or fund within section 13, sub-section 2, and consequently that the provisions of that sub-section as to reduction of pensions applied. *Nott Bower v. Liverpool Corporation*, 2 L. G. R. 494; 63 J. P. 243; 20 T. L. R. 261—Buckley, J.

— Allowance for Special Service — “Pay” — “Annual pay.” — An allowance for special duties in addition to the ordinary pay of a constable does not constitute part of the “pay” of a constable within the meaning of the Police Act, 1890, and ought not to be taken into account in estimating the pension to which he is entitled on his retirement. *Upperton v. Lloyd*, 72 L. J. K.B. 535; [1903] A.C. 281; 1 T. 642; 1 L. G. R. 659; 67 J. P. 349—*aff.* (E.)

— *LORD DAVEY*. — Such allowance constitutes extra pay, and is as truly part of the constable’s pay as his ordinary wages. But it is not entitling him to contract himself out of his service, and he does so contract by signing the desired pay-sheets in which his ordinary pay is set down under one column entitled “Amount for pay,” and the allowances under another column, and the allowances properly so-called for lodgings, &c. *Ib.*

— “Annual pay.” — The “annual pay” within the meaning of the First Schedule to the Police Act, 1890, of a constable paid weekly is not fifty-two times his weekly, but three hundred and sixty-five times his daily pay. *Ib.* S.C. in C.A., 70 L. J. Q.B. 249; [1901] 1 Q.B. 384.

— Police Inspector — Free House with Use of Fuel, Gas, and Water — “Pay” — “Annual pay.” — The free use, during his term of service, of a house, in which he is required to reside, and of fuel, gas, and water, is not part of the “pay” of a police inspector within the meaning of the Police Act, 1890, and ought not to be taken into account in estimating the pension to which he is entitled under the Act on his retirement. *Goodwin v. Sheffield Corporation*, 71 L. J. K.B. 492; [1902] 1 K.B. 629—D.

— Right to Appeal to High Court by Case Stated.] — Section 11 of the Police Act, 1890, does not prevent an appeal to the High Court by Case stated from being maintained against an order of quarter sessions made pursuant to that section. *Ib.*

— “Approved service” — Continuous Service — “Diligent and faithful service.” — The twenty-

five years’ “approved service” which under section 1 of the Police Act, 1890, entitles a constable to receive a pension need not be continuous service. (LORD DAVEY doubting.) *Garbutt v. Durham Joint Committee*, 75 L. J. K.B. 459; [1906] A.C. 291; 94 L. T. 525; 54 W. R. 596; 4 L. G. R. 647; 70 J. P. 265; 22 T. L. R. 444—H.L. (E.)

The chief officer’s certificate of “approved service” under section 4, sub-section 2, is only evidence of the period of service, and is not conclusive of the “diligent and faithful service” which under sub-section 1 of section 4 must be certified under the order of the police authority. Case remitted to quarter sessions for the reception of evidence whether in fact the service had been “diligent and faithful.” *Ib.* And see, as to amount of pension, *Liverpool Watch Committee v. Kydd*, 98 L. T. 24; 72 J. P. 63—D.; and in case of a “walking inspector,” *Story v. Nottinghamshire Standing Joint Committee*, 72 J. P. 31—D.

Authority to Arrest under Highway Act.] — See WAX.

Costs of — Liability of County Council for.] — See LOCAL GOVERNMENT.

Delivery of Stolen Goods by.] — See TROVER.

Obstruction of, when in the Execution of his Duty.] — See CRIMINAL LAW.

Police Act — Power of Quarter Sessions to State Case.] — A Court of quarter sessions has power to state a Case upon a question of law arising under section 11 of the Police Act, 1890. *Kydd v. Liverpool Watch Committee*, 76 L. J. K.B. 1155; [1907] 2 K.B. 591; 97 L. T. 453; 5 L. G. R. 1163; 71 J. P. 409; 23 T. L. R. 624—C.A.

POLICY.

See INSURANCE.

POLL.

See COMPANY — MEETINGS.

POOR LAW.

1. *Statutes*, 1821.
2. *Guardians*, 1821.
3. *Overseers*, 1824.
4. *Unions and Transfers of Areas*, 1825.
5. *Casual Wards*, 1826.
6. *Settlement and Removal*, 1827.
7. *Maintenance*, 1833.
8. *Relief*, 1838.
9. *Misconduct of Pauper*, 1839.
10. *Rateability*, 1840.
11. *Exemption*, 1854.
12. *Assessment*, 1857.
13. *Appeal*, 1859.
14. *Recovery of Rate*, 1862.

1. STATUTES.

Association Expenses.—61 & 62 Vict. c. 19 is the *Poor Law Union Association (Expenses) Act*, 1898.

Authorities.—4 Edw. 7 c. 20 is the *Poor Law Authorities (Transfer of Property) Act*, 1904.

Dissolution.—3 Edw. 7 c. 19 is the *Poor Law (Dissolution of School Districts and Adjustments) Act*, 1903.

Metropolis.—61 & 62 Vict. c. 45 is the *Metropolitan Poor Act*, 1898.

Outdoor Relief.—4 Edw. 7 c. 32 is the *Outdoor Relief (Friendly Societies) Act*, 1904.

Poor Law.—62 & 63 Vict. c. 37 is the *Poor Law Act*, 1899.

Released Persons.—7 Edw. 7 c. 14 is the *Released Persons (Poor Law Relief) Act*, 1907.

Removal.—63 & 64 Vict. c. 23 is the *Poor Removal Act*, 1900.

2. GUARDIANS.

Election of—Returning Officers—Urban Council.—Where the boundaries of a parish are not co-extensive with an urban district council, or with any of the wards of the urban district, or where the county council has not given directions that the polls for the election of guardians and of urban district councillors shall be taken together, the clerk to the guardians, and not the clerk to the urban district council, is entitled to act as the returning officer at an election of guardians. *Re v. Carter*, 63 J. P. 466—D.

—**Equality of Votes—Casting Vote—Petition—Costs.**—At an election of guardians two of the candidates, W. and H., received an equal number of votes. The deputy returning officer, who had no vote in the particular ward, under the erroneous belief that he had a casting vote, gave it for H., and the result was declared accordingly. W. presented an election petition making H., but not the returning officer, a respondent. No notice was given by H. that he would not oppose the petition, but at the hearing he did not oppose except as to costs:—*Held*, that the election was void, that no order as to costs could be made against the returning officer as he was not a party, but that the respondent must pay the petitioner's costs (including the costs of the Special Case) as from the time when he might have given notice of his intention not to oppose the petition. *Watts v. Hemming*, 71 J. P. 504—D.

Disqualification for Office—Interest in Contract—Time when Guardian Ceases to be a Member.

—By section 46, sub-section 1 of the Local Government Act, 1894, "A person shall be disqualified for . . . being a member . . . of a board of guardians if he . . . (e) is concerned in any bargain or contract entered into with the . . . board . . . ;" and by sub-section 7, "Where a member of a . . . board of guardians

becomes disqualified for holding office . . . the . . . board shall forthwith declare the office to be vacant, and signify the same by notice signed by three members and countersigned by the clerk of the . . . board, and notified in such manner as the . . . board direct, and the office shall thereupon become vacant":—*Held*, that a member of a board of guardians who is concerned in a contract entered into with the board is disqualified for being a member, and the disqualification does not cease by reason of the termination of the contract. *Re v. Rowlands*, 75 L. J. K.B. 501; [1906] 2 K.B. 292; 95 L. T. 502; 70 J. P. 463; 4 L. G. R. 983—D.

—**Composition or Arrangement with Creditors—Administration Order of County Court for Partial Payment of Debts.**—Section 46, sub-section 1 (c) of the Local Government Act, 1894, which provides that a person shall be disqualified for being a parish or district councillor or guardian if he has made a composition or arrangement with his creditors, applies to every composition, howsoever made, which the debtor has made with his creditors. A guardian, against whom a judgment had been recovered in a County Court, preferred to that Court a request under section 122 of the Bankruptcy Act, 1883, for an order for the administration of his estate and the payment of his debts, and stated that he proposed to pay 10s. in the pound. The Court made an order for the payment of his debts to that extent:—*Held*, that he had made a composition with his creditors, and was therefore disqualified for being a guardian. *Bradfield v. Cheltenham Guardians*, 75 L. J. Ch. 618; [1906] 2 Ch. 371; 95 L. T. 78; 54 W. R. 611; 70 J. P. 371; 4 L. G. R. 961; 13 Manson, 207; 22 T. L. R. 689—Buckley, J.

Contract—Tender for Supply of Coal to Union Workhouse—Acceptance of Tender—Mistake by Contractor as to Price—Attempted Withdrawal of Tender.—Contractors tendered in the form prescribed by the Order of the Local Government Board of December 31, 1877, for the supply to a board of guardians for a year of a certain kind of coal to be used in the workhouse. The guardians caused the tender to be sealed and signed in accordance with the Order of 1877, and fixed a later day for the execution of a bond securing the performance of the contract. Before that day arrived, the contractors, discovering that they had, owing to overlooking the cost of cartage, tendered at a price too low by 3s. a ton, intimated to the guardians that they withdrew their tender; and they subsequently declined to supply coal in accordance with it:—*Held*, that as from the sealing and signature of the tender there was a completed contract between the guardians and the contractors, for breach of which, by non-delivery of coal, the guardians, in the absence of *mala fides* on their part, could sue. *Islington Union v. Brentnall*, 5 L. G. R. 1219; 71 J. P. 407—Grantham, J.

Building Contract—Breach by Guardians—Damages—Reference to Arbitration—"Neglect or default in the execution of any public duty."—A breach by the guardians of a union of a private contract entered into by them in the performance of their public duties is not "a neglect or default" in the execution "of any

public duty or authority" within the meaning of section 1 of the Public Authorities Protection Act, 1893, and consequently the limit of six months prescribed by section 1 (a) for the commencement of proceedings does not apply to a reference to arbitration in respect of such breach. *Sharpington v. Fulham Guardians*, 73 L. J. Ch. 777; [1904] 2 Ch. 449; 91 L. T. 739; 52 W. R. 617; 68 J. P. 510; 2 L. G. R. 1229; 20 T. L. R. 648—Farwell, J.

Negligence of Guardians' Servant—Action against Guardians—Liability—Common Employment.—The plaintiff, an inmate of the defendants' workhouse, was ordered to do certain work in connection with an extension of the electric-lighting installation at the workhouse infirmary. The plaintiff was required to work upon a scaffold which had been erected in a negligent manner by a servant of the guardians, and which was unsafe. The scaffold gave way while the plaintiff was at work upon it, and he sustained personal injuries. In an action brought to recover damages from the defendants,—*Held*, that the doctrine of common employment had no application, inasmuch as the plaintiff was compellable by law to do the work which he was ordered to do. *Held*, further, that the action, not being one for the mere neglect of an ordinary administrative duty, was maintainable against the defendants. *Tozeland v. West Ham Guardians*, 75 L. J. K.B. 353; [1906] 1 K.B. 538; 94 L. T. 486; 54 W. R. 531; 70 J. P. 134; 4 L. G. R. 411; 22 T. L. R. 300—D.

Fraud by Clerk of Guardians—Guardians Damned.—By a resolution of poor-law guardians their clerk's salary was increased, such increase to include all claim to remuneration for work in connection with all elections of guardians. This resolution the clerk was directed to forward to the Local Government Board for their sanction. Without the knowledge of the guardians, and intentionally, the clerk communicated to the Local Government Board only a part of the resolution, omitting that part which had reference to the increased salary being inclusive of all remuneration in relation to elections. The Local Government Board sanctioned the increase, which was accordingly paid to the clerk. Some years later the guardians discovered what the clerk had done, whereupon they made a claim against the defendants who had guaranteed to the amount of 300*l.* the due and faithful performance by the clerk of the duties of his office:—*Held*, that the guardians were entitled to recover, as the clerk had not duly and faithfully discharged the duties of his office, and the guardians had been damnedified by having made payments of the increased salary on a resolution to which the sanction of the Local Government Board had not been obtained, which payments were consequently *ultra vires*. *Bramley Union v. Guarantee Society*, 64 J. P. 308—C.A.

Pauper Inmate of Workhouse—Order to Assist in Certain Work—Injury caused by Negligence of Permanent Official—Common Employment—Action for Damages—Liability of Guardians.—A pauper inmate of a workhouse was ordered by the master to assist in certain work in connection with an extension of the electric lighting installation at the workhouse infirmary. While he was working on a scaffold, which had

been erected in a negligent manner by a permanent official of the guardians, and which was unsafe, the scaffold gave way, and the pauper was severely injured. In an action by him for damages for negligence against the guardians,—*Held*, that the doctrine of common employment had no application, inasmuch as the pauper was compellable by law to obey the order to assist in the work. *Tozeland v. West Ham Guardians*, 76 L. J. K.B. 514; [1907] 1 K.B. 920; 96 L. T. 519; 71 J. P. 194; 5 L. G. R. 507; 23 T. L. R. 325—C.A.

Held, further, that the guardians in their corporate capacity were acting ministerially in the performance of their statutory duty to maintain and employ the pauper, and that consequently the action would not lie against them. *Ib.*

Brennan v. Limerick Guardians (2 L. R. Ir. 42) and *Dunbar v. Ardee Guardians* ([1897] 2 Ir. R. 76) applied. *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board* (28 L. J. Q.B. 41; 8 E. & B. 801) and *Levingston v. Lurgan Guardians* (Ir. R. 2 C.L. 202) distinguished. *Ib.*

Proceedings against—Limitation of Time for Commencement of—"Debt claim or demand lawfully incurred or become due."—A demand for a reference to arbitration under an arbitration clause in a building contract in respect of an alleged breach of that contract by the guardians of a union is not a commencement of proceedings within the meaning of section 4 of the Poor Law (Payment of Debts) Act, 1859, and a claim for damages for breach of such a contract does not constitute "a debt claim or demand lawfully incurred or become due" within the meaning of section 1 of that Act until the amount of the damage has been ascertained either by the award of an arbitrator or in some other manner provided by law. *Sharpington v. Fulham Guardians*, 73 L. J. Ch. 777; [1904] 2 Ch. 449; 52 W. R. 617; 63 J. P. 510; 2 L. G. R. 1229; 20 T. L. R. 648—Farwell, J.

"Debt or demand"—Unliquidated Damages.—The plaintiffs sued to recover from the defendants 49*l.* 1*l.* 9*d.* for water supplied to the defendants' workhouse from January 1, 1902, to the date of the writ in the action—namely, July 6, 1904. In the statement of claim this sum was claimed as damages for wasting water passing through the meter at the workhouse, but at the trial in 1906 the claim was treated as amended by adding an alternative claim for money due for water supplied by contract:—*Held*, that the action till amended was not a "proceeding" within the meaning of section 4 of the Poor Law (Payment of Debts) Act, 1859, and that as the amendment in the form of the claim was made after the time specified in section 1 of that Act, the plaintiffs were precluded from recovering any part of the sum sued for. *Chester Waterworks Co. v. Chester Union*, 96 L. T. 566; 71 J. P. 133; 5 L. G. R. 215; 23 T. L. R. 245—Jelf, J.

3. OVERSEERS.

"Parish council."—By virtue of the operation of the Local Government Act, 1894, the word

"overseers" in section 4 of the Poor Relief Act, 1743, is to read as "parish council." *King's Lynn Docks Co., Ex parte*, 69 L. J. Q.B. 341; [1900] 1 Q.B. 521; 82 L. T. 324; 48 W. R. 348; 64 J. P. 375—D.

Assistant Overseer — Appointment — Rate Books—Right to Temporary Possession.]—The Court will grant a writ of *mandamus* calling upon the overseers of a parish to deliver to an assistant overseer temporary possession of the rate books and other books in their custody as overseers, for the purpose of enabling him to perform the duties of his office. *Reg. v. Powell*, 68 L. J. Q.B. 274; [1899] 1 Q.B. 396; 80 L. T. 184; 63 J. P. 84—D.

A person may be appointed assistant overseer by a resolution of the parish council signed by the chairman of the council. *Id.*

Liability of Overseers for Acts of Assistant Overseer — Excessive Distress.]—An assistant overseer is not the servant of the overseers, but of the vestry. As there is statutory recognition of the office of assistant overseer, the overseers are not liable for his acts in the same way as a sheriff is for the acts of his subordinates. Therefore, where an assistant overseer is party to an excessive distress in the execution of a distress warrant issued for non-payment of rates, the overseers do not incur liability unless they do some act which makes them responsible. *Baker v. Wicks*, 73 L. J. K.B. 410; [1904] 1 K.B. 743; 90 L. T. 706; 52 W. R. 556; 68 J. P. 263; 2 L. G. R. 1155; 20 T. L. R. 382—Lord Alverstone, C.J.

4. UNIONS AND TRANSFERS OF AREAS.

Union — Alteration of — Division of "Property"—Annual Grants by County Council—Valuation.]—Where a parish is separated from a union under section 32 of the Poor Law Amendment Act, 1834, the annual sums granted by the county council to the union under section 24, sub-section 1 (d), and section 26, sub-section 2 of the Local Government Act, 1888, are property within the meaning of the words "other property held or enjoyed by such union" in section 32 of the Act of 1834, and in case the parties do not agree under section 11 of the Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), upon the manner of the valuation of these payments, it is the duty of the Local Government Board upon the true construction of section 32 of the Act of 1834 to ascertain the proportionate value of these payments to every parish of the union according to their existing capital value at the time of the alteration, and upon the basis of that value to fix once for all an amount to be received or paid or secured to be paid by every parish affected by the alteration. *Reg. v. Local Government Board*, 70 L. J. K.B. 272; [1901] 1 K.B. 210; 83 L. T. 648; 49 W. R. 226; 65 J. P. 36—C.A.

Alteration of Areas — Order for Division of Old Parish into New Parishes — Provision for Continuation of Pauper Settlements in New Parishes—Validity.]—Pursuant to section 36 of the Local Government Act, 1894, an order for the division of a parish was made by a

county authority and confirmed by the Local Government Board. The order contained a clause providing that every person who had acquired a settlement in the original parish should be deemed to have acquired a settlement in one of the newly formed parishes which comprised the place where the circumstances conferring the settlement in the original parish had occurred:—*Held*, that the clause was not *ultra vires* of the provisions of that section. *Held*, further, that, in any case, by virtue of section 42, no objection to the legality of the clause could be entertained in legal proceedings commenced more than six months after the confirmation of the order. *Reg. v. Middlesex Justices; Walsall Union, Ex parte*, 75 L. J. K.B. 784; [1906] 2 K.B. 365; 95 L. T. 419; 70 J. P. 385; 4 L. G. R. 873—D.

Separation of Parish from Union—Adjustment of Rights and Interests—"Property" of Union—"Fixing" Amount to be Paid by Union to Parish.]—By section 32 of the Poor Law Amendment Act, 1834, the Local Government Board may make an order for the separation of a parish from a union, and in such case the board are required to ascertain the proportionate value to every parish of the union of the "work-houses, or other property" held or enjoyed by the union for the use of the poor, and "to fix the amount" to be received or paid by every parish affected by the separation. On the separation of a parish from a union under this section, and on the adjustment of the rights and interests of the union and parish respectively,—*Held*, that annual sums which the union is entitled to receive from the county council of the county under the Local Government Act, 1888, in respect of the salaries of registrars and the costs of the officers of the union, are "property" within the meaning of the section, and that the Local Government Board have jurisdiction to apportion the same and to fix the amount to be paid by the union to the parish in respect of such sums. *Held*, also, that an apportionment of these annual sums according to the rateable values of the union and parish respectively, as shown, by the valuation lists in force during the year, is a "fixing of the amount" to be paid by the union to the parish within the meaning of the section, and that the Local Government Board have jurisdiction so to make the apportionment and to order that the union shall in each year pay to the parish the amounts of such annual sums so fixed according to the rateable values. *Reg. v. Local Government Board*, 82 L. T. 385; 64 J. P. 516—D.

Part of Old Parish—Urban Sanitary Authority — Union of Districts.]—*See* LOCAL GOVERNMENT, col. 1814.

5. CASUAL WARDS.

Provision of Permanent Casual Wards—Value of Land—Metropolitan Common Poor Fund.]—Permanent casual wards for paupers were erected by the Holborn Union upon land which they had acquired many years before, the union borrowing money for the purpose of erecting the wards, which was repaid by instalments out of the Metropolitan Poor Fund, as established by the Metropolitan Poor Act, 1867.

The Holborn Union sought to have the value of the land so used repaid to them out of the Metropolitan Common Poor Fund in one particular half-year. The auditor disallowed the item. Upon rules for a *certiorari* to quash the disallowance and for a *mandamus* to grant a certificate of allowance,—*Held*, that the whole sum could not be allowed in one half-year, and therefore the rules must be discharged. *Quare*, whether the union were not entitled to include in their accounts for the purpose of having repaid to them out of the Common Poor Fund the fair value of the land for the six months. *Reg. v. Mowatt; Holborn Union, ex parte*, 93 L. T. 789; 69 J. P. 461; 21 T. L. R. 646—D.

6. SETTLEMENT AND REMOVAL.

Statute.—63 & 64 Vict. c. 23 is the *Poor Removal Act, 1900*.

Parish Enlarged by Amalgamation of Part of Adjoining Parish.—Where by order of the Local Government Board, under the Divided Parishes Act, 1876, as amended by the Poor Law Act, 1879, a small part of one parish ceases to be part of that parish, and is joined on to and amalgamated with the next parish, the latter parish is not destroyed, nor are settlements gained in it by paupers, prior to the order, destroyed by reason of the amalgamation. *St. Saviour's Union v. Dorking Union* (67 L. J. Q.B. 408; [1898] 1 Q.B. 594) and *Reg. v. Tipton* (11 L. J. Q.B. 89; 3 Q.B. 215) distinguished. *West Ham Union v. London County Council*, 70 L. J. K.B. 503; [1901] 1 K.B. 720; 84 L. T. 471; 49 W. R. 443; 65 J. P. 358—D.

Division of Parish.—A settlement acquired by a person in the parish of Claines, Worcestershire, before September 30, 1885, is, by the operation of the Worcester Extension Act, 1885 (48 & 49 Vict. c. clxiv.), which divided the parish of Claines into two portions, preserved in that portion of the parish in which it has been acquired. *Worcester Union v. Birmingham Union*, 65 J. P. 771—D.

Parish in which Settlement Acquired Added to by Amalgamation of Part of another Parish.—Where by an Order of the Local Government Board made under the Divided Parishes Act, 1876, as amended by the Poor Law Act, 1879, a part of one parish ceases to be part of that parish and is amalgamated with another parish, the identity of the latter parish is not destroyed, nor are settlements acquired in it prior to the Order lost. *Reg. v. Tipton Inhabitants* (11 L. J. Q.B. 89; 3 Q.B. 215) and *St. Saviour's Union v. Dorking Union* (67 L. J. Q.B. 408; [1898] 1 Q.B. 594) distinguished. *West Ham Union v. London County Council*, 71 L. J. K.B. 299; [1902] 1 K.B. 562; 86 L. T. 134; 50 W. R. 275; 66 J. P. 356—C.A.

Division of Parish into Separate Parishes—Loss of Birth Settlement.—Where a parish partly within and partly without a rural sanitary district has been divided by the operation of section 1, sub-section 3 of the Local Government Act, 1894, a pauper loses his birth settlement acquired there before the passing of the Act, because the place of such settlement has

ceased to exist, and he cannot be treated as having a birth settlement in the new parish which originally formed the part of the old parish where he was born. *Reg. v. Tipton* (11 L. J. M.C. 89; 3 Q.B. 215) followed. *St. Saviour's Union v. Dorking Union*, 67 L. J. Q.B. 408; [1898] 1 Q.B. 594; 78 L. T. 29; 46 W. R. 309; 62 J. P. 308—C.A.

Division of Parish into Separate Parishes by Order—Pauper Deemed to have Acquired Settlement in New Parish.—An order of the Local Government Board dividing an existing parish into two separate parishes, which provides (*inter alia*) that, as between the two new parishes, every person who has acquired, or shall on or before a given date acquire, a settlement in the existing parish shall be deemed to have acquired such settlement in either of the separate parishes, does not apply to persons who are in the process of acquiring a settlement in the existing parish. Accordingly, a pauper who had resided in the old parish for two years and ten months up to the given date, and continued his residence in one of the new parishes for eighteen months after the given date, cannot add the two periods of residence together and claim to have acquired a settlement in the new parish. *Calne Union v. St. Mary, Islington, Guardians*, 69 L. J. Q.B. 400; 82 L. T. 121; 64 J. P. 246—D.

Division of Parish by Provisional Order.—By the Local Government Act, 1894, the parish of Broadwater, in which at that date the pauper had acquired a settlement by residence from 1886 to 1891, was divided into two parishes—Broadwater and Worthing. The residence of the pauper had been in that part of the original parish of Broadwater which under the Act became the parish of Worthing. By a Provisional Order in 1902, a part of the then parish of Broadwater, with parts of other parishes, was added to Worthing, so as to form a new parish. The Provisional Order provided for the preservation of settlements which had been acquired at the date of the Order in any existing parish affected by the Order; it further provided that, for all purposes of settlement and removal, residence prior to the commencement of the Order in any part of the existing parishes of Broadwater, certain other parishes, or Worthing, should be deemed to have been residence in the parish in which the part was included in the Order:—*Held*, that the Provisional Order did not operate to restore the settlement of the pauper in the old parish of Broadwater which had been destroyed by the Act of 1894, and that the pauper was not settled in the parish of Worthing. *East Preston Union v. Lewisham Union*, 91 L. T. 498; 2 L. G. R. 1077; 68 J. P. 404—D.

Addition to Original Parish of Part of Area of Another Parish.—Where by a statutory order of the Local Government Board the area of a parish is enlarged by the inclusion of a part of an adjoining parish, the identity of the original parish is not destroyed, nor are settlements acquired therein previously to the order lost. *Reg. v. Tipton Inhabitants* (11 L. J. M.C. 89; 3 Q.B. 215) and *St. Saviour's Union v. Dorking Union* (67 L. J. Q.B. 408; [1898] 1 Q.B. 594) distinguished. *West Ham Union v. London County Council*, 73 L. J. K.B. 85;

[1904] A.C. 40; 89 L. T. 614; 52 W. R. 465; 68 J. P. 145; 2 L. G. R. 301; 20 T. L. R. 127—H.L. (E.) And see *West Ham Union v. Edmon-ton Union*, 77 L. J. K.B. 85; [1908] A.C. 1; 98 L. T. 1; 72 J. P. 9; 6 L. G. R. 39—H.L. (E.)

Residential Settlement—Break of Residence—Absence on Military Service.—In order that a person should acquire a residential settle-ment under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, he must reside in a parish under the conditions men-tioned in the section for a period of three consecutive years. Separate periods of resi-dence cannot be added together to make up the three years, even though the interval between those periods is such as is, under section 1 of the Poor Removal Act, 1846, to be excluded in the computation of time for the purpose of that section. *St. Olave's Union v. Canterbury Union* (66 L. J. Q.B. 471; [1897] 1 Q.B. 438) followed. *Newark Union v. Maidstone Union*, 93 L. T. 602; 3 L. G. R. 1005; 69 J. P. 413—D.

The absence of a person from the parish where he lives on military service breaks his residence in that parish for the purposes of section 34 of the Act of 1876, notwithstanding that his house is kept up, that his wife and children continue to live there, and that he intends to return to his home at the conclusion of the service. *Ib.*

Illegitimate Child—Derivative Settlement.—On an enquiry as to the settlement of an ille-gitimate pauper with no settlement of his own, whose mother also has acquired no settle-ment of her own, it is not necessary, in order that the pauper shall be deemed to be settled in the parish in which he was born, within para-graph 3 of section 35 of the Divided Parishes Act, 1876, to ascertain what the mother's de-rivative settlement is; it is enough to shew that the mother was the legitimate offspring of an English father. *Plymouth Union v. Aarminster Union*, 67 L. J. Q.B. 871; [1898] A.C. 586; 79 L. T. 4; 47 W. R. 33; 62 J. P. 612—H.L. (E.)

—Mother's Settlement—Child under Sixteen—Residence for Three Years—Irremovability.—There is nothing to prevent a child under the age of sixteen years from acquiring a settlement. A person who has for three years so resided in a parish as to become irremovable is to be deemed to be settled therein within the mean-ing of section 34 of the Divided Parishes Act, 1876, although such person, being a wife or child, may also have acquired a derivative settlement. The child of such a person can take the parent's settlement under section 34, and is not relegated to its birth settlement under section 35, since it is not necessary to enquire into the derivative settlement of the parent within the meaning of the latter section. *Reg. v. Elvet (Inhabitants)* (29 L. J. M.C. 17; 2 E. & E. 266) followed. *Manchester Overseers v. Ormskirk Union* (59 L. J. M.C. 108; 24 Q.B. 678) not followed. *West Ham Union v. Hol-beach Union*, 72 L. J. K.B. 801; [1903] 2 K.B. 627; 52 W. R. 30; 67 J. P. 346; 1 L. G. R. 889—D.

Removability—Resolution by Guardians Adopt-ing Child—Power to Remove Child while Reso-lution not Rescinded.—The fact that the

guardians of a poor law union by whom a child is maintained have, acting under section 1 of the Poor Law Act, 1899, passed a resolution by which all the rights and powers of the parent of such child become vested in them, does not, even where they have not rescinded the resolu-tion, deprive them of the right to obtain an order for the removal of the child to the place of its last legal settlement. *Wantage Union v. Bristol Union*, 76 L. J. K.B. 25; [1907] 1 K.B. 68; 96 L. T. 118; 71 J. P. 54; 5 L. G. R. 33; 23 T. L. R. 54—D.

—Residence of Pauper for Upwards of Three Years.—A pauper resided for many years till 1897 in Bethnal Green. He was a railway goods guard travelling between Yarmouth and London. In 1897 he became tenant of a house in Yarmouth, of which he remained tenant for more than three years. He resided in that house with his wife except when absent in London, when he regularly occupied as a lodger a furnished room for an agreed weekly sum. He slept in London and Yarmouth on alternate days.—*Held*, that the pauper was settled in Yarmouth and was removable there. *Great Yarmouth Union v. Bethnal Green Union*, 97 L. T. 440; 71 J. P. 422; 5 L. G. R. 1105—D.

—Residence of Married Woman and Children for a Year—Departure of Husband with Intention of Returning—Residence of Wife.—A husband and wife, with their children under the age of sixteen, resided in a parish for part of a year. The husband, who was a foreigner with no settlement of his own, then went to America under circumstances which did not amount to desertion, and intending to return. The wife with her children continued to reside in the parish for the rest of the year, and then became chargeable to the parish. Her husband had not then returned.—*Held*, that the married woman and her children were irremovable from the parish. *Reg. v. St. George-in-the-East (Inhabit-ants)* (39 L. J. M.C. 90; L. R. 5 Q.B. 364) followed. *Tewkesbury Union v. Birmingham Guardians*, 73 L. J. K.B. 797; [1904] 2 K.B. 395; 90 L. T. 787; 53 W.R. 268; 68 J. P. 397; 2 L. G. R. 864; 20 T. L. R. 499—D.

—Deserted Wife—Evidence of Desertion—Wife sent Away by Husband.—Previously to October, 1895, a married woman, living with her husband, had contracted habits of intem-perance and conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for their children. In that month her husband told her that he would no longer put up with her, that he and she must live apart for a time, that she must find some other lodging, and that he would allow her eight shillings a week so long as she kept straight, and give her furniture for a room elsewhere, and if she reformed he and she could live together again. The wife, upon this, left her husband's house, and went to live in a room elsewhere, which she furnished with furniture taken from her husband's house. For eleven months the husband made her the weekly allowance he had expressed his inten-tion of making, but at the end of that time stopped it on discovering that his wife had committed adultery. The wife then went to live with a man in the S. Union, and lived

with him there from September, 1896, till 1903, when she was found wandering in a state of lunacy, and was removed to an asylum. An order of Justices was then made under section 294 of the Lunacy Act, 1890, adjudging that she was irremovable from the S. Union by reason of her residence in that union. On appeal the quarter sessions affirmed the order on the ground that the pauper, at the time of her residence in the S. Union, had been "deserted by her husband" within the meaning of section 3 of the Poor Removal Act, 1861, and was capable accordingly of acquiring a status of irremovability in that union:—*Held* (RIDLEY, J., dissenting), on the authority of *Reg. v. Maidstone Union* (49 L. J. M.C. 25; 5 Q.B. D. 31), that there was evidence on which the quarter sessions could so find. *Southwark Union v. City of London Union*, 93 L. T. 184; 3 L. G. R. 568; 69 J. P. 265—D.

— **Break of Residence.**—A female pauper, whose legal settlement was at C., acquired a status of irremovability from the E. Union, and became an inmate of the E. workhouse. On January 10, 1899, she left the E. workhouse with the intention of going to reside in the C. workhouse, and of not returning to the E. Union, and went to the house of her niece in the W. H. Union. On January 16, 1899, she left the house of her niece and returned to the E. Union, not with the intention of permanently residing there, but of being passed on therefrom to the C. Union, and was readmitted into the E. workhouse:—*Held*, that when she left the E. Union on January 10, 1899, she had broken her residence therein and lost her status of irremovability therefrom, and that she was therefore properly removable from the E. Union to the C. Union. *Cambridge Union v. Edmonton Union*, 69 L. J. Q.B. 584; [1900] 2 Q.B. 111; 82 L. T. 495; 48 W. R. 559; 64 J. P. 533—D.

— **Pauper in Receipt of Relief—Exclusion of Period.**—The provisions of section 1 of the Poor Removal Act, 1846, as to the exclusion for all purposes in the computation of time under the section of any period, *inter alia*, during which a person is in receipt of relief, prevent a pauper who has acquired a status of irremovability under the section, and who is in receipt of relief, from losing that status by a change of residence so long as he continues to be in receipt of relief. *Hartfield Overseers v. Rotherfield Overseers* (21 L. J. M.C. 65; 17 Q.B. 746) followed. *Poplar Union v. West Ham Union*, 94 L. T. 769; 4 L. G. R. 512; 70 J. P. 255—D.

— **Animus Revertendi.**—A female domestic servant who had acquired a status of irremovability in the T. Union by reason of her residence in service there fell ill and was, at her own wish, taken by her mistress to a home for weak-minded girls in another union, where she had been brought up. She expressed a hope that she might, if she got better, be taken back again into the situation she was leaving; but in fact, though she was not aware of this, the mistress had determined not to take her back. She shortly afterwards became insane:—*Held*, that under the circumstances there was no evidence of *animus revertendi* on the pauper's part; and that her leaving her situation in the

T. Union broke her residence there. *Tendring Union v. Ipswich Union*, 1 L. G. R. 574; 67 J. P. 304—D.

— **Illegitimate Child under Sixteen—Residence for Three Years—Independent Settlement.**—Illegitimate children under sixteen, residing with their mother and putative father in a union from which the putative father is irremovable, acquire a settlement of their own in that union by virtue of section 3 of the Poor Removal Act, 1846. *Fulham Union v. Woolwich Union*, 76 L. J. K.B. 739; [1907] A.C. 255; 97 L. T. 117; 71 J. P. 361; 5 L. G. R. 801; 23 T. L. R. 583—H.L. (E.)

By the LORD CHANCELLOR.—Section 34 of the Divided Parishes Act, 1876, by which any person who shall have resided for the term of three years in a parish from which he has become irremovable shall be deemed to be settled therein until he shall have acquired a settlement elsewhere, is applicable to illegitimate children under sixteen. The section is not qualified by section 35, by which, with the exception of wives and children under sixteen, derivative settlements are abolished. *Ib.*

By LORD MACNAGHTEN.—The proviso to section 1 of the Poor Removal Act, 1846, that a wife or children having no other settlement than that of the husband or parent are removable or irremovable, according as the husband or parent is removable or irremovable, applies to the case of illegitimate as well as to that of legitimate children. *Ib.*

— **Residence with Reputed Father.**—A woman left her husband in 1895, and went to live with another man in the W. Union, by whom she had three children. The man, woman, and children lived together in the W. Union from April, 1902, until February 23, 1905, when the woman died. On March 2, 1905, the reputed father and the children, who were under the age of sixteen years, were admitted into the workhouse of the W. Union, and on March 3, 1905, the reputed father died there:—*Held*, that by virtue of section 3 of the Poor Removal Act, 1846, the children were irremovable from the W. Union. *Maidstone Union v. Wandsworth Union*, 95 L. T. 125; 70 J. P. 403; 4 L. G. R. 1052—D.

— **Residence with Parent and Mother's Husband.**—An illegitimate child lived for three years with her mother and her mother's husband, being still under sixteen at the end of the residence:—*Held*, that she had acquired her mother's settlement—by the LORD CHANCELLOR on the ground that, the House having in *Highworth and Swindon Union v. Westbury-on-Severn Union* (59 L. J. M.C. 29; 14 App. Cas. 465) decided that part of the residence under sixteen was available to make up a settlement, it followed logically that the whole residence under that age would constitute a settlement; by LORD MACNAGHTEN on the ground that the child's mother took her husband's settlement, and that the child followed her mother's settlement till she attained sixteen and thereafter retained that settlement, the settlement thus acquired and retained ceasing to be a derivative and becoming a statutory settlement under section 35 of the

Divided Parishes Act, 1876. *West Ham Union v. Holbeach Union*, 74 L. J. K.B. 868; [1905] A.C. 450; 93 L. T. 557; 54 W. R. 137; 69 J. P. 442; 3 L. G. R. 1179; 21 T. R. 713—H.L. (E.)

Order of Justices Effective as a Judgment in Rem—Abortive Appeal—Appeal Dismissed on Technicality.—An order of two Justices, adjudging the settlement of a pauper to be in a particular union, is effective as a judgment *in rem* and conclusive as to the settlement of the pauper at the time; and an abortive appeal against it does not rob the order of its effect as a judgment *in rem*, notwithstanding the fact that such appeal has not been heard upon its merits, but has been dismissed merely upon a technical ground. *Uxbridge Union v. Winchester Union*, 91 L. T. 533; 2 L. G. R. 969; 68 J. P. 525—D.

7. MAINTENANCE.

Wilful Neglect to Maintain—Bona Fide Belief of Wife's Adultery.—The respondent T. E. was charged under section 3 of the Vagrancy Act, 1824, for that he, being able to work and maintain himself and his wife and family, "wilfully refused or neglected" to do so. The magistrates found that he refused to maintain his wife because of the *bona fide* belief that she had committed adultery, and that he had offered under certain conditions to support his children. They dismissed the summons, holding that under these circumstances T. E., the respondent, had not "wilfully refused or neglected":—*Held*, that the magistrates were right. *Morris v. Edmonds*, 77 L. T. 56; 18 Cox C.C. 627—D.

Refusal of Work Offered at Labour Colony—Vagrancy Act.—Upon the prosecution of an able-bodied pauper, under section 3 of the Vagrancy Act, 1824, as a person able wholly or in part to maintain himself and neglecting or refusing so to do, because he has refused work offered outside the workhouse for which he would receive board, lodging, and a small weekly wage, the Court must consider the conditions upon which such work has been offered, and whether the pauper's refusal to accept it was or was not reasonable. *Poplar Union v. Martin* (No. 1), 91 L. T. 550; 2 L. G. R. 1012; 68 J. P. 526; 20 Cox C.C. 742; 20 T. L. R. 659—D. *And see VAGRANT.*

Maintenance of Parent—Coverture—Married Woman having Separate Estate.—A married woman having separate estate is not liable under the Poor Law Acts to maintain a parent, even though she be of sufficient ability so to do. *Pontypool Union v. Buck*, 76 L. J. K.B. 66; [1906] 2 K.B. 896; 95 L. T. 795; 4 L. G. R. 1148; 71 J. P. 5; 23 T. L. R. 17—D.

of Wife—Order against Husband—Liability of Son—Concurrent Liability.—Justices have power, under section 7 of the Poor Relief Act, 1601, to make a maintenance order against the son of a woman who is a pauper lunatic, notwithstanding that a similar order has already been made against her husband under section 5 of the Poor Law Amendment Act, 1850. *Cole v. Brown*, 76 L. J. K.B. 847; [1907] 2 K.B.

301; 96 L. T. 710; 71 J. P. 335; 5 L. G. R. 727—D.

— of Son—Assignment by Father by Post-nuptial Settlement on Second Marriage—"Sufficient ability."—Where a father, in order to avoid a claim for the maintenance of his son, conveys all his property to his second wife by way of post-nuptial settlement, the Justices can draw the inference that the father is of "sufficient ability" to maintain such son within section 7 of the Poor Relief Act, 1601. *Coulson v. Davidson*, 96 L. T. 20; 71 J. P. 17; 5 L. G. R. 56—D.

— of Relatives—Running Away and Leaving Children Chargeable—Failure to Remove Children from Workhouse after Expiration of Sentence for Previous Offence.—A parent who has been convicted under section 4 of the Vagrancy Act, 1824, of running away and leaving his children, whereby they became chargeable, and who has in consequence undergone a sentence of imprisonment, may be again convicted under the section of running away and leaving such children chargeable, if on the expiration of his sentence he fails to remove them from the workhouse and absconds. *Bannister v. Sullivan*, 91 L. T. 380; 2 L. G. R. 874; 68 J. P. 390; 20 Cox C.C. 685—D.

— of Bastard—Marriage of Mother—Liability of Husband—Liability of Putative Father.—A bastard child may become "chargeable to a parish" within the meaning of section 5 of the Bastardy Laws Amendment Act, 1873, although its mother has married a man who is able to maintain the child. *Plymouth Guardians v. Gibbs*, 72 L. J. K.B. 38; [1903] 1 K.B. 177; 87 L. T. 685; 51 W. R. 157; 67 J. P. 61; 1 L. G. R. 48—D.

— of Pauper Children sent from Outside Area to Infection Hospital.—A number of pauper children, who were chargeable to the Chorlton Union, were sent, with the sanction of the Local Government Board, to a school certified for the reception of pauper children, situated in the urban district of Tottington. Tottington formed one of the constituent districts of the united district of which the plaintiff board (which was formed by a provisional order of the Local Government Board under section 279 of the Public Health Act, 1875) was the governing body; Chorlton Union was outside the plaintiff board's district. An outbreak of scarlet fever having occurred in the Tottington school, some of the children who had been sent there by the Chorlton Union were, at the instance of the medical adviser to the school, who was also medical officer of health for the Tottington district, sent to the hospital maintained by the plaintiffs. There was no evidence of any authority by the Chorlton Union to such removal. The plaintiffs claimed to recover from Chorlton Union the expense of such maintenance:—*Held*, that the action failed, there being no statutory liability on the part of Chorlton Union, and no evidence of any contractual liability, either express or to be implied from the urgency of the circumstances. *Bury and District Joint Hospital Board v. Chorlton Union*, 70 J. P. 31; 4 L. G. R. 489—Bray, J.

Pauper Lunatic — Out-Union Patient — Ex-

penses of Maintenance—Amount Chargeable.]—The visiting committee of a lunatic asylum are not empowered under sub-section 3 of section 283 of the Lunacy Act, 1890, to fix a weekly sum, not exceeding 14s., in respect of the maintenance in the asylum of out-county pauper lunatics, in addition to the weekly sum already fixed by them, under sub-section 1, in respect of the maintenance of each pauper lunatic in the asylum; but where they have, under sub-section 1, fixed a weekly sum of less than 14s. in respect of each pauper lunatic, they have power to differentiate between in-county and out-county pauper lunatics by fixing the maximum weekly sum of 14s. in respect of out-county pauper lunatics. *Fitch v. Bermondsey Guardians*, 74 L. J. K.B. 250; [1905] 1 K.B. 524; 92 L. T. 343; 53 W. R. 308; 3 L. G. R. 300; 69 J. P. 102; 21 T. L. R. 206—C.A.

— Wife Deserted by Her Husband—Misconduct of Wife.]—A wife having given way to habits of intemperance and having conducted herself in a manner rendering it impossible for her husband to keep a respectable home for the children of the marriage, the husband told her that he and she must part for a time; that she must find some other lodging and might take enough furniture to furnish it; and that he would allow her eight shillings a week so long as she continued chaste. Both parties then left the house in which they had been living, and separated, the wife taking with her enough furniture to supply a room for herself. For eleven months the husband paid the wife eight shillings a week. At the end of that time he found that she had committed adultery, and from thenceforth he neither saw her nor contributed towards her maintenance. She lived for nearly seven years with the adulterer in the appellants union. She was then found a pauper wandering in a state of lunacy in the respondent union, and was removed to a lunatic asylum in that union. An order having been made by Justices adjudging that the place from which she was then irremovable was in the appellants union,—*Held*, that she was a married woman “deserted by her husband” within the meaning of section 3 of the Poor Removal Act, 1861; and that, therefore, having resided in the appellants union for more than the three years prescribed by that section [now one year by virtue of section 17 of the Poor Law Amendment Act, 1866], she was irremovable from the appellants union. *Reg. v. Maidstone Union* (49 L. J. M.C. 25; 5 Q.B. D. 31) followed. *Southwark Union v. City of London Guardians*, 75 L. J. K.B. 559; [1906] 2 K.B. 112; 94 L. T. 763; 54 W. R. 547; 4 L. G. R. 730; 70 J. P. 449; 22 T. L. R. 568—C.A.

— Adjudication of Settlement — Order on Guardians for Expenses of Maintenance—Action for Recovery of Expenses Ordered to be Paid — Defences — Adjudication of Settlement made in Ignorance of Facts—Fresh Settlement Acquired since Adjudication.]—In an action brought under section 314, sub-section 2 of the Lunacy Act, 1890, for the recovery of the expenses of maintenance of a pauper lunatic from a board of guardians in whose union the pauper's settlement has, under section 289, been adjudged to be, and who have been ordered by Justices to pay such expenses, the

adjudication is conclusive as to the settlement. Accordingly, evidence to shew either that the adjudication was erroneous and made in ignorance of the facts, or that the pauper has since the adjudication acquired a fresh settlement, is not admissible. Where the pauper has acquired a fresh settlement since the adjudication, the remedy of the guardians is to apply for a fresh adjudication under sections 288 and 289. *Suffolk County Asylum v. Nottingham Union*, 3 L. G. R. 362; 69 J. P. 120—D.

Arrears of Maintenance — Recovery — Adult and Sane Pauper.]—Where an adult and sane pauper, who has been in a workhouse for some years, comes into money, the guardians have a common-law right of action against him to recover six years' arrears of money expended by them in respect of his maintenance. *Birkenhead Union v. Brookes*, 95 L. T. 359; 70 J. P. 406; 4 L. G. R. 988; 22 T. L. R. 583—D.

— — Infant Pauper — Legacy — Guardians' Right to.]—Section 16 of the Poor Law Amendment Act, 1849, entitling poor-law guardians to appropriate or recover out of the property of a pauper the expense incurred by them in maintaining him during the previous twelve months, leaves unaffected their common-law right of recovering in respect of expenditure necessarily incurred for his benefit. Accordingly, where an infant pauper becomes entitled to property he will be under the common-law liability to repay the guardians for expenses necessarily incurred for his benefit to the full extent of six years' arrears. *Clabbon, In re*, 73 L. J. Ch. 853; [1904] 2 Ch. 465; 91 L. T. 316; 53 W. R. 43; 68 J. P. 588; 2 L. G. R. 1292; 20 T. L. R. 712—Farwell, J.

— — Pauper Lunatic.]—Maintenance of a pauper lunatic in an asylum by the guardians of the poor of the parish to which he is chargeable, constitutes a debt of the lunatic to the guardians. *Watson, In re; Stamford Union v. Bartlett*, 68 L. J. Ch. 21; [1899] 1 Ch. 72; 79 L. T. 462; 47 W. R. 359—Stirling, J.

In an action by the guardians against his legal personal representative for arrears of maintenance, the Statute of Limitations may be set up. *Ib.*

Arrears of maintenance from a date six years prior to the commencement of the action only are recoverable. *Newbiggin, In re; Eggleton v. Newbiggin* (56 L. J. Ch. 907; 36 Ch. D. 477), followed. *Ib.*

In such an action the Court will not, in order to grant more than six years' arrears, take judicial notice of what might have been the effect of presenting a petition in lunacy for arrears in the lunatic's lifetime. *Stedman v. Hart* (23 L. J. Ch. 908; Kay, 607) distinguished. *Ib.*

— — Payments on Account—Appropriation.]—A pauper lunatic can plead the Statute of Limitations as a defence to a claim by guardians of the poor for arrears of maintenance, but the same answers can be made to that plea as in the case of any ordinary action

for debt. *Wandsworth Union v. Worthington*, 75 L. J. K.B. 235; [1906] 1 K.B. 420; 95 L. T. 331; 54 W. R. 422; 70 J. P. 191; 4 L. G. R. 320; 22 T. L. R. 284—Farwell, J.

When the receiver in lunacy of a pauper lunatic, acting under a general order of the Court directing him to apply the lunatic's income for her maintenance and benefit, had during a number of years made payments on account of the arrears of maintenance to the guardians of the poor, it was held that the guardians were entitled to recover from the lunatic's estate the whole of the amount still owing for arrears of maintenance, and not merely the arrears of maintenance for the six years prior to the commencement of the proceedings. *Ib.*

— — — Fund in Court—Form of Order—Payment on Account of Arrears of Maintenance.]

—Three pauper lunatics had for some years been confined in the L. County Asylum, and the guardians of the union to which they were chargeable had duly paid from time to time to the treasurer of the asylum the expenses of their maintenance. In 1905 the lunatics became entitled under a will to sums of money which were paid into Court by the trustees of the will, and were represented by Consols. On a summons taken out by the guardians asking that they might be recouped from the funds in Court for the past maintenance of the lunatics, and that provision might be made for their future maintenance,—*Held*, that the guardians ought to be paid from the funds the amounts paid annually in respect of the maintenance of the lunatics, such payments to the guardians to be deemed to be so made on account of arrears of maintenance claimed, as well as of future maintenance. *Williams's Trust, In re*, 96 L. T. 563; 5 L. G. R. 542; 71 J. P. 209—Parker, J.

— — — Claim in Administration of Deceased Lunatic's Estate.]—A pauper lunatic who had been maintained by the guardians since November 1, 1889, became entitled on October 14, 1895, to a sum of money as one of the next-of-kin of an uncle. The guardians, in February, 1898, applied in lunacy for the appointment of a receiver of the fund and payment thereof of the cost of the lunatic's maintenance for the then preceding six years. On January 31, 1899, an order was made in lunacy appointing a receiver and directing him to pay to the guardians 95l. 14s. for the maintenance of the lunatic from October 14, 1895, to February 14, 1899, and to apply the balance for the future maintenance of the lunatic. The lunatic died on June 29, 1899:—*Held*, that the claim of the guardians for the maintenance of the lunatic for the part of the six years prior to October 14, 1895, was a valid legal debt, and was not affected by the order in lunacy, and the guardians could enforce their claim against the lunatic's estate now that she was dead. *Taylor, In re; Edmonton Union v. Deeley*, 70 L. J. Ch. 332; [1901] 1 Ch. 480; 84 L. T. 35—C.A.

Failure to Comply with Maintenance Order—Jurisdiction to Commit Defendant—Evidence of Means.]—Justices have no jurisdiction to commit to prison a person for disobedience to an order made upon him for the payment of a

weekly sum towards the maintenance of his father in the absence of proof that such person has, or has had since the date of the order, the means of payment, and has refused or neglected to pay in accordance with the terms of the order. *Gamble, In re*, 68 L. J. Q.B. 195; [1899] 1 Q.B. 305; 79 L. T. 642; 63 J. P. 101; 19 Cox C.C. 225—D.

Money due under such an order is merely a civil debt, and comes within the provisions of sections 6 and 35 of the Summary Jurisdiction Act, 1879. *Ib.*

Order for Maintenance—Appeal to Quarter Sessions.]—An appeal does not lie to quarter sessions against an order of petty sessions for the maintenance of a pauper. *Reg. v. London Justices; Greenwich Union, Ex parte*, 69 L. J. Q.B. 364; [1900] 1 Q.B. 438; 82 L. T. 296; 48 W. R. 319; 64 J. P. 357—D.

Summary Reception Order—Pauper Lunatic.]—*See* LUNATIC, col. 1439.

8. RELIEF.

Outdoor Relief.]—4 Edw. 7 c. 32 is the *Outdoor Relief (Friendly Societies) Act*, 1904.

Duty of Guardians—Objection to Rate.]—Guardians are bound to give relief in urgent cases, even though such urgency may have arisen from the wilful refusal of those requiring it to work, the proper course for the guardians to adopt in case of wilful persistence in such refusal being to prosecute under the Vagrancy Act, 1824. Generally speaking, while the Court has jurisdiction in a proper case in an action at the instance of ratepayers to restrain guardians from applying poor rates for unauthorised purposes, it is not proper for ratepayers objecting to a poor rate as excessive to come to the Court by way of appeal against it and ask for an injunction, instead of going before the auditors appointed by the Local Government Board, and appealing therefrom as provided by the Poor Law Amendment Act, 1844. *Att.-Gen. v. Merthyr Tydfil Union*, 80 L. T. 618; 63 J. P. 536—Romer, J.

Able-Bodied Workmen who Refuse to Work—Wives and Children—Workmen on Strike.]—It is not lawful for the guardians of the poor of a union to give relief by means of relief works, or otherwise, to able-bodied men who are physically fit to work and able to obtain work at wages sufficient to support themselves and their families, but who refuse to perform such work. If the men become so reduced by want as to be unable to work they may be relieved, but they would then be liable to prosecution under the Vagrancy Act, 1824. *Att.-Gen. v. Merthyr Tydfil Union*, 69 L. J. Ch. 299; [1900] 1 Ch. 516; 82 L. T. 662; 48 W. R. 403; 64 J. P. 276—C.A.

The fact that there are large numbers of men who refuse to work owing to a trade strike does not create a case of urgent necessity within the meaning of section 54 of the Poor Law Amendment Act, 1834, or give to the men collectively any right to relief which they would not have individually. *Ib.*

Relief may be given to the wives and children of the men who refuse to work, and also to

other men who are thrown out of work in consequence of their refusal, if such persons are destitute. *Ib.*

The Local Government Board as the successors of the Commissioners appointed under the Poor Law Amendment Act, 1834, to carry out the provisions of that Act, have no power under that Act, or the Poor Law Audit Act, 1848, s. 4, to extend the application of the Poor Law statutes to persons not entitled to relief under them. They have not this power even in cases of emergency. *Ib.*

The High Court has jurisdiction to make a declaration to prevent an illegal application of the rates by guardians, but it cannot control the power of the Local Government Board to remit the disallowance of unlawful payments under section 4 of the Poor Law Audit Act, 1848. *Ib.*

— **Workmen on Strike.**—During a strike in the coal trade poor law guardians opened labour yards, with the sanction of the Local Government Board, and gave employment therein to numbers of those on strike, although it appeared that these men had been offered work at the mines at a wage sufficient to maintain themselves and their families, but that they had refused such offer. On the hearing of a motion for an interim injunction at the instance of certain ratepayers to restrain the guardians from paying for such relief out of their common fund, it appeared that the labour yards had then been closed and that all the expenses connected therewith had been paid except an amount due for stone supplied to the yards. Except for the purpose of meeting this particular amount the guardians gave an undertaking that until the trial of the action they would not draw further on their common fund in connection with the matter, and upon this undertaking no order was made on the motion. *Att.-Gen. v. Bedwellty Union*, 62 J. P. 792—Stirling, J.

9. MISCONDUCT OF PAUPER.

Order of Workhouse Officer—Disobedience—“Misbehaviour.”—A refusal by a pauper when outside a workhouse to obey a lawful order to go to another workhouse is not “misbehaviour” within the meaning of section 5 of the Poor Relief Act, 1815. *Mile End Guardians v. Sims*, 74 L. J. K.B. 647; [1905] 2 K.B. 200; 92 L. T. 238; 69 J. P. 145; 3 L. G. R. 349; 20 Cox C.C. 807; 21 T. L. R. 241—D.

Refusal to Work—Reasonableness of Conditions upon which Work Offered.—Where an able-bodied pauper is offered work upon the conditions that he promises to abstain from all intoxicating drink whilst resident on “the Colony,” and not to enter any premises where intoxicating drink is sold, and to discourage others from doing so; also to abstain from the use of all profane or obscene language whilst on the colony, and to attend the Saturday-night roll-call meetings in the citadel, and any special meetings which may from time to time be arranged by the governor of the colony, and to attend some place of worship once on a Sunday; he does not, by refusing to accept the work, wilfully refuse or neglect to maintain himself

within the meaning of section 3 of the Vagrancy Act, 1824, and therefore is not liable to be convicted under that section. Any conditions imposed upon the person to whom work is offered must, in order to bring him within the section if he refuses to accept the work, have reference to the work or the wages that are offered for it. *Poplar Union v. Martin* (No. 2), 74 L. J. K.B. 306; [1905] 1 K.B. 728; 92 L. T. 197; 53 W. R. 398; 69 J. P. 146; 3 L. G. R. 340; 20 Cox C.C. 785; 21 T. L. R. 240—D.

Casual Pauper—Task Imposed upon—Breaking Stones—“Pounding” Stones.—Under the General Order of the Local Government Board, dated December 18, 1882, casual male paupers who are detained more than one night may be required to break 7 cwt. of stone, or such other quantity not less than 5 cwt., nor more than 13 cwt., as the guardians, having regard to the nature of the stone, may prescribe—the stone to be broken to such a size as the guardians, having regard to the nature thereof, may prescribe:—*Held*, that this did not authorise the imposing upon a casual male pauper the task of pounding 1 cwt. of stone. *Rea v. Baddeley*; *Moore, Ex parte*, 70 J. P. 346—D.

10. RATEABILITY.

Beneficial Occupation—Caretaker or Servant.—If a person is a mere caretaker of a house, put in to preserve the house from depredation, the master who puts in such caretaker is not liable to be rated in respect of the house, because he has no beneficial occupation. The question in each case is whether there is a beneficial occupation. *Bertie v. Walthamstow Overseers*, 63 J. P. 545; 2 L. G. R. 1178—D.

The appellant, who was building a number of houses, put his foreman, who was receiving as such the usual wage of 2l. 15s. a week, into one of the houses. He paid no rent, and was subject to removal to any other of the appellant's houses at twenty-four hours' notice. The foreman's duty, besides his ordinary work as such, was to answer enquiries and look after the appellant's houses. The Justices held that the appellant was in occupation through his servant the foreman:—*Held*, that there was evidence to support that finding, and that the Court would not interfere with the Justices' determination. *Ib.*

Licensed Premises—Rateable Value—Hypothetical Tenant—Competing Firms of Brewers.—For the purpose of the assessment of premises to the poor rate, any circumstances which affect their annual value in the market must be taken into consideration in arriving at the gross estimated value—that is, at the sum which may reasonably be expected to be obtained from a tenant from year to year. Therefore, in the case of a public-house, if a demand for premises of that kind exists, whether by brewers or others, such demand must be considered, inasmuch as that demand directly affects the value. But any sums paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account, except so far as the probability of such sums being obtained raises the market value of the premises generally. *White*

v. Bradford-on-Avon Assessment Committee, 67 L. J. Q.B. 643; [1893] 2 Q.B. 630; 78 L. T. 758; 46 W. R. 603; 62 J. P. 533—D.

Agricultural Land—Market Garden—Glass-houses—Buildings.—The occupier of a market garden covered with glass-houses is not an occupier of agricultural land within the meaning of the Agricultural Rates Act, 1896, and is not entitled to the exemption conferred by that Act upon the occupiers of agricultural land. *Smith v. Richmond*, 68 L. J. Q.B. 898; [1899] A.C. 448; 81 L. T. 269; 48 W. R. 115; 65 J. P. 804—H.L. (E.)

Rating of Shooting Rights—Land Used as “arable meadow or pasture ground.”—A person who rents shooting rights over lands being arable, meadow, or pasture ground and woodlands is not an occupier of land used as “arable meadow or pasture ground only or as woodlands” within section 211, sub-section 1 (b) of the Public Health Act, 1875, but is the occupier of the special hereditament made rateable by section 3, sub-section 2 of the Rating Act, 1874, and is therefore liable to be rated under the Act of 1874 to the net annual value, and is not entitled to be assessed under the Act of 1875 in the proportion of one-fourth only of such annual value thereof. *Alton Urban Council v. Spicer*, 73 L. J. K.B. 280; [1904] 1 K.B. 678; 90 L. T. 576; 52 W. R. 624; 68 J. P. 256; 2 L. G. R. 507; 20 T. L. R. 296—D.

Canal—No Beneficial Occupation.—By an Act of 30 Geo. 3 the appellants were authorised to make a canal, and they were to be rated in respect of the lands and grounds purchased and taken in pursuance of the Act in the same proportion as other lands and grounds lying near were or should be rated, and “as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity.” Coal being worked near a portion of the canal, it began to subside and had to be closed and could not be used.—*Held*, that this portion was rateable as if it were open for canal traffic, and capable of being and in fact being so used. *Glamorganshire Canal Co. v. Merthyr Tydfil Union*, 88 L. T. 85; 67 J. P. 52; 1 L. G. R. 34—D.

Church and Mission Halls.—Church and mission halls sometimes used for temperance meetings and for congregational social meetings are not exclusively appropriated to public religious worship so as to be exempt from rating within section 1 of the Rating Exemptions (Scotland) Act, 1874 (which corresponds to section 1 of the Poor Rates Exemption Act, 1833). *College Street U.F. Church v. Edinburgh Parish Council*, 3 F. 414—Ct. of Sess.

Churchyard—Additional Land for Extension—Sale of Places for Interment—Receipt of Fees by Incumbent—Occupation by Incumbent—Liability to be Rated.—The ancient churchyard of a parish having become full, additional land, three hundred yards from the church, was acquired and consecrated as a burial ground. The incumbent of the parish received and retained to his own use the net sum derived from the sale of freehold graves, from fees for the re-opening of graves, for single inter-

ments in public graves, the placing of memorials, planting, &c.:—*Held*, that he was not in occupation either of the burial ground, or of the places for interment, or of the fees paid in respect thereof, so as to make him liable to poor rate as the beneficial occupier thereof. *North Manchester Overseers v. Winstanley*, 76 L. J. K.B. 33; [1907] 1 K.B. 27; 95 L. T. 796; 71 J. P. 48; 5 L. G. R. 7; 23 T. L. R. 35—D.

An additional piece of land annexed, although not immediately contiguous, to an ancient churchyard which has become full is, equally with the ancient churchyard, exempt from rateability. *Ib.*

Coal Mine—Maintenance of Permanent Main Roads and Airways in Mine—“Repairs.”—An annual expenditure was incurred in keeping in repair the permanent main roads and permanent main airways in a coal mine, such expenditure being necessary to maintain the mine in a state to command the gross rent paid for it:—*Held*, that such annual expenditure was in respect of “repairs” within the meaning of that term in section 1 of the Parochial Assessments Act, 1836, and that such sum had therefore to be deducted from the gross rent to arrive at the rateable value of the mine. *Brown v. Rotherham Assessment Committee*, 83 L. T. 193; 64 J. P. 580—D.

Profits or Annual Value—Gross and Rateable—Evidence.—At the hearing of an appeal against a rate on a colliery, the colliery company put forward evidence that the best and only fair method of arriving at the net annual value was that of ascertaining the receipts in the year, and then deducting therefrom the proper deductions; in fact, rating it like a railway. If this was admissible, it worked out substantially correct. It was contended that this evidence was not admissible, but that it should be rated on the annual rent obtainable:—*Held*, that the evidence was admissible. *Denaby and Cadeby Colliery Co. v. Doncaster Union*, 78 L. T. 388; 62 J. P. 343—D.

Where in a rate the gross and rateable value are entered at the same figure, the gross is to be treated as an ascertained figure, and such deductions as can be properly made may be made therefrom. *Ib.*

Dock (Floating) and Basin—Statutory Power to Levy Harbour Dues—Dues Connected with Occupation of Land.—The Swansea Harbour Trustees were appointed and incorporated by a private Act of Parliament as conservators of the harbour and river at Swansea within certain defined limits. Besides piers and other works which the trustees had constructed on lands purchased by them within the limits of the harbour, they had also constructed under their statutory powers a floating dock and basin which occupied part of what had been the bed of the river. The soil of the harbour and river underneath this floating dock and basin was not purchased by the trustees, but remained, as it always had been, the property of the lord of the manor. By various private Acts the trustees were authorised to take certain dues in respect of ships using the harbour:—*Held*, (by the Divisional Court), that the trustees were in

rateable occupation of the floating dock and basin; and (by the COURT OF APPEAL and HOUSE OF LORDS) that the harbour dues were not so connected with the occupation of land by the trustees that they should be taken into consideration in estimating the rateable value of the lands. *Swansea Harbour Trustees v. Swansea Union*, 71 J. P. 497; 5 L. G. R. 1240; 97 L. T. 585—H.L. (E.) Affirming, 94 L. T. 627; 22 T. L. R. 433—C.A.

Drill Hall—Not Used Exclusively as such—Objection to Assessment on Summons to Enforce Rate.]—A volunteer drill hall, besides being used for the purposes of the battalion, was let for concerts and other entertainments. It was assessed in the valuation list, and district rates were levied in respect of it. There had been no appeal against such assessment. On a complaint to recover the amount of the district rates, *Held*, that the Justices were bound to issue process for the recovery of such rates, as the premises were not exempt as being solely used by the Crown for the purposes of the Crown, nor were they exempt under section 26 of the Volunteer Act, 1863, for they were not solely used as a storehouse: *Held*, further, that the Justices could not go into the question of the amount of the assessment. *Rayner v. Drewitt*, 82 L. T. 718; 64 J. P. 567—D.

Gravel Pits—Land Occupied under Different Agreements—Part of Land Exhausted when Rate Made—Basis of Rate.]—At the date of the making of a poor rate a company were in rateable occupation of three and a-half acres of land held from the owner under three agreements made at various dates, which gave the company the right to occupy the land for one year, with liberty to dig for gravel. At the date in question the gravel in two and a-half acres out of the three and a-half acres in their occupation had been exhausted by the company, who used the two and a-half acres for storing gravel already dug. The gravel in the remaining acre was in course of being exhausted: *Held*, by the COURT OF APPEAL, that, in assessing the value of the land, its annual value at the time of making the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land added to the value of the exhausted two and a-half acres for storage purposes. *Farnham Flint Co. v. Farnham Union*, 70 L. J. K.B. 180; [1901] 1 K.B. 272; 88 L. T. 660; 65 J. P. 102—C.A.

Rex v. Bedworth (8 East, 387) approved. Dictum of BLACKBURN, J., in *Reg. v. Abney Park Cemetery Co.*, as reported L. R. 8 Q.B. at p. 519, as to the Legislature having taken "as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate," disapproved. *Ib.*

Hoarding for Advertisements.]—An advertising agent, merely as such, is not rateable to the relief of the poor as a person permitting land to be used for the erection of a hoarding used for the exhibition of advertisements within the meaning of section 3 of the Advertising Stations (Rating) Act, 1889. *Burton v. St. Giles and St. George's Assessment Committee*, 69 L. J. Q.B.

184; [1900] 1 Q.B. 389; 82 L. T. 24; 48 W. R. 222; 64 J. P. 213—D.

Home for Treatment of Epileptics—"Hospital."]—An institution having for its object the care and treatment of persons suffering from epilepsy—providing for such persons medical attendance, in combination with healthy and suitable employment and recreation, and supported partly by endowment, partly by subscriptions and donations, and partly by payments made on behalf of the patients—is a "hospital" within the meaning of the proviso in section 1 of the Poor Removal Act, 1846. *Ormskirk Union v. Chorlton Union*, 72 L. J. K.B. 721; [1903] 2 K.B. 498; 89 L. T. 256; 1 L. G. R. 692; 68 J. P. 42—C.A. Affirming, 51 W. R. 190—D.

"Lairage" for the Slaughter of Cattle—Profit-earning Capacity—Evidence of Receipts and Expenditure—Admissibility.]—In the assessment of premises, which are the only premises available for the purposes to which they are put, and the owners and occupiers of which are subject to statutory restrictions, although they are not the only possible occupiers of the premises, evidence is admissible of receipts and expenditure, and of other circumstances, and the assessment is not to be based solely on structural and land value. The profit-earning capacity of the premises is not the less a legitimate factor in determining the rent which a hypothetical tenant would give by reason of any statutory restriction in the application of the profits by the existing occupiers. *Mersey Docks and Harbour Board v. Birkenhead Union*, 70 L. J. K.B. 534; [1901] A.C. 175; 84 L. T. 542; 49 W. R. 610; 65 J. P. 579—H.L. (E.)

Lands Clauses Acts—Premises Taken by Promoters of Undertaking—Deficiency in Assessment—Liability to Make Good Deficiency.]—Under section 133 of the Lands Clauses Consolidation Act, 1845, the promoters of an undertaking who have become possessed under their statutory powers of lands liable to be assessed to the poor rate are liable to make good the deficiency in the poor rate by reason of such land having been taken and used for their works until the works shall be completed and assessed to the poor rate. Section 10 of the London Government Act, 1899, provides (sub-section 1) that a scheme under the Act shall provide for all the expenses of a borough council being paid out of the general rate; and (sub-section 2) that the general rate and the poor rate shall be assessed, made, and levied together as one rate, which shall be assessed, made, collected, and levied as if it were the poor rate, and all enactments applying or referring to the poor rate shall, subject to the provisions of the Act as to audit, be construed as applying or referring also to the general rate: *Held*, that the defendants, who had under their statutory powers become possessed of lands within the Islington borough, as to which a scheme had been made under the Act of 1899, were not liable to make good the whole of the deficiency in the general rate arising by reason thereof, but only the deficiency in that part of it which represented poor rate. *Islington Borough Council v. London School Board*, 72 L. J. K.B. 677; [1903] 2 K.B. 354; 89 L. T. 53; 52 W. R. 115; 1 L. G. R. 704; 68 J. P. 35—C.A. Affirming, 67 J. P. 18—Wright, J.

Library—Free—Managed by Committee under Corporation—Liability to be Rated.]—Under statutory powers the appellants were authorised to establish and maintain a public library, and to appoint a committee invested with the control and management of such library. It was to be held upon trust by the appellants for the benefit of the inhabitants of L. and the neighbourhood, and others resorting thereto. Admission was to be free, and a rate was to be levied for the purpose of defraying the expenses. Premises consisting of reading-rooms where books and newspapers could be read, and a library, were established by the appellants under these powers, and, in addition to the rate, grants were made and moneys were derived from other sources for their maintenance. They were open to the public during the appointed hours without charge;—*Held*, that the premises were not exempt from liability to be rated; and *held*, further, that, even although a certificate of exemption had been obtained under the Literary and Scientific Societies Act, 1843, the premises were not exempt under that statute. *Liverpool Corporation v. West Derby Union*, 92 L. T. 467; 53 W. R. 633; 69 J. P. 277; 3 L. G. R. 647; 21 T. L. R. 469—D.

Machinery—Enhanced Value of Buildings—Method of Computation.]—In assessing the rateable value of buildings fitted with machinery adapting them for the particular purpose for which they are used, the machinery is to be taken into consideration in so far as it enhances the value of the buildings. This rule applies whether the machinery is or is not affixed to the freehold. It is a question of fact whether the machinery does or does not enhance the value of the buildings. The enhanced value is not to be arrived at by valuing the machinery as a separate hereditament and adding a percentage of that value to the value of the buildings. *Tyne Boiler Works v. Longbenton Overseers* (56 L. J. M.C. 8; 18 Q.B. D. 81) followed and applied. *Crockett v. Northampton Assessment Committee*, 72 L. J. K.B. 320—D.

Rating of Factory with—Machinery Tenant's Property.]—Machinery or other fixtures which are part of the stock-in-trade, though they belong to the tenant, must be taken into account in assessing the rateable value of the premises, whether or not they are attached to the freehold. The principle established in *Reg. v. Guest* (7 L. J. M.C. 38; 7 Ad. & E. 951), and followed ever since, cannot now be disturbed. *Kirby v. Hunslet Union*, 75 L. J. K.B. 129; [1906] A.C. 43; 94 L. T. 36; 70 J. P. 50; 4 L. G. R. 144; 22 T. L. R. 167—H.L. (E.)

Cranes in Docks—Warehouses in Different Parish—Docks in Different Parishes in Same Union—Deductions.]—The L. and I. Docks used cranes worked by hydraulic power communicated to them by means of mains laid under the surface of the docks in which they were used alongside the rails upon which the cranes travelled. The cranes could be made to travel along the rails upon which they rest by means of hand gearing attached to them, or by means of hydraulic capstans, or by means of levers. When in use such cranes were firmly and securely attached, by means of a flexible tube capable of resisting a pressure of 700 lb. to the

square inch, to the hydraulic main by the side of the rails. While so attached the cranes could be moved along the rails 6 ft. in either direction, but in order to move them from one quay to another new lines of rails would have to be laid, or they would have to be moved by floating derricks:—*Held*, that these cranes must be treated as enhancing the rateable value of the dock undertaking, as they were on the premises for the purpose of making them fit as premises for the purpose for which they were used. *London and India Docks v. Poplar Union*, 83 L. T. 371; 64 J. P. 820—D.

Museum—Established by Act of Parliament—Public Admission—Possibility of Beneficial Occupation.]—S. Museum was established by an Act of Parliament under which the building and its contents were vested in trustees named in the Act and their successors. To these trustees was given the control of the building and museum subject to regulations contained in or made under the authority of the Act. One of these regulations was that the museum should be open on two days in each week during the months of April, May, and June each year to amateurs and students of architecture, and to persons who requested and obtained admission at any other times. Two rooms were to be set aside for the residence of a curator. The curator, besides taking care of the museum, collected the rents of a house which was settled as an endowment of the museum; and while the museum was closed to visitors the trustees of it met therein for the purpose of distributing the funds arising under a trust created for the benefit of poor architects by the founder of the museum:—*Held*, that the rights conferred on the public by the Act were not such as to exclude all beneficial occupation on the part of the trustees, and that consequently the building was rateable. *Soane Museum v. St. Giles-in-the-Fields (Vestry)*, 83 L. T. 248—D.

Police Station—Residences of Officers—Rateability of Residences.]—Premises erected by a county council for the purposes of a police station, in addition to cells for prisoners and other offices constituting the police station, comprised three dwelling-houses exclusively occupied by the superintendent, inspector, and sergeant respectively and their families for their domestic use, all three residences being within the boundary wall of the police station. These dwelling-houses might be visited and inspected at any time, and in respect thereof a certain sum was deducted as rent from the salaries of the officers. The officers might be required to move elsewhere at any moment, but whilst they were attached to the station it was necessary that they should be resident within or adjacent to the station, and when appointed they were compelled to reside in such houses. There was frequent communication passing between the officers and those in charge of prisoners, and no prisoner could be locked up, bailed, or remanded unless one of the three officers was present:—*Held*, that the three dwelling-houses of the officers were a part of the police station, and were therefore with the police station exempt from rateability to poor rate. *Cross v. West Derby Union*, 81 L. T. 645; 64 J. P. 182—D.

Railway—Directly Productive and Indirectly

Productive Lines.—For rating purposes, additional or relief lines at a railway station must be treated as running lines and directly productive, and they are not the less so because they are used incidentally for other purposes, such as shunting. But lines at the station required only for purposes quite apart from anything arising in the particular parish—as for a sorting and waiting station—are to be treated as indirectly productive. *Great Northern Railway and Edmonton Union, In re*, 93 L. T. 479; 3 L. G. R. 1359; 69 J. P. 179, 316; 21 T. L. R. 638—Channell, J.

— **Relief Lines.**—A branch of the Taff Vale Railway was mainly used for the conveyance of coal from collieries to a seaport for shipment. The output of coals from the collieries was fairly constant, but the rate of shipment was irregular. The collieries had little siding accommodation on which loaded waggons could stand, and, in order that the working of the collieries might not be stopped when ships were not ready to take delivery of coal, the railway company daily took loaded waggons from the collieries and delivered empty waggons returning from the sea there. In the parish of R., through which the branch in question ran between the collieries and the port, there were, in addition to the main running lines, a series of relief lines in the nature of loop lines. In an arbitration as to the valuation of the railway in the parish of R. for rating purposes the arbitrator stated his award in the form of a Special Case. He found that the main and primary purpose for which the relief lines were laid and used was the relief of the main running lines by providing lines on which the coal waggons going down to or coming back from the sea could pass one another, and lines on which coal waggons could, if necessary, wait until a ship was ready to receive the coal. He found that the relief lines were directly productive of profit to the railway company, and that 85 per cent. of the gross receipts of the company in the parish were earned by waggons which traversed one or more of the relief lines, but did not traverse the adjacent portion of the main running line. And he made his award on the footing that the relief lines were, in the valuation of the railway, to be treated as directly productive, and not as indirectly productive.—*Held*, that the arbitrator was right. *Taff Vale Railway and Cardiff Union, In re*, 71 J. P. 529; 97 L. T. 739; 6 L. G. R. 22—C. A. Affirming, 95 L. T. 455; 4 L. G. R. 932—Bigham, J.

— **Connecting Line between Two Railways used Solely for Through Traffic—Interest on Cost of Construction.**—A railway company constructed a short line to connect their system with that of another railway company, the amount required for the construction of the line being borrowed from the latter company at a certain rate of interest. There were no stations or sidings on the line, nor did the line originate any traffic, the whole traffic consisting of through traffic passing between the systems of the two companies. No company other than these two companies could be found to acquire the line. Its sole advantage to these companies was for the exchange of traffic under an agreement for that purpose between them, and in the absence of such an agreement

the line would be of no value, and could not be let to either of the two companies:—*Held*, that for rating purposes the rating authority were entitled to take into consideration the interest payable by the one company to the other on the cost of construction. *Great Central Railway v. Banbury Assessment Committee*, 76 L. J. K.B. 577; [1907] 1 K. B. 717; 96 L. T. 243; 71 J. P. 157; 5 L. G. R. 328; 23 T. L. R. 283—C. A. Reversing, 54 W. R. 470—D.

— **Parochial Principle—Cost of Construction—Interest on Cost of Construction Guaranteed.**—

A railway line was constructed by the L. and B. railway company under an Act of 1845, whereby another company, the B. railway company, were to provide for the purpose the sum of 125,000*l.*, the estimated cost of constructing the line, and were to be paid in perpetuity by the L. and B. company a sum, called in the Act a rent, equal to 4 per cent. on the capital of 125,000*l.*, or so much thereof as should have been spent on the line, together with one moiety of the surplus profits of the line, and the line when constructed was to become the property of the L. and B. company. In fact the L. and B. company spent on the construction of the line 240,000*l.* in addition to the above-mentioned sum of 125,000*l.* The appellant company became the successors of the L. and B. company; and under Acts of 1877 and 1879 the capital of the B. company was converted into guaranteed stock of the appellants, and the B. company was dissolved. On an appeal against a rate made on the portion of the railway in the parish of A. in the year 1904 the quarter sessions stated a Case, setting out the above facts, and stating also in effect that there was no such competition for the line as would give it any specially enhanced value:—*Held*, that interest on the capital cost of the construction of the line afforded no criterion of the rent a hypothetical tenant would give for the line, and that the portion of the line in the parish must therefore be valued for rating purposes on the parochial principle—that is to say, by computation from the net earnings of the line in the parish. *Great Central Railway v. Banbury Union (supra)* followed. *London and North-Western Railway v. Amptwell Union*, 94 L. T. 314; 4 L. G. R. 92; 70 J. P. 46—D. Affirmed, 71 J. P. 545; 97 L. T. 869; 6 L. G. R. 64—C. A.

— **Signal-Box.**—A signal-box is part of the non-productive property of a railway in respect of which a deduction is allowed from the gross receipts of the railway for the purpose of assessing the railway to poor rate in a parish, but is rateable locally according to the parochial principle of rating. *Midland Railway v. Pontefract Union*, 70 L. J. K.B. 691; [1901] 2 K.B. 189; 84 L. T. 536; 65 J. P. 455—D.

— **Railway Station—Rateability as One or as Several Hereditaments.**—The property of a railway company in a parish consisted of running lines, sidings, a passenger station, engine sheds, carriage and wagon, locomotive, and permanent way shops, an excursion platform, a cattle dock, a pumping station, an hydraulic pumping station, electric light and oil-gas works, a coal yard, and a goods warehouse. The whole formed a continuous area approached by gates under the sole control of the company and com-

pletely fenced round except where the main running lines passed through. There was access from every part to every other part. The gates were locked or watched at night, so that the public could not enter without permission. The main lines passed through the passenger station and under its roof. The portions of the property other than the lines and passenger station could be distinguished as separate areas, but were served by lines connected with the rest of the railway, and their use was connected with and auxiliary to the general purposes of the company's business. The carriage and wagon and locomotive shops, pumping and hydraulic pumping stations, electric light, and oil-gas works, and goods warehouse, as laid out, were only adapted for use by the company, but if suitable arrangements had been made they might have been occupied separately from the railway and by other persons:—*Held*, that for the purpose of assessing and rating the property to the poor rate it might be treated as one hereditament, and that its several parts need not be treated as separate hereditaments. *North-Eastern Railway v. York Union*, 69 L. J. Q.B. 376; [1900] 1 Q.B. 733; 82 L. T. 201; 64 J. P. 437—D.

— Lines Passing through Station — Lines Contributing Directly to Company's Earnings. —

Lines of railway constructed within the area of a railway station for the convenience of traffic, as supplementary to the original lines passing through the station, but diverging from and rejoining them, are for rating purposes to be treated, like the original lines, as part of the railway directly contributing to the company's earnings, and are assessable on the "parochial" system, notwithstanding that such supplementary lines be used for traffic destined to or coming from goods or coal yards, or for standing and unloading goods wagons, or for running goods trains, or for the standing of engines and passenger carriages, or, at times, for shunting, or as bay lines into which local trains when emptied are shunted preparatory to recommencing a journey. *Stockport Union v. London and North-Western Railway*, 67 L. J. Q.B. 335; 78 L. T. 180; 62 J. P. 244—C.A.

Rector's Rate — House — Occupation — Caretaker.—By 51 Geo. 3, c. 150, after reciting an Act of 1 Car. 2, c. 37, whereby a yearly sum of 250*l.* was charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden, for the support and benefit of the rector, curate, clerk, and sextons for the time being of that parish, that charge of 250*l.* was repealed, and in lieu thereof a yearly sum of 520*l.* was charged upon all houses within the said parish to be assessed by the churchwardens and paid by the occupiers of such houses respectively:—*Held*, that houses consisting of the offices, warehouses, storerooms, and counting-houses of publishers, some rooms in which were occupied by caretakers and their families, such caretakers having internal access to the whole of the premises, were chargeable under this statute. *Lewin v. Newnes*, 90 L. T. 160; 68 J. P. 164; 20 T. L. R. 206—D.

School—"Voluntary school"—Exemption from Rates.—A building maintained and used as an institution for the maintenance and education of orphan and fatherless girls, daughters of

soldiers and sailors, who receive an elementary and religious education and practical instruction for domestic service, and who reside in such building, is not a building used exclusively or mainly for the purposes of the schoolrooms, offices, or playground of a voluntary school, so as to be exempt from rates by virtue of section 3 of the Voluntary Schools Act, 1897. *Patriotic Fund Commissioners v. Wandsworth Borough*, 88 L. T. 865; 67 J. P. 311; 1 L. G. R. 711—D.

"Sewage carrier" partially Underground—Rateability of Portions below the Surface.—A sewage carrier, above ground in some places and underground in others, is not within the exception in favour of underground sewers, nor exempt from rateability to the poor rate, but is rateable as a whole. *Ystradyfodwg Sewerage Board v. Newport (Mon.) Assessment Committee*, 69 L. J. Q.B. 280; [1900] 1 Q.B. 365; 82 L. T. 53; 48 W. R. 382; 64 J. P. 293—D.

Sewage Farm—Obligation on Tenant to Receive Sewage of District—Advantages to Sewerage Board in Disposal of Sewage.—Land which had been acquired by a sewerage board for the purposes of sewage disposal, and on which the board had at large expense constructed works for distributing the sewage on the land, was let by the board to a farming tenant at a rent of 490*l.* a year, the tenant covenanting to receive and dispose of the sewage delivered on the land by the board so as to satisfy the statutory obligations of the board. The rent paid by the tenant was a fair rent for the advantages which the tenant got under the lease, including the value of the sewage for manurial purposes:—*Held*, that in valuing the sewage farm (including the works in question) for rating purposes the annual value of the advantages accruing to the sewerage board (over and above the actual rent of the farm) in respect of the facilities afforded to them by the user of the farm as a sewage farm for the performance of their statutory duties ought to be taken into consideration. *Davies v. Seisdon Assessment Committee*, 76 L. J. K.B. 472; [1907] 1 K.B. 680; 96 L. T. 315; 71 J. P. 153; 5 L. G. R. 306; 23 T. L. R. 251—C.A.

— Lease to Tenant—Sewage Works on Farm—Occupation by Sewerage Board.—The S. board acquired a sewage farm and laid down thereon certain carriers and other sewage works and plant. They leased the farm to C., reserving the right of entry thereon for the purpose of constructing, maintaining, altering and repairing the works as might be requisite for using the farm as a sewage farm. C. was to irrigate by means of the works on the farm, and was to keep the pipes and carriers properly flushed and clean. The board kept the works in repair, and from time to time their surveyor and agents went on the land to see that the sewage was properly distributed and treated, and to do repairs:—*Held*, that the board were rightly held not to be in occupation of these carriers and other sewage works and plant, and so not legally rateable in respect thereof. *Stourbridge Drainage Board v. Seisdon Union*, 86 L. T. 415; 66 J. P. 372—D.

Sewer Vested in Public Authority—Underground Sewer—Sewer Outside District of Public Authority—Payment for Use of Sewer by Other Authorities.—The authorities which decide that

certain underground sewers of public bodies are not liable to be rated must be regarded as anomalies in rating law and will not be extended. All sewers (which, on general principles, *prima facie* are rateable) must be held rateable unless, first, they are quite underground, so that the surface under which they run is not occupied or in any way affected by them; and secondly, no payment is made to the persons in whom the sewers are vested for the use of them by others. *Ystradyfodwg Main Sewerage Board v. Newport (Mon.) Assessment Committee*, 70 L. J. K.B. 318; [1901] 1 K.B. 406; 84 L. T. 40; 49 W. R. 292; 65 J. P. 307—C.A.

Toll-bridge—Lease of Tolls and Toll-house—De Facto Occupation of Bridge by Lessee.—The corporation of a city granted a lease of the tolls payable for passage over a swing bridge, erected in lieu of a ferry, and of a toll-house situate on or adjoining the bridge, to a lessee for a term of years. The lease reserved to the corporation right to open the bridge at certain times for the passage of ships and certain rights of passage toll-free over the bridge. It contained a covenant by the lessee not to place or permit to be placed any gate or bars across the bridge, and not to permit the exhibition of bills or placards upon it, and reserved a right of entry to the corporation on the bridge for the purpose of removing anything placed on the bridge in contravention of this covenant:—*Held*, that, looking at the lease as a whole, though it did not, as a matter of conveyancing, amount to a demise of the bridge, yet it showed that the intention of the parties was that the lessee should be in *de facto* occupation of the bridge, and that his rights over the bridge should be paramount and those of the corporation subordinate; and that the lessee was the rateable occupier of the bridge. *Holywell Union v. Halkyn District Mines Drainage Co.* (64 L. J. M.C. 113; [1895] A.C. 117) followed. *Percy v. Hall*, 88 L. T. 830; 67 J. P. 293; 1 L. G. R. 613—D.

Tramway—Deduction of Interest and Sinking Fund of Money Borrowed—Parochial or Mileage Rating.—In rating a tramway leased by a corporation to a tramway company on which tramway the company is to repay, by means of a sinking fund, borrowed money with interest thereon, no deduction is to be made in respect of the money so borrowed or the interest. *Melbourne Tramway and Omnibus Co. v. Fitzroy Corporation*, 70 L. J. P.C. 1; [1901] A.C. 153; 83 L. T. 442—P.C.

The company is the occupier of the land in such circumstances, though the ownership is in the Crown, and its rating is that of a simple occupation rate, and the true test of value is the rent obtainable from a hypothetical tenant. *Ib.*

When a tramway passes through several rating areas, the parochial principle of rating is to be applied by which buildings are rated separately to the area in which they stand, and the remainder of the rating value is distributed among the rating areas on the mileage principle. *Ib.*

— **Tramway Lines Passing through Several Contiguous Parishes.**—The undertaking of an electric tramway company comprised a system of lines of tramways which ran through several contiguous parishes. In some cases the com-

pany's cars passed over the same lines of tramway for a portion of the journey when traversing different routes. The company charged passengers conveyed in their cars specified fares for any length of journey between certain fixed points and other fixed points upon such lines. The journeys which might be taken upon payment of such fares in all cases overlapped one another. Passengers could enter and leave a car at any time upon the route traversed by the car; and upon portions of the company's system the traffic was, and consequently the receipts obtained by the company in respect of such traffic were, greater per mile of highway than upon other portions of the system:—*Held*, that, in order to ascertain the rateable value of the company's undertaking in a certain parish, it was not an incorrect method of valuation in the circumstances of the case to arrive in the first instance at a rateable value of the whole of the undertaking, and then (after deducting the value of the indirectly productive part thereof), for the purpose of adopting the parochial principle so far as possible, to divide such rateable value among the parishes in which the undertaking was situate, according to the number of car miles run in each parish during a period of twelve months. *London United Tramways v. Brentford Union*, 96 L. T. 528; 71 J. P. 249; 5 L. G. R. 682—C.A.

Warehouse—Occupation.—J. B. M. & Co. were the owners of a warehouse at L. During a certain period the warehouse was closed and had no goods in it whatever, and all the working appliances such as scales, weights, and trucks were removed, and the water-supply and hydraulic power was cut off. A notice was exhibited saying the warehouse was to let, but the owners did not intend to allow any part to be used unless they could obtain sufficient goods which would take up at least one-half of the available space of the warehouse and so make it commercially worth their while to open the warehouse. On an application for a distress warrant for the rates for such period during which the warehouse was closed, the Justices found as a fact that there had been no occupation of the warehouse during that period, and they refused the application:—*Held*, that the Justices were justified in so finding. *Re v. Henderson; James, Ex parte*, 92 L. T. 662; 69 J. P. 294; 3 L. G. R. 756—D.

— **Empty Warehouse—Occupation—Intention—Liability to Rates.**—From a date prior to the making of certain rates the respondents gave notice to the appellants that they intended to keep certain warehouses unoccupied during the current overseers' year, and to claim exemption from the rates in respect thereof. All goods had been removed before the making of the rate, and the warehouses had not been used since that date, though they were advertised in the list of warehouses to let belonging to the respondents. Each warehouse was one of a block, through which continuous shafting passed, and at the end of the block was a notice: "For storage, apply to the L. W. Company." A warehouse in respect of which notice had been given to the appellants was still advertised on the cards issued by the respondents, and they had tried to let it by notice affixed on the warehouse:—*Held*, that the Justices were justified in coming to the conclusion that there

was no occupation of these warehouses so as to render the respondents liable to be rated in respect thereof. *Booth Overseers v. Liverpool Warehousing Co.*, 85 L. T. 45; 65 J. P. 740—D.

Warehouses in Different Parish.]—The L. and I. Docks also used certain warehouses, situate outside the parishes in the P. Union, in connection with and for the purposes of their undertaking. These warehouses were separately assessed in the parishes in which they were situate, and they did not adjoin the dock warehouses or docks:—*Held*, that the net receipts derived from these warehouses should be deducted from the net receipts derived by the L. and I. Docks from their whole undertaking, inclusive of such warehouses, when ascertaining the rateable value of the premises of the L. and I. Docks within the parishes in the P. Union. *London and India Docks v. Poplar Union*, 83 L. T. 371; 64 J. P. 830—D.

Docks in Different Parishes in Same Union.]—Where one system of docks is situated in different parishes in the same union, the rateable value ought to be ascertained upon the parochial principle. *Ib.*

Deductions—Superannuation—Amalgamation.]—Expenses of one company, such as superannuation allowances or rents of premises made payable by such company, upon an amalgamation of several companies to form one undertaking, ought not to be deducted from receipts in order to arrive at the net revenue of the undertaking. *Ib.*

Waterworks—Reservoir—Capital Value—Cost of Providing New Buildings and Roads in Lieu of Buildings and Roads Submerged.]—In ascertaining the capital value of a reservoir forming part of a system of waterworks, in order to arrive at the rent which a hypothetical tenant from year to year would pay for it as an index of the rateable value, the cost of new buildings and roads compulsorily provided in accordance with the provisions of the statute under the powers of which the reservoir was constructed, in lieu of buildings and roads submerged by the reservoir, ought to be included in the calculation. *Liverpool Corporation v. Llanfyllin Assessment Committee*, 68 L. J. Q.B. 762; [1899] 2 Q.B. 14; 80 L. T. 667; 63 J. P. 452—C.A.

— **“Intake”—Right to Use Water.]**—The New River Co. has, under various Acts of Parliament, the right of appropriating water from the river Lea, at a point fixed by statute, by means of an “intake” consisting of a structure erected on land occupied by them for the purpose:—*Held*, that the added value of the intake, beyond the structural value of the building and the value of the land as land, by reason of the special fitness of the land and structure for the particular purpose to which they were put, should be taken into account in rating the intake:—*Held*, further, that the price, fixed by statute, payable by the company for the water itself so appropriated by them was not an element to be taken into consideration in arriving at the rateable value of the intake. *New River Co. v. Hertford Assessment Committee*, 71 L. J. K.B. 827; [1902] 2 K.B. 597; 87 L. T. 360; 51 W. R. 49; 66 J. P. 724—C.A.

— **Water Main—Main Constructed under Agreement between Local Authorities for Supply of Water from One to the Other.]**—The Liverpool Corporation, who are the owners of the Vyrnwy reservoir in Montgomeryshire, and of an aqueduct whereby the water from the reservoir is conveyed to Liverpool, are empowered by their local Acts to agree with any local authority whose district is within twenty miles of the aqueduct to supply them with water from the aqueduct and to execute the necessary works on behalf of such authority. Under these powers the corporation agreed with the Wallasey Urban District Council to supply them with water and to lay a main from the aqueduct to Wallasey for that purpose; and such main was laid accordingly. By the terms of the agreement the district council were to take, and they did take, the steps necessary under the Public Health Act, 1875, to enable the main to be laid. The agreement provided that the main when laid should be the property of the corporation, and that the water supplied should be paid for by the district council according to the quantity supplied as measured by a meter at the Wallasey end of the main:—*Held*, that the Liverpool Corporation, and not the Wallasey Urban District Council, were the rateable occupiers of the main. *Liverpool Corporation v. Birkenhead Union*, 94 L. T. 509; 70 J. P. 146; 4 L. G. R. 273—D.

Workmen's Lodgings—Structures Easily Removable from Place to Place.]—The appellants, who were contractors for the construction of a line of railway, desired for the purposes of their business that certain of the men whom they employed should live near the works, and for that purpose they had, by agreement with the owners or occupiers of certain pieces of land, erected upon these pieces of land wooden huts or structures. The structures were capable of being removed as occasion required without damage to the ground, and they contained no sanitary arrangements. Each structure was divided into a sleeping room, where about twenty men slept, a living room, sleeping-rooms for a caretaker and his family, and a pantry; and the structures had been in their then situation for upwards of a year. It was admitted that if the structures were rateable in law the appellants were the proper persons to be rated in respect of them:—*Held*, that the structures were rateable in law, and that the appellants were properly rated in respect thereof. *Mitchell v. Worksop Union*, 92 L. T. 62; 69 J. P. 53; 3 L. G. R. 44; 21 T. L. R. 156—D.

11. EXEMPTION.

Crown—Premises used for Purposes of—Police Residence with Cell.]—Certain premises were formerly the lodge of an old prison now pulled down. They were occupied by two members of the county constabulary, and were formerly used as a police-station with two cells. The premises are now used for the residence of two constables and their families, and one of the cells is still retained for the detention of prisoners. A certain weekly sum is deducted from the pay of the constables as rent in respect of their occupation of part of the premises. No police books are kept there, and charges are not taken there. The whole of

the premises are subject to the inspection of the Government inspector of police, but no inspection has been made for six years, though they were yearly inspected by the county surveyor:—*Held*, that the premises were not exempt from the poor rate, as being used for police purposes. *Monmouth Overseers v. Monmouthshire County Council*, 87 L. T. 65; 66 J. P. 788—D.

— **Volunteer Drill Hall and Storehouse—Part occasionally Let for other Purposes.**—Certain premises were used as a storehouse, drill hall, &c., for a volunteer battalion, the whole of the property being in the occupation of, and vested in, the commanding officer. Certain portions of the premises were occasionally let for lectures, balls, &c., but such letting was subservient to the use of the premises for military purposes. The appellant was the caretaker, and did not reside on the premises, but the musical and dramatic licences were taken out in the name of the appellant. The appellant was rated in respect of such portions of the premises as were let out for the above-mentioned purposes:—*Held*, that, although the appellant was not the proper person to be rated, as he was only a servant, yet those portions of the premises which were let out were properly rateable. *Lewis v. Durham Union*, 90 L. T. 383; 68 J. P. 220; 2 L. G. R. 533; 20 T. L. R. 227—D.

Premises Used for Police Purposes—Chief Constable's House.—Premises used for police purposes are none the less so used because part consists of the chief constable's house where he resides with his family. The whole premises, therefore, are exempt from assessment to the poor rate. *Leicester County Council v. Leicester Assessment Committee*, 73 L. T. 463; 46 W. R. 585—D.

— **"Society instituted for purposes of science, literature, or fine arts exclusively"—Association for Advancement of Art of Music.**—A society, the primary object of which is the advancement of the art of music by means of a central teaching and examining body, by rewarding with academical degrees and certificates of proficiency persons proved worthy of such distinctions, and by the promotion and supervision of such musical instruction in schools as may be conducive to the dissemination of the art and encouragement of its cultivation throughout her Majesty's dominions, and which is supported wholly or in part by annual voluntary contributions, and does not, and by its laws may not, make "any dividend, gift, division, or bonus in money," is a society instituted for the purposes of the fine arts exclusively within section 1 of the Scientific Societies Act, 1843, and is entitled to exemption from rating. *Royal College of Music v. St. Margaret and St. John, Westminster (Vestry)*, 67 L. J. Q. B. 540; [1898] 1 Q. B. 809; 78 L. T. 441; 62 J. P. 357—C. A.

Society Instituted for Purposes of Science Exclusively—Annual Voluntary Contributions.—The objects for which an institute was established were, *inter alia*, to study, investigate, discover, and improve the means of preventing and curing infective diseases, and to provide a place where research might be carried

on for these purposes; to provide instruction and education in preventive medicine for practitioners and advanced students; to prepare and supply protective and curative materials for the prevention and treatment of infective diseases; to treat persons suffering from such diseases; and to examine its students. The institute was bound to apply its income and property, whencesoever derived, solely towards the promotion of its objects. It was supported by donations and annual subscriptions, fees derived from lectures and from students, fees for diagnoses and for the use of its laboratories, receipts from the sale of the protective and curative materials which it prepared, and receipts from the sale of its printed transactions. It purchased land and erected buildings thereon, which it occupied and used for the above-mentioned objects. It let several rooms, not structurally severed from the rest of the buildings, or having any separate entrance, on a yearly tenancy to the Local Government Board, who occupied and used them for purposes connected with vaccination. It made no dividend, gift, division, or bonus in money to or between any of its members. It had obtained a certificate under the Scientific Societies Act, 1843:—*Held*, that it was not exempt from rateability in respect of the buildings as a society instituted for purposes of science exclusively within the meaning of section 1 of that Act. *Jenner Institute v. St. George's, Hanover Square, Assessment Committee*, 69 L. J. Q. B. 814; 83 L. T. 344—D.

Scientific, Literary, and Artistic Societies—"Voluntary contributions"—Contributions from Local Education Authority—Government Grants.—Contributions paid out of the rates by the local education authority, and grants paid by the Board of Education out of moneys provided by Parliament, towards the support of a scientific, literary, or artistic society are "voluntary contributions" within the meaning of the Scientific Societies Act, 1843. Consequently, a society instituted for the purposes of science, literature, or the fine arts exclusively, and receiving such contributions and grants annually, is exempt from rates under that Act if the other necessary conditions are fulfilled, though not in receipt of any other voluntary contributions. *Royal College of Music v. Westminster Vestry* (67 L. J. Q. B. 80; [1898] 1 Q. B. 304) followed. *Liverpool Corporation v. West Derby Union* (3 L. G. R. 647) not followed. *Hornsey School of Art v. Edmonton Union*, 94 L. T. 203; 70 J. P. 121; 4 L. G. R. 178—D.

Serjeants' Inn.—Occupiers of chambers in Old Serjeants' Inn, which inn formerly belonged to the see of Ely, and was held (subject to a perpetual rent) by the Honourable Society of Judges and Serjeants-at-Law, but the fee-simple of which was sold by the society in 1877, are not exempted from being rated to the poor rate by virtue of 3 & 4 Will. 4, c. ex. *Jonas v. St. Dunstan Overseers*, 95 L. T. 787; 71 J. P. 33; 5 L. G. R. 147; 23 T. L. R. 13—D.

Borough—Incorporation of—Property Partially Exempted from Rates Except Poor Rate and "charges at present collected with the poor rate"—Expenses under Education Act.—In 1894 an urban district together with certain adjoining areas comprised in a rural district was formed

into a municipal borough in the usual way by charter. The scheme framed under the Municipal Corporation Act, 1882, in connection with the creation of the borough contained a provision that certain harbour property in the adjoining areas should not in future "pay to the borough or be assessable for any rates or charges" (except water rate) at a higher rate than 3d. in the pound per annum "exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district," so long as the roads, &c., in the harbour should be maintained and lighted out of the harbour revenue. At the time of the creation of the borough the adjoining areas were not under the jurisdiction of a school board, and the harbour property was consequently not rated towards the expenses of any school board; but the property was rated through the medium of the poor rate in the usual way towards expenses of a school attendance committee:—*Held*, that the property in question was not exempted by the above provisions from being rated for the purposes of the expenses of the borough council as local education authority. *Whitehaven Harbour Commissioners v. Whitehaven Union*, 94 L. T. 504; 4 L. G. R. 128; 70 J. P. 89—D.

Private Act.—A private Act of 1780 vested a piece of land in trustees for certain purposes therein mentioned for the benefit of the inhabitants of a borough, and provided that for ever thereafter the land should be deemed and taken as within and parcel of the borough, but should in no wise be assessed to poor's rate:—*Held*, that the land was exempt for ever from being assessable to poor's rate, and therefore a rate committee, to whom the trustees had leased a portion of the land for a race-course, were not liable to poor's rate by reason of their occupation. *Pontefract Assessment Committee v. Pontefract Park Trustees*, 78 L. T. 738—C.A.

12. ASSESSMENT.

Basis of—Parochial Principle.—By a private Act the lessees of a railway, which connected the systems of several railway companies, but had no terminal stations of its own, were liable to pay a minimum annual rent or sum of 30,000l. in respect of it. The line was worked at a loss. The quarter sessions, without considering the fact that 30,000l. had been fixed by the statute to be paid for the accommodation acquired by the lessees, fixed the rateable value upon the footing of what a hypothetical tenant would give for the line, having regard to its position, connections, and the accommodation afforded:—*Held*, that the quarter sessions proceeded on the right principle. *East London Railway v. Greenwich Union*, 97 L. T. 404; 71 J. P. 460; 5 L. G. R. 922—D.

Rateable Value—Licensed Premises—Trade Actually Done.—The estimated amount of business done on licensed premises, although an enquiry into profits is to be avoided, is one of the circumstances which may be taken into consideration in assessing them for poor rate. *Cartwright v. Sculcoates Union*, 69 L. J. Q.B. 403; [1900] A.C. 150; 82 L. T. 157; 48 W. R. 394; 64 J. P. 229—H.L. (E.)

The distinction referred to in *Dodds v. South*

Shields Assessment Committee (64 L. J. Q.B. 508; [1895] 2 Q.B. 133) between exceptional and ordinary cases involves no principle of law, though it may be a convenient rule of practice. *Ib.*

Deductions—Expense Necessary to Maintain Premises in State to Command Rent—Licensed Premises—Compensation.—The charge imposed in any year under section 3 of the Licensing Act, 1904, on licensed premises for the purpose of forming a compensation fund cannot be allowed as a deduction under section 1 of the Parochial Assessments Act, 1836, in arriving at the rateable value of such licensed premises. *Waddle v. Sunderland Union*, 76 L. J. K.B. 16; [1906] 2 K.B. 899; 95 L. T. 784; 4 L. G. R. 1155; 71 J. P. 1; 23 T. L. R. 7—D. Affirmed, C.A., [1908] 1 K.B. 642; 72 J. P. 99.

Sea Wall—Rent-charges Imposed on Some of Protected Lands only.—Rentcharges were by a local Act created for the purpose of maintaining works for the protection from inundation by the sea of the lands in a particular district, but were imposed upon some only of the lands within the district, although the works also benefited the remainder of the lands:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that the rentcharges so imposed could not be allowed as specific deductions in arriving at the rateable value of those lands on which they were imposed. *Stead v. Newport Union*, 76 L. J. K.B. 753; [1907] 2 K.B. 460; 97 L. T. 413; 71 J. P. 363; 5 L. G. R. 892—C.A.

Expenses of Dredging Harbour.—The expenses of dredging a harbour are a proper deduction under section 37 of the Poor Law (Scotland) Act, 1845 [cf. section 1 of the Parochial Assessments Act, 1836], in arriving at the annual value of the harbour. *Burghhead Harbour Co. v. George*, 8 F. 982—Ct. of Sess.

Insurance.—In ascertaining the probable annual cost "of insurance" to be deducted, allowance is not to be made except for sums which during any of the years taken in striking the average were actually paid as premiums of insurance. *Ib.*

Buildings—Cost of Construction—Evidence of Letting Value.—In valuing premises consisting of a dwelling-house, a percentage on the actual cost of construction cannot properly be taken as the sole basis of assessment when there is evidence of letting value and of expense of repairs, insurance, and up-keep of the premises borne by the owner. *Fletcher v. Commissioner of Valuation*, [1907] 2 Ir. R. 112—K.B. D.

Statutory Restrictions as to Application of Revenue.—The Commissioners of the Leith Harbour and Docks were empowered by their private Act to levy dock-rates up to certain prescribed limits, and the revenue so obtained was directed to be applied, after payment of the expenses of maintaining the harbour and docks, "in or towards the expense of executing further improvements on or additions to and extensions of the harbour and docks and works connected therewith." The rates actually levied were much below the statutory limits, but were in excess of the cost of maintenance, and the balance, which was considerable, was

applied in reduction of debt incurred in making extensions of the undertaking:—*Held*, that the undertaking was to be valued as a profit-earning subject; that consequently the only expenditure to be deducted from the gross revenue was tenant's expenditure; but that a sum in name of tenant's profits ought also to be deducted. *Leith Harbour Commissioners v. Leith Assessor*, [1907] S. C. 751—Ct. of Sess.

Valuation List in Metropolis.—*See* METROPOLIS.

18. APPEAL.

"Person aggrieved"—**Person bound to Reimburse Rates Paid by the Person Entered in Rate Book.**—The words in section 18 of the Union Assessment Committee Act, 1862, "any person who may feel himself aggrieved by any valuation list," include a person who, although his name does not appear in the rate book, is by agreement bound to refund to the person whose name does appear in the rate book the rates paid by him. He is therefore entitled to give notice to the assessment committee and the overseers of his objection to the valuation list. *Reg. v. Brentford Assessment Committee*; *Herring*, *Ex parte*, 96 L. T. 704; 5 L. G. R. 1188; 71 J. P. 281—D.

Appeal to Quarter Sessions—Service of Notice—Jurisdiction.—Upon an appeal to quarter sessions from a poor rate the giving proper notice of appeal is not a condition precedent to quarter sessions having jurisdiction to enter and respite the appeal. *Reg. v. Kent Justices* (80 L. T. 622) not followed upon this point. *Reg. v. De Grey*; *King's Lynn Docks Co., Ex parte*, 69 L. J. Q.B. 341; [1900] 1 Q.B. 521; 82 L. T. 324; 48 W. R. 348; 64 J. P. 375—D.

Service of Notice—Reasonable Notice—Parish Councils.—The L. C. and D. Railway Co. appealed to quarter sessions against the assessments for the poor rate made on their property in eleven parishes in the county of K. Seven of these parishes had parish councils, and the remaining four had parish meetings. No notices of appeal against the rate had been served within proper time on the parish councils, and the Justices refused to enter and respite the appeal with a view to proper notices being served. On a rule *nisi* for a *mandamus* calling on the Justices to show cause why they should not enter and respite the appeal in order to enable notices to be properly served on the parish councils,—*Held*, that the parish councils should be served with notice, and that, as notices had not been served in proper time upon them, there was no appeal that could be entered and respited. *Held* also that, as the rule *nisi* only mentioned parish councils, it was not necessary to decide whether parish meetings should be served with notice of appeal or not. *Reg. v. Kent Justices*; *London, Chatham, and Dover Railway, Ex parte*, 80 L. T. 622—D.

Next Quarter Sessions after "cause of appeal" Arises—Knowledge of Right to Appeal.—A parish authority appealing against a county rate do not appeal to the next quarter sessions after their "cause of appeal" has arisen, within the meaning of section 22 of the County Rates Act, 1852, by merely appealing to the next avail-

able quarter sessions after they have become aware of their right to appeal, if these are not the next after their right to appeal has come into existence. *Yorkshire (West Riding) County Council v. Middleton Parish Council*, 75 L. J. K.B. 485; [1906] 2 K.B. 157; 94 L. T. 735; 70 J. P. 326; 4 L. G. R. 624; 22 T. L. R. 493—D.

Order Altering Basis of Rate—Retrospective Operation on Existing Rate.—The Court of quarter sessions have no jurisdiction under the County Rates Act, 1852, to order that an alteration of the county rate basis shall operate retrospectively upon a rate previously made. *Ib.*

Appeal to Special Sessions—Notice to Parish Council.—It is a condition precedent to an appeal to special sessions against a rate, under section 6 of the Parochial Assessment Act, 1836, that notice of appeal should have been given to the parish council. *Reg. v. Tewkesbury Justices*, 72 L. J. K.B. 41; [1903] 1 K.B. 39; 87 L. T. 583; 51 W. R. 285; 67 J. P. 54; 1 L. G. R. 66—D.

Next Practicable Sessions—Time—Assessment Committee—Failure to Obtain Relief—Next Sessions after Failure.—A rate was made on April 21, 1903. Certain ratepayers considered themselves aggrieved by the assessment, but took no steps till October 26, 1903, when they gave notice of objection to the assessment committee. In the meantime meetings of the assessment committee had been held on May 15 and August 13, and a Court of quarter sessions had been held on June 27. A subsequent Court was held on October 27. The objection was, on November 12, heard at a meeting of the assessment committee and decided against the ratepayers, who, on December 5, gave notice of appeal to the next Court of quarter sessions, held on January 2, 1904:—*Held*, that, having regard to the provisions of section 1 of the Union Assessment Committee Amendment Act, 1864, and notwithstanding section 4 of the Poor Relief Act, 1743, the appeal was not necessarily out of time. *Imperial and Grand Hotels Co. v. Christchurch Union*, 74 L. J. K.B. 768; [1905] 2 K.B. 239; 92 L. T. 847; 53 W. R. 627; 69 J. P. 805; 3 L. G. R. 895; 21 T. L. R. 545—C.A.

Gross Estimated Rental—Finality of Figure Appearing in Rate-Book and Valuation List.—The gross estimated rental of premises as it appears in the rate-book and valuation list is final, and it is not competent to a Court of quarter sessions, upon a ratepayer's appeal from the assessment committee, to admit evidence tendered by the rating authority to shew that the gross estimated rental has been understated. *Horton v. Walsall Union*, 67 L. J. Q.B. 804; [1898] 2 Q.B. 237; 78 L. T. 684; 46 W. R. 607; 62 J. P. 437—D.

Rate Payable in Instalments—Appeal during Period of Second Instalment—Liability to Repay.—A rate was made payable in two instalments. Certain ratepayers paid the first instalment, and subsequently appealed successfully against the assessment:—*Held*, that by virtue of section 8 of the Poor Rate Act, 1801, the amount overpaid on the first instalment must be repaid. *Imperial and Grand Hotels Co. v. Christchurch Union*, 74 L. J. K.B. 57; [1905] 1 K.B. 89; 91 L. T. 691; 53 W. R. 343; 69 J. P. 9; 2 L. G. R. 1370; 21 T. L. R. 67—D.

Second Rate since Notice of Objection to Valuation List—Necessity for Further Notice of Objection to List.]—On June 23, 1900, the appellants gave to the assessmen^t committee notice of objection to the valuation list, on the ground that their premises were over-assessed. The assessment committee reduced the assessment, though not to the extent claimed by the appellants, and the appellants appealed to special sessions against the current rate. The next rate was made on October 26, 1900, and the assessment having subsequently been further reduced by the decision of special sessions, though not to the extent claimed, and the valuation list altered accordingly, the appellants paid that rate on the assessment so reduced. A further rate was made on May 4, 1901, and the appellants gave notice of appeal to quarter sessions against that rate. The respondents took the preliminary objection that by section 1 of the Union Assessment Committee Amendment Act, 1864, it was a condition precedent to the appellants' right to appeal that they should again have given to the assessment committee notice of objection to the list. The quarter sessions allowed the objection, and dismissed the appeal:—*Held*, that they had properly allowed the objection, and should not be compelled by *mandamus* to hear the appeal. *Rex v. Essex Justices*, 71 L. J. K.B. 148; [1902] 1 K.B. 180; 85 L. T. 678; 50 W. R. 188; 66 J. P. 961—D.

Whether a person who has objected to the valuation list before the assessment committee only on the ground that his own premises are over-assessed can appeal to sessions on the additional grounds that the premises of other persons are under-assessed, and that rateable premises of other persons are omitted from the rate, *quære*. *Ib*.

Right of Assessment Committee to Appear as Respondents to Appeal—Notice of Meeting to Obtain Consent of Guardians.]—By section 2 of the Union Assessment Committee Amendment Act, 1864, an assessment committee of a union may with the consent of the guardians, after notice shall have been sent to every guardian, appear as respondents to a poor-rate appeal, but in the name of the guardians of such union. By section 12 of the Divided Parishes Act, 1882, where under the Poor Law Amendment Act, 1834, or any amending Act, the consent in writing of a majority of the guardians of a union is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which meeting and of the business to be transacted thereat not less than fourteen days' notice shall be given to each guardian. A ratepayer having given notice of appeal against his assessment upon which a rate had been based, a clear four days' notice was sent by the clerk of the assessment committee to each of the guardians that at their next meeting the consent of the board to the appearance of the committee as respondents to the appeal would be proposed. The guardians at their meeting gave their consent to such appearance:—*Held*, that the consent so given was a sufficient compliance with section 2 of the Act of 1864, and that section 12 of the Act of 1882 did not apply so as to require a fourteen days' notice to render the consent to appear as

respondents valid, because section 12 of the Act of 1882 referred only to a consent required by statute to be in writing, whereas section 2 of the Act of 1864 did not, as a condition precedent, require that the consent should be in writing. *Smith v. Leigh Union Assessment Committee*, 73 L. J. K.B. 135; [1904] 1 K.B. 484; 90 L. T. 240; 52 W. R. 340; 2 L. G. R. 283; 68 J. P. 210; 20 T. L. R. 215—C.A.

No Consent to Assessment Committee to Appear—Costs against Assessment Committee.]—Application was made to the London Quarter Sessions by a ratepayer for leave to serve notice of appeal and to enter an appeal against the decision of the assessment committee of the St. George's, Strand, and Westminster Unions respecting the valuation and assessment of his premises under the Valuation (Metropolis) Act, 1869. The assessment committee were empowered by the Westminster City Council to appear and oppose the application, which, however, was granted, and an appeal was accordingly entered. At the hearing of the appeal it was allowed with costs against the assessment committee, who had not been empowered by the Westminster City Council to appear at the hearing:—*Held*, that in the absence of the consent of the Westminster City Council to the appearance of the assessment committee at the hearing of the appeal, the quarter sessions had no jurisdiction to make the order as to costs against the assessment committee. *Rex v. London Justices; St. George's, Strand, and Westminster Unions, Ex parte*, 97 L. T. 247; 71 J. P. 322; 5 L. G. R. 704—D.

Costs—Jurisdiction to Vary Order of Special Sessions as to Costs.]—The Court of quarter sessions has jurisdiction under section 6 of the Parochial Assessments Act, 1836, on allowing an appeal from special sessions, to make an order varying the order of special sessions as to costs. *Rex v. Cornwall Justices*, 72 L. J. K.B. 622; [1903] 2 K.B. 178; 88 L. T. 775; 52 W. R. 31; 67 J. P. 290; 1 L. G. R. 605—D.

14. RECOVERY OF RATE.

Summons for Distress Warrant—Jurisdiction of Justices to Consider Validity of Rate—Retrospective Rate.]—On October 11, 1903, the respondent entered into occupation of certain premises in respect of which he was liable to be rated to the poor rate. On November 6, 1903, a rate was allowed by the Justices, the title of which stated the date of the allowance of the rate and that the rate was made to meet the expenses of the parish up to March 25, 1904, but did not state the date from which the expenses began. The respondent, alleging that the rate was a six months' rate from September 29, 1903, refused to pay the proportion from that date to October 11, 1903, though he paid the proportion from the latter date to March 25, 1904. On a complaint by the overseers in respect of the non-payment of the former amount, the Justices found as a fact that the rate was meant to cover the six months from September 29, 1903, held that the respondent was not liable for the amount alleged, and dismissed the complaint:—*Held*, that, in the circumstances, the Justices had no jurisdiction

to enquire whether the respondent was liable for the amount claimed, but were bound to issue a distress warrant for payment of that amount. *Cheney v. Tallwin*, 73 L. J. K.B. 943; [1904] 2 K.B. 763; 91 L. T. 552; 63 J. P. 528; 2 L. G. R. 1338—D.

— **Omission of Commencing Date in Title of Rate.**—Where the title of a rate states the date of the allowance of the rate and the date up to which the expenses to be met by the rate will be incurred, the period for which the rate is estimated is sufficiently set forth under section 14 of the Poor Rate Assessment and Collection Act, 1869, notwithstanding that the date from which the expenses have been incurred is not stated. *Ib.*

— **Objection before Justices on Application for—Jurisdiction to Rate.**—By section 69 of the Great Northern and City Railway Act, 1892, it was enacted: "The company shall in respect of all lands and buildings acquired by them under the powers of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions." The railway company acquired certain land under this Act upon which buildings formerly existed, but had been pulled down before the railway company had acquired any interest in the land:—*Held*, that the railway company were not liable to be rated in respect of these buildings under section 69. *Held*, further, that as the objection raised by the respondents as to their liability went to the jurisdiction to rate, that objection could be entertained by the Justices upon an application for a distress warrant. *St. Stephen (Churchwardens) v. Great Northern and City Railway*, 86 L. T. 390; 50 W. R. 395; 66 J. P. 373—D.

— **Appeal to Quarter Sessions before Levy.**—No appeal lies to quarter sessions under section 6 of the Poor Relief Act, 1601, from an order of Justices directing that a distress warrant shall issue for the recovery of poor rates until after a distress has actually been levied. *Reg. v. London Justices; Bayne, Ex parte*, 68 L. J. Q.B. 383; [1899] 1 Q.B. 532; 80 L. T. 286; 47 W. R. 316; 63 J. P. 383—D.

— **Amount Payable—Hereditament Let for Term not Exceeding Three Months—Weekly Tenancy.**—A weekly tenant subject, by local custom, to a week's notice to quit, is the occupier of a rateable hereditament, "let for a term not exceeding three months," within the meaning of section 1 of the Poor Rate Assessment and Collection Act, 1869, and as such occupier is en-

titled to the relief given by section 2 of the Act, by which he cannot be compelled to pay at one time or within four weeks a greater amount of poor rate than would be due for one quarter of the year. *Hammond v. Farrow*, 73 L. J. K.B. 726; [1904] 2 K.B. 332; 91 L. T. 77; 63 J. P. 352; 2 L. G. R. 817; 20 T. L. R. 497—D.

— **Tender of Part of Rate—Refusal to Pay Balance—Discretion of Magistrate to Issue Distress Warrant for Balance only.**—Where, on an application by overseers to a magistrate for a distress warrant to enforce payment of a rate, the ratepayer tenders in Court to the overseers a part of the rate, which they refuse to accept, but declines on conscientious grounds to pay the balance, the magistrate is not bound to issue a distress warrant for more than the balance. *Rex v. Gillespie*, 73 L. J. K.B. 106; [1904] 1 K.B. 174; 90 L. T. 15; 52 W. R. 367; 68 J. P. 11; 2 L. G. R. 59; 20 T. L. R. 113—D.

— **Discretion of Magistrate.**—On an application for a distress warrant for the recovery of poor rate the Justices have jurisdiction, at their discretion, to issue a distress warrant for the full amount of the rate, notwithstanding a tender in Court of part of it by the ratepayer; and, in default of payment and of sufficient distress for the whole, they have jurisdiction, if they think fit, to issue a warrant of commitment. *Rex v. Gillespie* (73 L. J. K.B. 106) explained. *Wiles, Ex parte*, 73 L. J. K.B. 112*n.*; 90 L. T. 225; 2 L. G. R. 103; 68 J. P. 13; 20 Cox C.C. 602; 20 T. L. R. 150—D.

— **Change of Occupation—Payment of Proportion—Period for Making the Rate—Period from Allowance by Justices—Issue of Distress Warrant.**—The appellant was summoned on a complaint preferred on behalf of the overseers to shew cause why he had not paid a certain poor rate. The rate was allowed by the Justices on October 21, 1893, and was intended for the period from September 29, 1893, up to March 25, 1899. The premises, in respect of which the appellant was rated, were occupied by him from before September 23, 1893, up to November 30, 1898, and the complaint was in respect of the proportion of the rate from September 29 to November 30, 1898. It was contended by the appellant that he was only liable to pay the proportion of the rate from October 21 to November 30, 1893. The magistrates were of opinion that their duties were ministerial only, and that they had no jurisdiction to enquire what excess had been charged, and they directed a distress warrant to issue for the whole amount claimed—namely from September 29 to November 30, 1898:—*Held*, that the contention of the appellant was right, and that he was only liable to pay the proportion from October 21 to November 30, 1893. *Davis v. Woodfield*, 81 L. T. 782; 64 J. P. 215—D.

— **Termination of Occupation during Period of Rate—Apportionment by Justices—No Fresh Demand for Sum Apportioned—Jurisdiction to Issue Distress Warrant.**—A demand for payment of a rate for the full period of the rate was made upon an occupier in respect of premises in his occupation at the commencement of the period. He ceased to occupy part of the premises during the period, but no fresh demand was made or summons issued for the

reduced amount for which he then became liable. On a summons for non-payment the Justices apportioned the rate and determined the smaller amount due from the occupier:—*Held*, that, notwithstanding that there had been no fresh demand or summons, the Justices had jurisdiction to issue forthwith a distress warrant for the smaller amount. *Mansel v. Iichen Overseers*, 75 L. J. K.B. 232; [1906] 1 K.B. 221; 94 L. T. 320; 54 W. R. 456; 70 J. P. 148; 4 L. G. R. 279; 22 T. L. R. 223—D.

Jurisdiction of County Court to Entertain Action for Recovery of Excess over Reasonable Charge—"Reasonable charges of taking, keeping, and selling the distress."—The County Court has jurisdiction to entertain an action for the recovery of any charge in excess of what is reasonable in respect of the taking, keeping, and selling of a distress levied for unpaid poor rates. *Re v. Bridport County Court Judge; Edwards, Ex parte*, 74 L. J. K.B. 464; [1905] 2 K.B. 108; 92 L. T. 571; 53 W. R. 527; 69 J. P. 221; 3 L. G. R. 679—D.

Costs and Charges—Implied Repeal of Earlier by Later Legislation.—By the Distress (Costs) Act, 1817, the costs and charges in respect of a distress for rent are, where the amount demanded and due does not exceed 20*l.*, fixed by a schedule to the Act. By the Distress (Costs) Act, 1827, that schedule is made applicable to poor rate. By the Distress for Rates Act, 1849, "reasonable charges" are to be levied for the taking, keeping, and selling of a distress:—*Held*, that, with respect to a distress under 20*l.*, the Act of 1849 does not repeal the provisions of that of 1827. *Hill v. Pannifer* (73 L. J. K.B. 556; [1904] 1 K. B. 811) overruled. *Coster v. Headland*, 75 L. J. K.B. 483; [1906] A.C. 286; 94 L. T. 589; 70 J. P. 249; 4 L. G. R. 589; 22 T. L. R. 441—H.L. (E.)

Costs of Selling—Limit Imposed by Statute—Subsequent Statute Allowing "reasonable charges."—Section 1 of the Distress for Rates Act, 1849, repeals by implication the provisions of the Distress (Costs) Act, 1817 (as applied to distress for poor rate by the Distress (Costs) Act, 1827), as to the costs of distresses for poor rate, and the "reasonable charges" of selling the goods may be allowed under the Act of 1849, although they may exceed the limit imposed by the earlier Act. *Hill v. Pannifer*, 73 L. J. K.B. 556; [1904] 1 K.B. 811; 90 L. T. 511; 52 W. R. 588; 68 J. P. 261; 2 L. G. R. 381; 20 T. L. R. 324—D. But see *Headland v. Coster*, 21 T. L. R. 123—C.A.

Amount of—Implied Repeal of Earlier Legislation by Subsequent General Legislation.—The provision in section 1 of the Distress (Costs) Act, 1817, as applied to a distress for the poor rate by the Distress (Costs) Act, 1827, that in the case of a distress where the sum demanded and due does not exceed 20*l.*, no more costs and charges in respect of such distress shall be taken than are fixed in the schedule to the former Act, is still in force and has not been rendered inoperative by reason of the repeal of the statute 27 Geo. 2, c. 20 by section 86 of the Summary Jurisdiction Act, 1848, or impliedly repealed by section 1 of the Distress for Rates Act, 1849. *Hill v. Pannifer* (73 L. J. K.B. 556; [1904]

1 K.B. 811) overruled. *Moyle v. Cocksedge* (Willes, 686) approved. *Headland v. Coster*, 74 L. J. K.B. 210; [1905] 1 K.B. 219; 92 L. T. 98; 3 L. G. R. 174; 69 J. P. 90; 21 T. L. R. 123—C.A.

Keeping Possession of Goods Distrained.]—The defendant, a police constable, under a warrant of distress for poor rate, seized goods belonging to the plaintiff. He removed the goods to the police station, where they were stored in a room which was kept locked, the key being hung up in the police station. After a lapse of five days the goods were sold, and the defendant rendered to the plaintiff an account containing an item for five days' charge for "keeping possession of the goods distrained, 5*s.*" The plaintiff paid the amount. In an action brought in the County Court to recover it back, on the ground that there was no authority for making such a charge,—*Held*, that the charge for "keeping possession" of the goods was one which was sanctioned by a table of fees, approved by the Secretary of State, under section 23 of the Police Act, 1890, and that it was lawfully made, notwithstanding that the goods had been removed from the plaintiff's premises. *Scott v. Denton*, 76 L. J. K.B. 380; [1907] 1 K.B. 456; 95 L. T. 760; 71 J. P. 66; 5 L. G. R. 251; 23 T. L. R. 78—D.

Per LORD ALVERSTONE, C.J.—The expression "man in possession" in the schedule to the Distress (Costs) Act, 1817, means a man in possession of the goods seized, but not necessarily in possession of them on the premises where they were seized. *Ib.*

No Publication.]—See *Beeson v. Derby Overseers*, *ante*, LOCAL GOVERNMENT, col. 1425.

Preferential Payment—Insolvent Estate.]—See EXECUTOR AND ADMINISTRATOR, col. 847.

in Bankruptcy.]—See *Mannesman Tube Co., In re, ante*, COMPANY, col. 466.

POST OFFICE.

Literature for the Blind.]—6 Edw. 7 c. 22 is the *Post Office (Literature for the Blind) Act*, 1906.

Mails.]—2 Edw. 7 c. 36 is the *Mail Ships Act*, 1902.

Money Orders.]—3 Edw. 7 c. 12 is the *Post Office (Money Orders) Act*, 1903.

— 6 Edw. 7 c. 4 is the *Post Office (Money Orders) Act*, 1906.

Post Office.]—4 Edw. 7 c. 14 is the *Post Office Act*, 1904.

Postal Facilities.]—61 & 62 Vict. c. 18 is the *Post Office (Guarantee) Act*, 1898; and c. 59 is the *Post Office Guarantee (No. 2) Act*, 1898.

Underground Wires—Power of Local Authority to Impose Conditions.]—See TELEGRAPH.

Carriage of Mails—Demand of Postmaster-General—Hours and Times of Mail Trains.]—

The Postmaster-General, who is empowered by the Conveyance of Mails Act 1838, upon service of a twenty-eight days' notice, to require the conveyance and forwarding of the mails by a railway company "at such hours or times in the day or night" as he shall direct, is not restricted to the naming of fixed and definite hours for the departure and running of mail trains, but is entitled to name variable times, by making the departure and running of the mail trains dependent on the time of the arrival of the mails in ordinary course of through transit by rail and sea. *Rex v. Great Northern Railway*, [1907] 2 Ir. R. 242—K.B.D.

Ferry—Exemption of Post-Office Officials from Tolls.—Although Post-Office officials, as servants of the Crown, are entitled to be carried free over ferries properly so called, such right does not apply to a ferry which a corporation is empowered by statute to establish and work, but is under no obligation to maintain. *Att.-Gen. v. Londonderry Bridge Commissioners*, [1903] 1 Ir. R. 389—M.R.

Wrongful Act of Subordinate Official—Action against Postmaster-General.—The Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post-Office, for wrongful acts done by his subordinates in carrying on the business of the department. *Bainbridge v. Postmaster-General*, 75 L. J. K.B. 866; [1906] 1 K.B. 178; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70—C.A.

Contract by Letter.—See CONTRACT.

Sending Obscene Literature by Post.—See *Rex v. De Marney*, ante, CRIMINAL LAW, col. 644.

POWERS.

1. *Power of Appointment*, 1867.
 - (a) *General*, 1867.
 - (b) *Special*, 1874.
2. *Power of Charging*, 1886.
3. *Power of Jointuring*, 1887.
4. *Power of Leasing*, 1887.
5. *Power of Sale*, 1887.
6. *Release of Power*, 1888.
7. *Fraud on Power*, 1888.
8. *Other Matters*, 1889.

1. POWER OF APPOINTMENT.

(a) *General*.

Construction—Appointment under Power—Power Arising on Death or Second Marriage of Widow—Appointment at Death—Intermediate Income.—The rule of construction that a gift by will, referring to one only of two events on which a prior interest determines, will be construed as a gift subject to that prior interest, may be applied to a will exercising a power. *Shuckburgh's Settlement, In re; Robertson v. Shuckburgh*, 71 L. J. Ch. 32; [1901] 2 Ch. 794; 85 L. T. 406; 50 W. R. 133—Farwell, J.

By a marriage settlement a sum of 20,000l.

Three per Cent. Annuities was settled upon trust, after the testator's death, to pay the income to his wife till her second marriage, and after such marriage to pay half the income to her for her life, and subject thereto upon trust for the issue of the marriage, in such shares as the testator should by deed or will appoint, and in default of appointment for the children of the marriage in equal shares. The testator by his will appointed that, after the death of his wife, 12,000l. should be held in trust for his elder son, and 8,000l. for his younger son. The wife married again:—*Held*, that the appointment took effect as an appointment subject to her interest, and that the elder son was entitled on his attaining twenty-one to the payment of three-fifths of the free moiety of the fund, and of the accumulations since the date of the marriage. *Ib.*

— Appointment — Discretionary Power to Resort to Capital.—A testator gave the income of his property to his widow for life, and directed that "in case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient."—*Held*, that, on the true construction of the will, the word "sufficient" must here be taken to have reference not only to the widow's actual wants, but also to her desires; and that the direction thus amounted to a general power of appointment over the whole capital, exercisable by the widow at any rate during her life. *Pedrotti's Will, In re* (29 L. J. Ch. 92; 27 Beav. 583), distinguished. *Richards, In re; Uglow v. Richards*, 71 L. J. Ch. 66; [1902] 1 Ch. 76; 85 L. T. 452; 50 W. R. 90—Farwell, J.

Settlement of Wife's Property—Limitation "as she shall direct."—A marriage settlement dealing with real estate belonging to the wife provided that, should she survive her husband, which happened, the trustees should reconvey the lands to her "her heirs, executors, administrators, and assigns respectively for her and their own use and benefit, or otherwise as she shall direct."—*Held*, that these words did not necessarily confer a general power of appointment on the wife, it appearing that such a power would defeat the whole scheme of the deed. *Van Grutten v. Foxwell*, 84 L. T. 545—H.L. (E.)

Married Woman—Will—Intention to Pay Husband's Debt—Assets for Payment of Debts.—If a married woman, in exercise of a general power of appointment by will, gives a legacy in discharge of a debt due from her husband to the legatee, which is unpaid at her death but is afterwards paid by her husband, the amount of the legacy is under section 4 of the Married Women's Property Act, 1882, made assets liable for the testatrix's debts. *Hodgson, In re; Darley v. Hodgson*, 68 L. J. Ch. 313; [1899] 1 Ch. 666; 80 L. T. 276; 47 W. R. 443—North, J.

It makes no difference that the debt is wrongly described as due from the testatrix if the Court is satisfied that she was referring to her husband's debt. *Ib.*

Married Woman Married before 1881—Restraint on Anticipation of Life Interest—Release of Power.—A married woman married before

the Conveyancing and Law of Property Act, 1881, may under section 52 of that Act by deed unacknowledged release a power of appointment over personal property in which she has a life interest subject to a restraint on anticipation. *Chisholm's Settlement, In re*; *Hemphill's Settlement, In re*; *Hemphill v. Hemphill*, 70 L. J. Ch. 533; [1901] 2 Ch. 82—Stirling, J.

Successive Appointments of Specific Sums—Appointment of Residue—Duties—Costs of raising Appointed Sums.—Where successive appointments of specific sums have been made by the donee of an ordinary power of appointment, and then a final appointment is made of the residue of the trust fund after satisfying the previous appointments, the costs of raising the specific amounts, as well as the general costs of administering and distributing the fund, must be borne by the appointees rateably. *Chisholm, In re*; *Goddard v. Brodie*, 71 L. J. Ch. 289; [1902] 1 Ch. 457; 86 L. T. 183—Kekewich, J.

As a general rule, the costs of raising any particular sum cannot be distinguished from the general costs of trustees in administering the whole trust fund. The rule referred to in *Saunders, In re*; *Saunders v. Gore* (67 L. J. Ch. 55; [1898] 1 Ch. 17), followed. *Ib.*

Joint Power of Appointment—Husband and Wife—Assignment by Wife and Persons Entitled in Default of Appointment—Concurrence of Husband—Husband's Power as Surviving Donee—Release.—Where property is settled on trust as a husband and wife shall jointly appoint, and in default of such joint appointment as the survivor shall appoint, and the wife, with the husband's concurrence, joins with the persons entitled in default of appointment in assigning the property for value, such assignment will constitute a dealing inconsistent with any exercise of the power by the husband after his wife's death, and will in effect amount to a release of such power. *Foakes v. Jackson*, 69 L. J. Ch. 352; [1900] 1 Ch. 807; 83 L. T. 26; 48 W. R. 616—Farwell, J.

Exercise—By Deed or Writing Duly Executed or by Will—Testamentary Documents not Admitted to Probate—Exercise of Power.—A power of appointment exercisable by deed or writing duly executed or by will is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, and containing no reference to the power or to the property subject to it. *Edmonstone, In re*; *Bevan v. Edmonstone*, 49 W. R. 555—Byrne, J.

Document "purporting to be a will."—By a settlement property was vested in trustees upon trust to pay the income to A. for her life, and after her decease to her husband for his life, and after the death of the survivor of them upon trust for the children of A. as she should by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, or any codicil or codicils thereto, or "by any writing in the nature of or purporting to be a will or codicil," direct or appoint. A. executed a document which purported to be her last will, but which, inasmuch as it was not signed by her in the presence of the attesting witnesses as her last

will and testament, was not admitted to probate:—*Held*, that, though the document was not a will according to law, it was one which "purported" to be a will, and, being so, operated as a valid execution of the power of appointment. *Broad, In re*; *Smith v. Draeger*, 70 L. J. Ch. 601; [1901] 2 Ch. 86; 84 L. T. 577—Kekewich, J. discussed: *Barnett, In re*; *Dawes v. Izor*, 77 L. J. Ch. 267; [1908] 1 Ch. 402—Warrington, J.

Residuary Gift—Lapse—Blending of Appointed Fund with Estate of Appointor.—Testatrix having a general testamentary power under a settlement, by her will appointed that the trustees of the settlement should stand possessed of a proportion of the trust funds subject to her power in favour of certain appointees, and should stand possessed of the residue thereof in trust for H. S. She gave some pecuniary legacies, and empowered the trustees of the settlement and her executors respectively, with the consent of the respective appointees and legatees, to appropriate any security subject to her power of appointment, or belonging to her, towards payment of the legacies thereinbefore appointed or bequeathed, and continued, "As to all the rest and residue of my real and personal estate, I devise, bequeath and appoint, the same, subject to the payment thereout of my debts, funeral and testamentary expenses," to the said H. S. absolutely, and she appointed executors. H. S. died in the lifetime of the testatrix:—*Held (dissentiente VAUGHAN WILLIAMS, L.J.)*, that according to the true construction of the will the residue of the appointed trust funds was taken out of the settlement for all purposes and passed to the next-of-kin of the testatrix and not to the persons entitled under the settlement in default of appointment. *Davies' Trusts, In re* (41 L. J. Ch. 97; L. R. 13 Eq. 163), considered. *Martem, In re*; *Shaw v. Marten*, 71 L. J. Ch. 208; [1902] 1 Ch. 314; 85 L. T. 704; 50 W. R. 209—C.A.

Bequest of Personal Property Described in a General Manner—Gift of all Stocks, Shares, and Securities.—A testatrix had general testamentary powers of appointment over funds comprised in her marriage settlement, and over a settled legacy and share of residue under a will. Her husband, if he survived her, had a life interest in both funds. By her will she bequeathed, subject to her husband's life interest therein and his enjoyment of the annual income thereof, "all stocks shares and securities which I possess or to which I am entitled," to her sisters, and desired that after the death of her husband all such stocks, shares, and securities should be and become the absolute property of her sisters in equal proportions. The settled funds were represented by colonial and railway stocks and a small sum of cash:—*Held*, that the gift was a bequest of personal property described in a general manner within section 27 of the Wills Act; that the words "which I possess or to which I am entitled" did not shew a contrary intention; and that the will therefore exercised the powers to the extent to which the property subject to them came within the definition of "stocks shares and securities." *Turner v. Turner* (21 L. J. Ch. 843) followed. *Jacob, In re*; *Mortimer v. Mortimer*, 76 L. J.

Ch. 217; [1907] 1 Ch. 445; 96 L. T. 362—Parker, J.

— **General Power by Will** “expressly purporting to exercise such power”—**Will of Donee of Power—Residuary Bequest of Personal Estate over which the Donee should have “any disposing power”—Exercise of Power.**—A residuary bequest of personal estate over which the testatrix has “any disposing power” is a sufficient exercise of a general testamentary power of appointment to which a condition is attached that no will shall be deemed an exercise of the power “unless it expressly purports to exercise such power.” *Waterhouse, In re; Waterhouse v. Ryley*, 77 L. J. Ch. 30; 98 L. T. 30—C.A. Affirming, 96 L. T. 638—Joyce, J.

— **Severance—Income—Specific Gift.**—An appointment, under general powers over two funds, of the sum of 5,000*l.* and the stocks, funds, and securities representing the same and “such part of the stocks, funds, shares, and securities comprised in the first schedule as shall with the said sum of 5,000*l.* make up the sum of 9,000*l.*” is a specific gift, and the income during the first year after the testator's death goes to the appointees. *Marten, In re; Shaw v. Marten*, 70 L. J. Ch. 354; [1901] 1 Ch. 370—Byrne, J.

— **Administrator with Will Annexed—Receipt—Married Woman.**—The administrator with the will annexed of the donee of a general power of appointment who has exercised the power by will is the proper person to distribute the appointed fund, and to give a valid discharge for the same to the trustees of the settlement. *Peacock, In re; Kelcey v. Harrison*, 71 L. J. Ch. 325; [1902] 1 Ch. 552; 86 L. T. 414; 50 W. R. 473—Swinfen Eady, J.

— **Testamentary Appointment in Discharge of a Debt—Predecease of Appointee—Lapse.**—A testamentary appointment in discharge of a moral or legal obligation does not lapse merely by reason of the appointee predeceasing the testator, but extends to the legal personal representative of the appointee. *Stevens v. King*, 73 L. J. Ch. 535; [1904] 2 Ch. 30; 90 L. T. 665; 52 W. R. 443—Farwell, J.

— **General Power to Appoint Charge—Will—General Gift—Exercise of General Power of Appointment.**—A testator by his will declared that it should be lawful for A. by deed or writing to limit and appoint, grant, sell, lease, and confirm all or any part of certain lands to any person or persons, by way of mortgage or otherwise, as a security for any sum not exceeding 2,000*l.*, or by any such deed, writing, or by will, to charge and incumber the lands with the payment of any sum not exceeding 2,000*l.* for such use, intent, and purpose as A. should think fit to direct and appoint. A., by his will, made after the Wills Act, and which did not refer to this power, gave, devised, and bequeathed to his wife all his property real and personal, and all his estate, goods and chattels, moneys and charges secured upon lands of or to which he was possessed or in any way entitled:—*Held*, that A.'s will did not operate under section 27 of the Wills Act as an exercise of the power of charging and appointing in favour of the wife. *Jones, In re; Greene v. Gordon* (56 L. J. Ch.

58; 34 Ch. D. 65), distinguished and observed upon. *Wallinger's Estate, In re*, [1893] 1 Ir. R. 139—C.A.

Section 27 of the Wills Act presupposes the existence of some real estate, or some personal estate, as the case may be, which is subject to a general power of appointment, and which, though not the testator's property, is at his uncontrolled disposition. The language of the section does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it. *Ib.*

“Give, devise, bequeath and appoint”—**No further or other Reference to Power.**—A testator executed a will in 1894 wherein he purported to exercise a power of appointment over certain property in which he took a life interest under the terms of his father's will. In 1896 he executed a second will, whereby he did not in terms revoke the will of 1894, and which did not in terms allude to the power of appointment or purport to execute it. The second will, however, contained the words, “I give, devise, bequeath and appoint all my real and personal estate whatsoever unto my trustees upon trust. . .” The COURT, following *Mayhew, In re; Spencer v. Cutbush* (70 L. J. Ch. 423; [1901] 1 Ch. 677), *held* that the use of the word “appoint,” taken with the context and surrounding circumstances, was a sufficient exercise of the power, and that the will of 1894 was revoked. *Kent v. Kent*, 71 L. J. P. 50; [1902] P. 103; 86 L. T. 536—Jeune, P.

Charge on Realty in Aid of Personality—Residuary Bequest—Administration of Assets.—By a will, which contained no reference to a general power of appointment possessed by the testatrix over a sum of 2,000*l.*, she devised her real estate to trustees for a term of years, upon trust, by sale or mortgage, to raise such sums as would be required in aid of her personal estate for payment of debts, legacies, &c., and, after giving certain legacies and annuities, she bequeathed the residue of her personal estate to three persons:—*Held*, that by virtue of section 27 of the Wills Act, 1837, the gift of the residue took effect as an appointment of the sum of 2,000*l.*, but that such sum must be applied, like the rest of the personality, in payment of debts and legacies in priority to any sums raisable under the term of years. *Hartley, In re; Williams v. Jones*, 69 L. J. Ch. 79; 81 L. T. 804; 43 W. R. 245—North, J.

Exercise in Favour of Creditor as Security in Pursuance of Covenant—Rights of General Creditors against Appointed Fund.—Where the donee of a general testamentary power of appointment over a fund, in consideration of money lent to him, covenants by deed to exercise the power by a will giving the lender a first charge on the fund, and does so, the fund is assets for the payment of the appointor's debts generally, and the lender has no priority over other creditors. *Fleming v. Buchanan*

(22 L. J. Ch. 886; 3 De G. M. & G. 976) approved. *Beyfus v. Lawley*, 72 L. J. Ch. 781; [1903] A.C. 411; 89 L. T. 309—H.L. (E.) Affirming, 51 W. R. 150—C.A.

Foreign Domicil.]—A foreign will, containing no indication that it is to be construed with reference to English law, does not import section 27 of the Wills Act so as to operate as an exercise of a general power of appointment. *Price, In re*; *Tomlin v. Latter* (69 L. J. Ch. 225; [1900] 1 Ch. 442), considered and applied. *D'Este Settlement Trust, In re*; *Poultier v. D'Este*, 72 L. J. Ch. 305; [1903] 1 Ch. 898; 88 L. T. 384; 51 W. R. 552—Buckley, J.

B. having, under an English settlement, a general power to appoint a fund by will, and being a domiciled Frenchwoman, made a will in French form, appointing her husband general and universal legatee. The will was unattested, but valid according to French law, and was admitted to probate in England:—*Held*, that it did not operate as an execution of the power. *Id.*

Conflict of Laws—Will to be Attested by Two Witnesses—Foreign Unattested Will—Defective Execution of Power.]—Where the donee of a testamentary power of appointment is a foreigner with foreign domicil, and special formalities for the execution of the power are required by the instrument creating it, it is not enough for the valid execution of the power that the instrument purporting to execute it is a will according to the law of the domicil, but such will must comply with the formalities required by the power. *Barretto v. Young*, 69 L. J. Ch. 605; [1900] 2 Ch. 339; 83 L. T. 154—Byrne, J.

A donee of a general power to appoint by will created by a will antecedent to the Wills Act, 1837, was a domiciled Frenchwoman. She executed a holograph will in French, which was valid by the law of France, and purported to be an exercise of the power. This will, although unattested, was admitted to probate in England. The power, by the terms of the will which created it, was to be executed by the donee in the presence of and attested by two or more credible witnesses:—*Held*, that, the requirements for execution specified by the power not having been satisfied, the power was not well executed. *Id.*

French Will—Unattested Will—Execution of Power.]—A disposition of personal property by a writing signed by a person residing in France, who has since died, the writing being unattested, but in form a valid will according to French law, will not operate as an execution by that person of a general power of appointment by will, since it has not been attested by two or more witnesses as required by sections 9 and 10 of the Wills Act. *Kirwan's Trusts, In re* (52 L. J. Ch. 952; 25 Ch. D. 373), followed. *D'Huart v. Harkness* (34 L. J. Ch. 311; 34 Beav. 324) considered. *Hummel v. Hummel*, 67 L. J. Ch. 363; [1898] 1 Ch. 642; 78 L. T. 518; 46 W. R. 507—Kekewich, J.

Donee Domiciled Abroad—Holograph Will—Will Valid by Law of Domicil—Probate in England.]—Where, by an English instrument, a

general power of appointment of personalty by will was given to a French subject domiciled in France, and she executed a holograph will in French which was valid by the law of France and which though unattested was admitted to probate in England, it was held that neither the provisions of the Wills Act, 1837, nor of the Wills Act, 1861, applied, and that the power was validly exercised. *D'Huart v. Harkness* (34 L. J. Ch. 311; 34 Beav. 324) approved and followed. *Kirwan's Trusts, In re* (52 L. J. Ch. 952; 25 Ch. D. 373), and *Hummel v. Hummel* (67 L. J. Ch. 363; [1898] 1 Ch. 642) discussed and distinguished. *Price, In re*; *Tomlin v. Latter*, 69 L. J. Ch. 225; [1900] 1 Ch. 442; 82 L. T. 79; 48 W. R. 373—Stirling, J.

Power of Revocation and New Appointment.]—The principle that a general devise and bequest does not operate under section 27 of the Wills Act, 1837, as an exercise of a power of revocation and new appointment applies to the case where the power of revocation and new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power. *Goulding's Settlement, In re*; *Dobell v. Dutton*, 48 W. R. 183—Cozens-Hardy, J.

Gift to such Charitable Institutions as Trustees may Determine—Pure and Impure Personalty—Proceeds of Sale of Real Estate.]—Where under the will of a person dying before the passing of the Mortmain and Charitable Uses Act, 1891, a mixed fund, consisting of pure and impure personalty and the proceeds of sale of real estate, is given to trustees to apply to such charitable institutions and objects as they may determine, and in such manner as they may think fit, the gift is a valid gift to the trustees of both the pure and impure personalty and the proceeds of the sale of the realty, and confers on them a power to appoint to any charitable object that they think fit. If the trustees appoint to objects that can take the property in question, the appointment will be valid; but if they appoint to objects which cannot take—*e.g.* if they appoint impure personalty to institutions not exempted from the provisions of the Charitable Uses Act, 1735—the appointment will to that extent fail. *Lewis v. Allenby* (L. R. 10 Eq. 668) discussed. *Piercy, In re*; *Whitwham v. Percy*, 67 L. J. Ch. 297; [1898] 1 Ch. 565; 78 L. T. 277; 46 W. R. 503—C.A.

Quære, per VAUGHAN WILLIAMS, L.J., whether, if the trustees appointed to objects which could not take, that would be an exercise of their power in such a sense that they could not subsequently appoint to objects that could take. *Id.*

Bequest of Property not Subject to Power.]—*See ELECTION*, col. 782.

Overriding Clause or Provision in Default of Appointment.]—*See Simmons, In re*; *Denison v. Orman*, 87 L. T. 594.

(b) *Special Power.*

Intention to Exercise.]—Where the intention of a testator to exercise a special power of appoint-

ment over particular property can be ascertained from his will, effect will be given to it, notwithstanding that there is no actual reference in the will to the power or to the property, and the testator possesses other general powers of appointment to which the words of the will are applicable. *Sharland, In re; Rew v. Wippell*, 68 L. J. Ch. 747; [1899] 2 Ch. 536; 81 L. T. 384—Kekewich, J.

— **Gift of Property “over which I have disposing power.”**—A testator had by his marriage settlement power to appoint a rent-charge of 30*l.*, subject to the life interests therein of himself and his intended wife, amongst the children of the marriage, and in default of appointment his wife had a like power. He had no other power of appointment. The testator by his will devised and bequeathed to his executors all properties to which he might be entitled or was possessed of at the time of his death or over which he had any disposing power, on trust to pay the income thereof to his wife for life, and after her death to his children, share and share alike. There were three children of the marriage. The testator's wife survived him, and by her will devised and bequeathed the residue of the property belonging to her, or over which she had any power of appointment or disposition, to her daughter A.:—*Held*, that there was no intention to exercise the power expressed in the will of the testator, and that the annuity passed under the will of his wife. *Sykes v. Carroll*, [1903] 1 Ir. R. 17—M.R.

— **Reference to Power.**—Where it is manifest on the construction of a will that the testator intended to dispose thereby of property of his own, and also of property over which he had a special power of appointment, and under the disposition made by the will the property subject to the power is given to a member of the class amongst whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his own interest therein. *Byrne v. Cullinan*, [1904] 1 Ir. R. 42—C.A.

— **Appointment by Will Dated Prior to Will Creating Power—Personalty.**—H. by his will gave “all the residue of the property over which at the time of my death I shall have a disposing power” to trustees upon trust for sale and conversion and investment, and he directed his trustees “to pay the yearly income or produce arising from my trust estate” to his wife during her life or widowhood; and in case she should marry again he directed his trustees “to pay to her out of the income of my trust estate in addition to the provision made for her by marriage settlement an annuity of 50*l.* payable half-yearly instead of the whole of such income.” The will contained further trusts for the benefit of his children. H.'s father by his will empowered each child of his by will or codicil to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in the father's residuary estate for life or for any period determinable on or before death, and declared the trusts of a sum of 4,000*l.* by reference to the trusts of the residue. The father's will was dated after that of the son,

but the father predeceased the son. The son had no power of appointment in favour of his widow other than that contained in the will of the father:—*Held*, that the case was not within section 24 or section 27 of the Wills Act, 1837, and there was no legal presumption of an intention on the part of the son to exercise the power contained in the father's will; and the son's will could not fairly be construed as disclosing an intention to exercise a non-existent special power, supposing it were possible to exercise such a power, by anticipation. *Hayes, In re; Turnbull v. Hayes*, 70 L. J. Ch. 770; [1901] 2 Ch. 529; 85 L. T. 85; 49 W. R. 659—C.A.

Quære, whether it is possible as a matter of law to exercise by anticipation a special power which has not been created until after the alleged exercise. *Id.*

Appointment to Uses of Prior Settlement—“Capable of taking effect”—Trusts Void for Remoteness—Non-objects of Power.—Where property is appointed, under a special power, to the uses of a prior settlement or such of them as are “capable of taking effect,” and some of the uses so incorporated fail for remoteness or by reason of the *cestuis que trust* not being objects of the power, the void trusts may be disregarded as not being “capable of taking effect,” and the power will be otherwise well exercised. *Finch and Chew's Contract, In re*, 72 L. J. Ch. 690; [1903] 2 Ch. 486; 89 L. T. 162—Kekewich, J.

The phrase “capable of taking effect” means what the law allows to take effect, and is not confined to trusts which by reason of the intervening circumstances are still in fact subsisting and capable of coming into existence. *Id.*

Appointment of Specified Sums—Invested Sum of 30,000*l.*—Rise in Value of Securities—Surplus.—Testator gave a sum of 30,000*l.* to be invested by his trustees upon trust to pay the interest and annual proceeds thereof to his daughter for life, and after her death upon trust for her children or grandchildren as she should by deed or will appoint. By her will the daughter, after reciting the power, appointed that the “said sum of 30,000*l.*, together with the interest and annual proceeds thereof,” should be held as to two sums of 1,000*l.*, one of 4,000*l.*, and three sums of 6,000*l.*, each of which was described as “part of the said sum of 30,000*l.*,” and “as to another sum of 6,000*l.*,” being the remaining part of the said sum of 30,000*l.*,” upon trusts in favour of various objects of the power. On the death of the daughter the securities upon which the 30,000*l.* was invested were worth 39,000*l.* sterling:—*Held*, that the daughter's will operated as an appointment of the entire fund in aliquot shares. *Cruddas, In re; Smith, In re; Cruddas v. Smith*, 69 L. J. Ch. 355; [1900] 1 Ch. 730; 82 L. T. 514—C.A.

Appointment of Specified Sum Described as One Third Portion—Deficiency of Fund.—A donee of a power of appointment in favour of younger children over a sum of 4,500*l.* raisable out of lands and over lands, which money and lands in default of appointment were to be

divided equally among the objects of the power by deed poll, executed at a date when three objects of the power were living, and on the intended marriage of J. E. B. one of the objects of the power directed and appointed as follows: "That the sum of 1,500*l.* being one third portion of the sum of 4,500*l.* so raisable as aforesaid . . . shall accordingly be raised, and also interest therefor at the rate of 5 per cent. per annum; and doth hereby appoint that the said sum of 1,500*l.* and the interest thereon as aforesaid shall, immediately upon the execution of these presents . . . belong to and be vested in the said J. E. B."; and also appointed to J. E. B. one moiety of the lands, but did not at any time make any appointment of the residue. The lands proving insufficient to realise 4,500*l.*,—*Held*, that the specific sum of 1,500*l.* and interest was appointed and payable in full out of the deficient gross sum. *Butler v. Blackall*, [1907] 1 Ir. R. 405—Ross, J.

Grandchildren of Donor Objects of Power—Appointment by Mother by Will to Children in Equal Shares—Subsequent Appointment by Deed of Part of Fund to One Child—Person "in loco parentis"—Rule against Double Portions—Satisfaction—Evidence Admissible.—Appeal from a decision of STIRLING, J. (66 L. J. Ch. 731; [1897] 2 Ch. 574), allowed upon the facts, evidence being admitted to shew that a part of a fund irrevocably appointed by deed was accepted by the appointee on account and in part payment *pro tanto* of her share under a previous appointment by will of the same fund by the same appointor. *Ashton, In re; Ingram v. Papillon*, 67 L. J. Ch. 84; [1898] 1 Ch. 142; 77 L. T. 582; 46 W. R. 231—C.A.

Absence of Hotchpot Clause—Implied Appointment—Conditional Appointment.—A donee of a power of appointing a trust fund amongst her son and two daughters and their issue, by her will, after appointing two sixths to her son for life or until alienation, and then to his children, and one sixth to each of her two daughters, declared as follows: "I make no appointment of the other two sixth parts as I wish them to pass directly to my said two daughters, and I also declare that neither my son nor his children shall take any share or interest in the said unappointed parts of the said trust fund":—*Held*, that the other two sixths were not appointed by implication, and that the appointment to the son was not conditional on his claiming no part of them, but that they were distributable as in default of appointment amongst the son and two daughters in equal shares. *Jack, In re; Jack v. Jack*, 68 L. J. Ch. 188; [1899] 1 Ch. 374; 80 L. T. 321—Romer, J.

Real Estate—Power of Sale—Appointment to Trustees upon Trust for Sale.—A power of appointment over real estate in favour of children is well exercised by an appointment to trustees upon trust for sale and to hold the proceeds upon trust for the objects of the power; and the trustees so appointed by the donee of the power will have the legal estate vested in them, and will be the proper persons to sell. *Kenworthy v. Bate* (6 Ves. 792) and *Cowx v. Foster* (1 J. & H. 30) followed. *Paget, In re; Mellor, In re; Mellor v. Mellor*, 67

L. J. Ch. 151; [1898] 1 Ch. 290; 78 L. T. 72; 46 W. R. 328—Kekewich, J.

Excessive Exercise of Power—Invalidity.—A testator gave to his son a power to appoint certain real estate in certain events to his (the donee's) sons for life, with remainder to their issue in tail. By a testamentary instrument the donee, after referring to the power given to him by the testator, appointed one part of the estate "to my eldest son E. R. A. and his issue":—*Held*, that the Court was not at liberty to speculate as to the meaning of the terms of the appointment, but must interpret it according to the actual language used; and that there was nothing in that language to entitle the Court to put a different construction on the appointment than that the donee intended that E. R. A. should take an estate tail. *Adams, In re; Adams v. Adams*, 94 L. T. 720—C.A. Reversing, 54 W. R. 42—Buckley, J.

—Appointment to Object for Life, with Power to Appoint by Will—Perpetuity—Delegation—Appointment to Children of S. Born in Testator's Lifetime—Gift over if S. should Die without Leaving any Child—Hotchpot Clause—Two Funds.—By marriage settlement the husband's moneys were settled upon trust, after the death of the husband and wife, for the children, grandchildren, or other issue of the marriage, born in the lifetime of the husband and wife, or one of them, in such shares as they or the survivor should appoint, and in default of appointment, for the children being sons attaining twenty-one, or being daughters attaining twenty-one or marrying; and certain Government stock (the wife's fortune) was settled upon trust, after the death of the husband and wife, thereout to pay 1,000*l.* to each of the children at twenty-one if sons, or if daughters at that age or marriage, and as to the residue of the said stock for the children, grandchildren, or other issue of the marriage, on the same limitations as in the case of the husband's moneys. The settlement contained a proviso that in case any appointment should be made in pursuance of the powers therein contained, or either of them, which should only extend to a part or parts of the said moneys or stock, such appointment should be valid, notwithstanding the non-appointment of the remaining part or parts, but in that case any child entitled to a share under such appointment should be entitled to no further share of the unappointed part or parts of the said respective trust moneys, stocks, &c., unless and until he or she should have brought his or her appointed share into hotchpot. There were children of the marriage, two sons and a daughter. The husband died without having joined in any appointment, leaving his wife surviving. Two granddaughters were born in her lifetime. She by her will appointed the husband's moneys to one son, and after reciting the settlement of the stock, and that 1,000*l.* was to be paid thereout to each child, she appointed 10,000*l.* thereof to her daughter, and as to the residue of the said stock, she appointed it to trustees upon trust to pay the income to the other son for life, and after his decease upon trust for such one or more of his children born in her own lifetime and in such shares as he should by will appoint, and in default for such persons as he should by will appoint, with a gift over in case the son should die without leaving any children or remoter issue him surviving. Afterwards

she made a codicil revoking the appointment of the 10,000*l.* stock and appointing same to trustees upon trust for her daughter for life, and after her death for her child or children born in the testatrix's lifetime in such shares as the daughter should by deed or will appoint, and in default of such appointment for such children share and share alike: provided that if the daughter should die without leaving any child or children, the trustees should hold the said trust funds upon trust for the testatrix's said granddaughters:—*Held*, (1) that the limitations in the will of the residue of the stock subsequent to the appointment of the life interest to the son were void for remoteness, and that the power of appointment to the son was a delegation of the power given by the settlement, and void, and that, so far, those limitations were void on this ground also; (2) that the limitations in the codicil after the daughter's death constituted a direct valid appointment to the daughter's children born in the testatrix's lifetime, leaving it to the daughter only to appoint the shares in which they should take; that the latter power was separable from the appointment to the daughter's children, and void as a delegation, leaving the appointment to the children unaffected; and applying *Ellicombe v. Gompertz* (3 Myl. & Cr. 127) that the gift over was to be construed as applying only to the failure of children of the daughter, born in the testatrix's lifetime, and that the appointment to the granddaughters was valid; (3) that the single hotchpot clause applied to all the funds without distinction, and that the son to whom the husband's moneys in the settlement were appointed was bound to bring his interest into hotchpot. *Hutchinson v. Tottenham*, [1898] 1 Ir. R. 408—V.C.

Cy-près—General Intent—Particular Intent.]

—The donee of a power of appointment amongst the children or other issue of the donee born in his lifetime appointed the hereditaments subject to the power to his son for life, with remainder to his son's sons successively according to seniority, for life, with remainder to the sons of such son's sons successively according to seniority in tail, with remainders over. All the children of the donee of the power were born after the death of the original testator:—*Held*, that the appointment could not be construed *cy-près* so as to give an estate tail to the first appointee, as any such estate tail would sacrifice the particular intent and defeat the general intent of the testator. *Monypenny v. Dering* (22 L. J. Ch. 318; 2 De G. M. & G. 145) and *Hampton v. Holman* (46 L. J. Ch. 248; 5 Ch. D. 138) considered and applied. *Rising, In re*; *Rising v. Rising*, 73 L. J. Ch. 455; [1904] 1 Ch. 533; 90 L. T. 504—Swinfen Eady, J.

Irrevocable Appointment in Favour of First Wife and Children—Subsequent Appointment in Favour of Second Wife—Inconsistency.]—If an irrevocable appointment is made of a life interest in favour of a first wife, and subject thereto the fund is appointed absolutely to children, the appointor cannot after the death of his first wife make a valid appointment to a second wife to take effect in priority to the interests of the children. Such second appointment will be void as inconsistent with the previous exercise of the power. *In re Hancock*; *Malcolm v. Burford-Hancock*, 65 L. J. Ch. 690; [1896] 2 Ch. 173—C.A.

Donee of Power Appointing to Herself.]

Under the terms of a settlement, and in a particular event, a lady had a power to appoint the settled trust funds by deed or will in favour of a grandchild or grandchildren of her paternal grandfather, and in default of any such appointment the trust funds were to be held in trust for all such grandchildren equally. The lady was thus an object of the power and also entitled to a share in default of appointment:—*Held*, that, upon the true construction of the power, the lady might appoint to herself as one of the grandchildren. *Taylor v. Allhusen*, 74 L. J. Ch. 350; [1905] 1 Ch. 529; 92 L. T. 382; 53 W. R. 523—Kekewich, J.

Ademption—Settled Estate—Premiums on Leases by Tenant for Life—"Capital money."]

Where the tenant for life of land under a settlement grants leases on which premiums are paid by the lessees, and subsequently exercises a power of appointment by will conferred upon him by the settlement, the premiums so paid do not pass under the appointment of the property in respect of which they were paid, but go as in default of appointment; and there is no distinction whether the power exercised is a general or a special power. *Dowsett, In re*; *Dowsett v. Meakin* (70 L. J. Ch. 149; [1901] 1 Ch. 398), approved. *Beddington v. Baumann*, 72 L. J. Ch. 155; [1903] A.C. 13; 87 L. T. 658; 51 W. R. 383—H.L. (E.)

Revocation.]—A testatrix who, besides other property, was entitled to a sum of 4,000*l.* under the will of her father for life, with power of appointment by will among her children, left three testamentary documents, dated respectively 1890, 1894, and 1895. By the will of 1890 she bequeathed to her daughter G. the sum of 4,000*l.* absolutely, for her use and benefit, "being the sum left me by my late father, &c." By the will of 1894 she left 4,000*l.* to her daughter G. without specifying any fund. By the will of 1895 she left all her property to her daughter G., with remainder over in case she should predecease her. Neither the will of 1894 nor the will of 1895 contained any words of revocation:—*Held*, first, that the will of 1890 was a sufficient execution of the power; and secondly, that in the absence at least of a general revocatory clause, the fact that the will of 1895 disposed of the whole property was not by itself sufficient to revoke the execution of the power effected by the will of 1890. *Cadell v. Wilcocks*, 67 L. J. P. 8; [1898] P. 21; 78 L. T. 83; 46 W. R. 394—Jeune, P.

Bequests to Persons not Objects of Power—"Give bequeath and appoint" Residue of Estate and Effects.]

Where a lady who had a testamentary power of appointment over certain funds in favour of her husband by her will bequeathed certain legacies "out of my separate estate or out of the estate and effects over which I have any disposing power" to persons not objects of the power, and proceeded, "I give bequeath and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband . . . absolutely," it was held that the power had been exercised. Evidence was admitted to prove that the lady had no other testamentary power of appointment. *Milner, In re*; *Milner v. Bray*, 68 L. J. Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47 W. R. 369—Stirling, J.

Will Invalid by Law of Domicil—Probate in England—Valid Exercise of Power.]—A special power of appointment by deed or will conferred by an English settlement over the trust funds therein comprised is well exercised by the will of the donee made in English form and subsequently proved in this country, although an invalid will by the law of the donee's foreign domicil. *Pouey v. Hordern*, 69 L. J. Ch. 281; [1900] 1 Ch. 492; 82 L. T. 51—Farwell, J.

The exercise of such a power operates not as a disposition of property belonging to the donee, but as a nomination of beneficiaries under the settlement, and consequently the property appointed is not affected by the law of the donee's domicil restricting testamentary disposition. *Ib.*

After-acquired Property.]—By a marriage settlement in 1859 real estate was settled for the benefit of S. R. and her husband W. R. for their lives and then for the children of S. as she should by deed or will appoint, and, in default, to them in equal shares, and if no such child, then for such persons as S. should by deed or will appoint, and in default for S., her heirs and assigns. And in the settlement was a covenant by W. that after-acquired property of S. should be conveyed to the trustees to be held by them upon the trusts of the settlement. W. and S. R. married and had four children, one only of whom was now living. W. R. died in 1891. By her will made in that year S. "in pursuance of all powers and authorities in anywise enabling me thereto" directed, limited, and appointed her residuary estate as to a moiety for her son M. and his wife and children, and as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real and personal estate which was never conveyed to the trustees of the settlement:—*Held*, first, that the after-acquired property was not bound by the covenant in the settlement; secondly, that there was not sufficient evidence to shew an intention on the part of the testatrix to exercise her special power of appointment in favour of her son M. *Rickman, In re; Stokes v. Rickman*, 80 L. T. 518—Stirling, J.

Whether Coupled with a Trust—Fund Bequeathed to Trustees upon Trust to Pay Income to A. for Life—Power to "Demise" Fund to such of her Brothers or Sisters or their Children as she should think proper—Power Executed in Favour of Niece who Predeceased Donee—Residuary Gift.]—A testatrix bequeathed the sum of 3,000l. upon certain trusts, and, amongst others, upon trust to pay the interest on a sum of 500l., part thereof, to her niece Rebecca for life or until she should be married, in which event she directed the said sum of 500l. should be settled. The testatrix then declared the trusts of other portions of the 3,000l. in favour of her nieces Anne and Frances, and declared that it was her will and desire that her said nieces or such of them as died unmarried should have power to "demise" the above-mentioned legacies to such of their brothers and sisters or their children as she or they should think proper. The will contained a residuary gift to a sister of the testatrix. Rebecca died without having married. By her will she left the 500l.

so bequeathed to a sister who predeceased her:—*Held*, that there was no trust for the objects of the power, and that the sum of 500l. fell into the residue. *Hall, In re; Sheil v. Clark*, [1899] 1 Ir. R. 308—M.R.

Gift of Residue after Payment of Debts, &c.—"Appoint, devise, and bequeath"—Execution of Special Power—Evidence.]—A testatrix, who possessed a special power of appointment in favour of nephews and nieces over a fund of personalty, after giving a number of pecuniary legacies, proceeded to "appoint, devise, and bequeath" all the residue of her real and personal estate to trustees, upon trust to covert the same and out of the proceeds thereof to pay her debts and funeral and testamentary expenses, and to pay and divide the residue of the proceeds equally between certain nephews and nieces:—*Held*, that evidence was admissible to prove that the testatrix possessed at the time of her death no other power of appointment, having reference to the fact that the word "appoint" was found in her will, and that the above disposition was under the circumstances an exercise of the special power of appointment. *Dictum in Richardson's Trusts, In re* (17 L. R. Ir. 436), questioned. *Mayhew, In re; Spencer v. Cutbush*, 70 L. J. Ch. 428; [1901] 1 Ch. 677; 84 L. T. 761; 49 W. R. 330—Farwell, J.

Conditions Attached to Appointment—Validity—Election.]—By an ante-nuptial marriage contract a fund was provided to the children of the marriage "in such proportions" as the spouses might "direct and appoint." The husband's will, which was also signed by the wife, contained this joint appointment: "We hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed and dealt with as hereafter provided for my children's shares of my estate." The will contained directions to the trustees in regard to the children's shares (including their shares of the marriage-contract fund as well as their shares of his own estate) which in the case of sons might, and in the case of daughters would, have the effect of reducing their right in a share to a life interest, and in both cases without the right to dispose of it by will or otherwise. This appointment was challenged, on the grounds—first, that issue of predeceasing children who were included in the appointment were not objects of the power; and secondly, that the restrictions created by the will, so far as attaching to the children's shares of the marriage-contract fund, were invalid and invalidated the whole appointment. When the appointment took effect there were no issue of predeceasing children in existence:—*Held*, first, that the appointment was not invalid on the first of these grounds, as issue were not included in the appointment in the event which happened; secondly, that the appointment was valid as a division of the fund among the children, but that the restrictions imposed were invalid; and, thirdly, that the children were entitled (without being put to an election) to their share of the marriage-contract fund, free of the restrictions imposed, as well as to their share of their father's own estate bequeathed

by his will. *Matthews Duncan's Trustee v. Matthews Duncan*, 3 F. 533—Ct. of Sess.

"Give, devise, bequeath and appoint" the Residue—Exercise of Power—Indications of Intention of Testator.—A testator, who under his marriage settlement possessed a special power of appointment over certain leasehold hereditaments in favour of all and every the children of such marriage, after giving certain specific legacies, proceeded to "give devise bequeath and appoint" all the rest, residue, and remainder of his estate whether real or personal to trustees upon trust to convert the same and out of the proceeds thereof to pay his debts and funeral expenses and to hold the residue of such trust moneys upon trust to pay and divide the same unto and equally between three of his eight sons. He proceeded: "and I make no provision under this my will for my other children, they being sufficiently provided for." He further gave his trustees power to postpone conversion of his estate and to invest the trust moneys representing the shares of two of the three sons during their respective minorities in certain securities, and to pay the whole of the income thereof to the other son as their guardian for and on account of their support and maintenance:—*Held*, there being several indications that the testator was not dealing with the property the subject of the power, that, notwithstanding the use of the word "appoint," the will did not operate as an exercise of the special power of appointment. *Mayhew, In re; Spencer v. Cutbush* (70 L. J. Ch. 428; [1901] 1 Ch. 677), distinguished. *Weston's Settlement, In re; Neeves v. Weston*, 76 L. J. Ch. 54; [1906] 2 Ch. 620; 95 L. T. 581—Buckley, J.

Equitable Limitations—Appointment to Trustees to Convert—Conversion—Legal Estate Outstanding in Trustees of Instrument Creating Power.—A power to appoint real estate to such child or children and "for such estate or estates manner and form" as the donee should appoint is well exercised by an appointment by the donee by will to trustees upon trust to convert and divide the proceeds amongst the appointees, and such appointment operates as a conversion of the real estate into personal estate, notwithstanding that the legal estate in the property appointed is outstanding in the trustees of the instrument creating the power. Principle of *Kenworthy v. Bate* (6 Ves. 792) applied. *Redgate, In re; Marsh v. Redgate*, 72 L. J. Ch. 204; [1903] 1 Ch. 356; 51 W. R. 216—Buckley, J.

Shares to be Vested in and Paid to Children on Attaining Majority, or, in the Case of Daughters, on Marriage—Payment Deferred till Death of Parents—Unappointed Residue—Death of Son in Parents' Lifetime, of Age and Intestate—Period of Vesting—Absolute Interest.—Certain trust funds were settled on the husband and wife for life, with power of appointment, and in default of appointment in trust for the children equally who being a son should attain twenty-one or die under that age leaving issue, or being a daughter should attain that age or marry; such shares to be vested in and paid to them, respectively, at the same age, day, or time, if the same should happen after the decease of their parents; but if the same

should happen in their lifetime, then immediately after the decease of the survivor. The settlement contained the usual hotchpot clause. There were two children of the marriage, a son and a daughter. On the occasion of the daughter's marriage one moiety of the trust funds was appointed to her by her parents, and was settled on certain trusts by her marriage settlement. The parents likewise appointed a further portion of the trust funds in favour of the son, which, however, did not exhaust the whole. The son died in the lifetime of his parents, having attained age, unmarried and intestate:—*Held*, that the postponement of enjoyment was solely for the convenience of the estate, there being nothing to shew that the postponement was intended to depend on any event personal to the children themselves; that consequently the son, having attained age, had acquired an absolute interest in the unappointed residue, and that his personal representative was entitled to receive it. *Darley v. Percival*, [1900] 1 Ir. R. 129—V.C.

Successive Appointments—Cumulative or Substitutionary—Election.—A marriage settlement contained a power of appointment over a fund in favour of children (other than an eldest son) exercisable by the husband and wife jointly and by the survivor of them. In 1872 the husband and wife appointed one-seventh of the fund to a daughter, and in 1878 another one-seventh to another daughter. At the date of each of these appointments there were seven children of the marriage living, besides an eldest son. In 1891, after the death of the husband and one of the children, the wife purported to appoint the fund in sixths to her six surviving children, other than the eldest son, for life, with remainders to their children respectively. The appointment to grandchildren being discovered to be in excess of the power given by the settlement, the wife in 1893 executed a deed-poll supplemental to the appointment of 1891, whereby she appointed that after the deaths of her six children their one-sixth shares should be held in trust for them absolutely, and stated that her intention was that, under the appointment of 1891 and present appointment, each of her children should take a vested interest in one-sixth of the capital and income of the fund:—*Held*, that the intention of the wife, as appearing from the subsequent appointments, was that the fund should be divisible in sixths; that the daughters to whom the one-sevenths were appointed could not take the one-sixth in addition to the one-seventh appointed to them respectively, and that no question of election arose. *England v. Lavers* (L. R. 3 Eq. 63) followed and explained. *Ashton, In re; Ingram v. Papillon* (66 L. J. Ch. 731; [1897] 2 Ch. 574), distinguished. *Tancred's Settlement, In re; Somerville v. Tancred. Selby, In re; Church v. Tancred*, 72 L. J. Ch. 324; [1903] 1 Ch. 715; 88 L. T. 164; 51 W. R. 510—Buckley, J.

Remoteness.—A testator being entitled, under settlement executed on his marriage in 1877, to a life interest in lands, with power of appointment to child or children after his death, by his will dated May 20, 1896, appointed all the lands comprised in the settlement to one daughter on her attaining twenty-five. The testator died in 1901, when the appointee was

fifteen years old:—*Held*, that the appointment was not void for remoteness. *Hallinan's Trusts*, *In re*, [1904] 1 Ir. R. 452—C.A.

— **Appointment to Class Ascertainable on Daughter's Marriage—Appointment to Daughter who shall Marry—Appointment of Income to Daughters Living and Unmarried.**—By a marriage settlement made in 1793 personal estate was settled in trust for the husband and wife successively for life with remainder in trust for the children of the marriage as the husband and wife should jointly appoint. There were seven children. In 1835 the husband and wife appointed 1,500*l.* to be paid to each of the three unmarried daughters who should afterwards marry, and so long as the three daughters or any of them should remain unmarried directed the income of the residue to be paid to them or such of them as should be living and unmarried in equal shares, with a gift over, if all of them should marry, to such three daughters equally, but if one or two only should marry, then after the death or marriage of such one as should be last living and unmarried to the four other children and such of the three unmarried daughters as should marry in equal shares. One only of the three married. The survivor of them died unmarried in 1897:—*Held*, that the ultimate gift over was void for remoteness, as the class was not necessarily ascertainable within twenty-one years from the death of the survivor of the appointors. *Held also*, that the appointments of 1,500*l.* to each of the daughters who should marry were void on the same principle. *Held further*, that there was a good gift of an equal undivided one-third of the income to each of the three unmarried daughters, but that the implied gift over of the share of a daughter, upon her marriage, to the remaining daughters, was bad. *Wainwright v. Miller* (66 L. J. Ch. 616; [1897] 2 Ch. 255) considered and followed. *Gage, In re*; *Hill v. Gage*, 67 L. J. Ch. 200; [1898] 1 Ch. 493; 73 L. T. 347; 46 W. R. 569—Kekewich, J.

— **Election.**—A case of election can be raised, if the facts admit of it being raised, as much in the case of an appointment void for remoteness by reason of the rule against perpetuities as in the case of an appointment void for being to a person not an object of the power. *Hancock's Trusts, In re* (23 L. R. Ir. 34), and *dicta* of JAMES, V.C., in *Wollaston v. King* (38 L. J. Ch. 392, 395; L. R. 8 Eq. 165, 175), and PEARSON, J., in *Warren's Trusts, In re* (53 L. J. Ch. 787; 26 Ch. D. 208, 219), disapproved. *Bradshaw, In re*; *Bradshaw v. Bradshaw*, 71 L. J. Ch. 230; [1902] 1 Ch. 436; 86 L. T. 253—Kekewich, J.

Stock Sufficient to Raise "net sum of 2,000*l.*"—Incidence of Succession Duty.—The donee of a power of appointment under a settlement appointed that "so much of the stocks, funds, shares, and securities" subject to the settlement "as shall be sufficient to raise the net sum of 2,000*l.*" should thenceforth belong to and be vested in E., an object of the power:—*Held*, that E. was entitled to have the succession duty on the sum appointed paid out of the funds remaining unappointed. *Banks v. Braithwaite* (32 L. J. Ch. 35) questioned. *Saunders, In re*; *Saunders v. Gore*, 67 L. J.

Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450; 46 W. R. 180—C.A.

Partial Appointment—Range of Investments.—See *Falconer's Trusts, In re*; *Property and Estates Co. v. Frost*, 77 L. J. Ch. 303; [1908] 1 Ch. 410—Warrington, J.

2. POWER OF CHARGING.

Power to Charge Portions—Provision Limiting Amount to be Charged—Form of Provision—Common Form at Date of Will.—By his will, made in 1860, a testator who died in 1863 devised his real estate in strict settlement, and empowered each person thereby made tenant for life, whether in possession or not, to charge the property with the payment of any annual sum not exceeding 1,000*l.* by way of jointure, and with any sum not exceeding 20,000*l.* for portions of younger children. The will then provided that the devised property should not by virtue of these powers at any one time be liable to the payment of more than the annual sum of 1,500*l.* for jointures, and more than the principal sum of 30,000*l.* for portions of younger children. Provisions similar to this were to be found in books of precedents published before the date of the will. One tenant for life died in 1872, having charged the property with 20,000*l.* for portions; and another tenant for life died in 1874, having made the same charge. Both these sums of 20,000*l.* were raised and paid. In 1890 a third tenant for life, who never came into possession, died, having also charged the property with 20,000*l.* for portions. On a summons taken out to determine whether this third charge was a good exercise of the power and valid and effectual for the whole amount,—*Held*, that, the form of the provision having been the common form at the date of the will, the words "at any one time" must be construed as applying to the sum chargeable for portions as well as to the sum chargeable for jointures; and that the third charge of 20,000*l.* therefore did not transfer the limitations imposed by the will in respect of portions, but was valid and effectual for the whole amount. *Beckett, In re*; *Bethell v. Grimthorpe*, 93 L. T. 746; 22 T. L. R. 84—Joyce, J.

Power to Tenant for Life to Charge Settled Property—Gift of Remainder of Personality—Charge on Realty.—Where by a settlement power is given to the tenant for life, by deed or by will, to charge all or part of the settled property with payment to himself or any other person of a sum not exceeding a certain amount, with interest, and to appoint the premises so charged to any person for any term of years without impeachment of waste, upon trusts for raising the sums charged, with interest, and by his will, after giving certain legacies, the tenant for life gives all his real property to one person and all the rest of his personal property to others, the general gift of the personality does not operate as a charge, in favour of the donees, on the real estate which he had power to charge. *Wallinger's Estate, In re* ([1898] 1 Ir. R. 139), followed. *Jones, In re*; *Greene v. Gordon* (56 L. J. Ch. 53; 34 Ch. D. 65), distinguished. *Salvin, In re*; *Marshall v. Wolseley*, 75 L. J. Ch. 825; [1906] 2 Ch. 459; 95 L. T. 289—Buckley, J.

3. POWER OF JOINTURE.

Power to Jointure—Defective Execution—Covenant to Exercise before Power in Existence—Approval of Draft Deed—Effect.—A settlement on marriage contained a covenant by the husband that he would charge the real and personal estate which might come to him on the death of his father, whether under settlement, will, intestacy, or otherwise, with a jointure of 400*l.* to his wife for life. At the date of the covenant his father was living, but had made a will giving his son power to appoint a jointure of 400*l.* to any wife for life, to be charged upon certain freehold hereditaments settled thereby. After his father's death the covenantor approved a draft deed to carry out the covenant, and appointing, in exercise of the power, a jointure of 400*l.* to his wife for life, to be charged upon the settled hereditaments; but he died a few days afterwards, before the deed had been executed. He had made a will appointing, in alleged exercise of the power, a jointure of 400*l.* out of the settled estate to his wife during widowhood only:—*Held* (applying *Affleck v. Affleck*, 26 L. J. Ch. 353; 3 Sm. & G. 394), that the covenant, coupled with the approval of the draft deed, constituted a due exercise of the power of appointment; and, following *Coventry v. Coventry* (2 P. Wms. 222), that the approval of the draft deed constituted a selection of the property upon which the jointure was to be charged. The wife was therefore entitled to a jointure of 400*l.* for life charged upon the settled hereditaments. *Charlton v. Charlton*, 75 L. J. Ch. 715; [1906] 2 Ch. 523; 95 L. T. 714—Warrington, J.

And see *Bolton Estates Acts, In re, post*, SETTLED LAND; also *infra*, FRAUD ON POWER and SETTLEMENT, col. 1889.

4. POWER OF LEASING.

Lease by Donee to Himself and Others.—The donee of an ordinary power of leasing cannot validly exercise the power by leasing to himself either alone or jointly with others. *Quare*, whether, independently of express statutory authority or some long-established special custom, the donee can validly exercise such a power by leasing to a trustee for himself, as such an execution would seem to transgress the doctrine of equity forbidding a man to put himself in such a position that his interest conflicts with his duty. *Boyce v. Edbrooke*, 72 L. J. Ch. 547; [1903] 1 Ch. 836; 88 L. T. 344; 51 W. R. 424—Farwell, J. And see MORTGAGE and SETTLEMENT.

5. POWER OF SALE.

"Trustees for the time being" of Will—Executors of Surviving Trustee.—A testator devised his real estate to certain trustees, their heirs and assigns, upon certain trusts, and the will contained a power of sale of real estate exercisable by "the trustees for the time being" under the will:—*Held*, that the power of sale was exercisable by the executors of the last surviving trustee. *Pixton and Tong's Contract, In re*, 46 W. R. 187—Byrne, J.

To Trustees—Execution by Survivor.—A power of sale given to trustees, not being a bare power, but one coupled with an interest, can be executed by the survivors or survivor. *Bacon, In re*; *Turner, In re*; *Toovey v. Turner*, 76 L. J. Ch. 213; [1907] 1 Ch. 475; 96 L. T. 630—Swinfen Eady, J.

Devise to Trustees.—See TRUST.

6. RELEASE OF POWER.

Validity—Conveyancing Act, 1881, s. 52.—A release of a limited power of appointment is not void although made by the donee for his own benefit. *In re Radcliffe*; *Radcliffe v. Bewes* (61 L. J. Ch. 136; [1892] 1 Ch. 227), followed. *In re Somes*; *Somes v. Somes*, 65 L. J. Ch. 262; [1896] 1 Ch. 250—Chitty, J.

The Conveyancing Act, 1881, s. 52, does not apply to cases of powers coupled with a duty where the release would be a breach of trust. *Id.*

Joint Power—Husband and Wife—Assignment by Wife and Persons Entitled in Default of Appointment—Concurrence of Husband—Husband's Power as Surviving Donee.—Where property is settled on trust as a husband and wife shall jointly appoint, and in default of such joint appointment as the survivor shall appoint, and the wife, with the husband's concurrence, joins with the persons entitled in default of appointment in assigning the property for value, such assignment will constitute a dealing inconsistent with any exercise of the power by the husband after his wife's death, and will in effect amount to a release of such power. *Foakes v. Jackson*, 69 L. J. Ch. 352; [1900] 1 Ch. 807—Farwell, J.

Married Woman Married before 1881—Restraint on Anticipation of Life Interest.—A married woman married before the Conveyancing and Law of Property Act, 1881, may under section 52 of that Act by deed unacknowledged release a power of appointment over personal property in which she has a life interest subject to a restraint on anticipation. *In re Chisholm's Settlement*; *In re Hemphill's Settlement*; *Hemphill v. Hemphill*, 70 L. J. Ch. 533; [1901] 2 Ch. 82—Stirling, J.

Bankruptcy—Right of Trustee in to Release Power of Appointment.—See BANKRUPTCY, col. 105.

7. FRAUD ON POWER.

Covenant to Exercise Testamentary Power in Particular Way—Family Arrangement.—The donee of a special power to appoint by will among children (which is a fiduciary power) is intended to and should keep the ordinary exercise of it under his control until the moment of his death; and he cannot, in anticipation of his last will, validly covenant that it shall be exercised in a particular way. Such a covenant is bad, as calculated to defeat the object of the creation of the power. *Dicta* of JAMES, L.J., in *Thacker v. Key* (L. R. 8 Eq. 403, 414) and BRETT, L.J., in *Palmer v. Locke* (50 L. J. Ch. 113, 115; 15 Ch. D. 294, 301), approved. *In re Bradshaw*; *Bradshaw v. Bradshaw*, 71 L. J. Ch. 230; [1902] 1 Ch. 436—Kekewich, J.

Such a covenant being bad cannot be sued

upon even if made in a deed or deeds of family arrangement. It is not analogous to the release of a power of this kind, which depends upon a foundation of its own. *Ib.*

Jointuring—Bargain between Husband and Wife—Appointment in Consideration of Payment by Wife to Husband—Validity of Appointment.] The exercise of a power of jointuring can be the subject of a bargain between a husband and wife; and so long as no part of the jointure itself is under the appointment to be received by any person other than the wife, the husband can exercise the power in favour of the wife in consideration of receiving some benefit out of her property, and the fact that the consideration given by her is the full actuarial value of the jointure annuity is immaterial. *Saunders v. Shafto*, 74 L. J. Ch. 110; [1905] 1 Ch. 126; 91 L. T. 789; 53 W. R. 424—C.A.

A tenant for life of real estate had a power to charge the estate with a jointure to his wife of 300*l.* a year. He married in 1868, and in 1882 he exercised the power to the full extent in favour of his wife in consideration of a sum of 50*l.* then paid to him by his wife out of her own money. He died in 1902. There was evidence of an actuary that 50*l.* was at the time the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and wife:—*Held*, that the execution of the power was not a fraud upon the power, and was valid. *Baldwin v. Roche* (5 Ir. Eq. R. 110) followed. *Whelan v. Palmer* (57 L. J. Ch. 784; 39 Ch. D. 648) overruled. *Ib.*

8. OTHER MATTERS.

Ademption, of.]—See WILL.

Advancement, of.]—See post, WILL.

Attorney, of.]—See PRINCIPAL AND AGENT.

Bankrupt—Appointment by—Creditors Subsequent to Receiving Order.]—See BANKRUPTCY, col. 105.

—Trustee of—Right to Release Power of Appointment.]—See BANKRUPTCY, col. 105.

Election—Void Limitations.]—See ELECTION.

Estate Duty—Incidence of.]—See REVENUE.

Foreign Domicil—Will.]—See INTERNATIONAL LAW.

Lunatic—Exercise by Committee on behalf of.]—See LUNATIC, cols. 1433-4.

Remoteness—Validity.]—See PERPETUITIES.

Tenant for Life, of.]—See SETTLED LAND.

Trustee—Exercise by.]—See TRUST.

Trustees, of.]—See TRUST.

PRACTICE AND PLEADING.

1. Parties, 1890.

(a) *Plaintiffs*, 1890.

(b) *Defendants*, 1892.

(c) *Representative*, 1894.

(d) *Absent*, 1895.

(e) *Change of*, 1895.

(f) *Intervention by Persons not Parties*, 1897.

(g) *Interested Person*, 1898.

(h) *Third-Party Procedure*, 1898.

(i) *Suing in Forma Pauperis*, 1902.

(j) *Particular Parties*.

(i.) *Companies*. See COMPANY.

(ii.) *Executors and Administrators*.
See EXECUTOR AND ADMINISTRATOR.

(iii.) *Infants*. See INFANTS.

(iv.) *Lunatics*. See LUNATIC.

(v.) *Married Women*. See HUSBAND AND WIFE.

(vi.) *Partners*. See PARTNERSHIP.

2. *Writ of Summons*, 1902.

3. *Originating Summons*, 1910.

4. *Joinder of Causes of Action*, 1911.

5. *Pleadings and Particulars*, 1913.

6. *Interlocutory Proceedings*, 1916.

(a) *Summons for Directions*, 1916.

(b) *Ordinary Summons*, 1917.

(c) *Summary Judgment*, 1918.

(d) *Motion*, 1920.

(e) *Short Cause*, 1921.

(f) *Payment into and out of Court*, 1921.

(i.) *Payment into Court*, 1921.

(ii.) *Payment out*, 1926.

(g) *Discovery*. See DISCOVERY.

(h) *Inspection of Property*, 1926.

(i) *Staying Proceedings*, 1927.

(j) *Injunction*, 1931.

(k) *Receiver*, 1931.

(l) *Transfer of Action*, 1933.

(m) *Discontinuance of Action*, 1934.

(n) *Dismissal of Action*, 1934.

(o) *Undertaking*, 1935.

(p) *Security for Costs*, 1935.

7. *Trial*, 1936.

8. *New Trial*, 1938.

9. *Judgments and Orders*, 1940.

10. *District Registry, Judgment in*, 1945.

11. *Other Matters*, 1946

1. PARTIES.

(a) *Plaintiffs*.

Action Commenced in Name of Wrong Person as Plaintiff—Bona fide Mistake—Substitution of Other Person as Plaintiff after Decision that Original Plaintiff has no Cause of Action.]—Where a bona fide mistake of law or of fact has been made in commencing an action in the name of the wrong person as plaintiff, the Court has jurisdiction under Order XVI.

rule 2 to order another person to be substituted as plaintiff even after it has been decided that the original plaintiff has no right of action. *Hughes v. Pump-House Hotel Co.* (No. 2), 71 L. J. K.B. 803; [1902] 2 K.B. 485; 87 L. T. 359; 50 W. R. 677—C.A.

Separate Transactions—Joint and Separate Causes of Action.—In an action by the Universities of Oxford and Cambridge for an injunction to restrain the defendants from selling or advertising books bearing the title "The Oxford and Cambridge Publications," or "The Oxford and Cambridge Edition," the statement of claim alleged that the plaintiffs carried on an extensive business in printing and publishing at their respective presses known as the Oxford University Press and the Cambridge University Press; that certain works were the joint publications of the two presses; that the defendants had commenced to publish and advertise text-books under the titles in question; and that the use by the defendants of such titles was calculated to deceive, and induce the belief that the books emanated from the presses of the plaintiffs, or were authorised by them:—*Held*, that the case came within Order XVI. rule 1, as interpreted by CHITTY, L.J., in *Stroud v. Lawson* (67 L. J. Q.B. 718; [1898] 2 Q.B. 44), for, first, the right of relief alleged to exist in each plaintiff arose out of one transaction, or series of transactions, if each publication by the defendants was to be treated as a separate transaction; and secondly, the question of publication, and the belief that would be induced by the publications of the defendants, were common questions of fact that would arise in the action, and consequently that the two Universities could be joined as plaintiffs. *Oxford and Cambridge Universities v. Gill*, 68 L. J. Ch. 34; [1899] 1 Ch. 55; 79 L. T. 338; 47 W. R. 248—Stirling, J.

"Same transaction."—Where several persons, separately, apply for debentures in a company, relying on a prospectus and covering letter which contain misrepresentations, they may jointly sue the directors, as they have, within Order XVI. rule 1, a claim for relief arising out of the "same transaction." *Drincobier v. Wood*, 68 L. J. Ch. 181; [1899] 1 Ch. 393; 79 L. T. 543; 47 W. R. 252; 6 Manson, 76—Byrne, J.

Conspiracy—Compulsion by Illegal Means.—Persons whom it is sought to compel by illegal means to act not in accordance with the views they would themselves adopt, but in accordance with the views of others, may join as co-plaintiffs in an action against those seeking to coerce them. *Walters v. Green*, 68 L. J. Ch. 730; [1899] 2 Ch. 696; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742—Stirling, J.

Co-plaintiffs—Compromise of Action by One of Co-plaintiffs—Application by Defendants to Strike Out His Name as Co-plaintiff—Discretion of Court.—A co-plaintiff who has compromised an action is not entitled as a matter of course to have his name struck out as a co-plaintiff. *Matheus, In re; Oates v. Mooney*, 71 L. J. Ch. 656; [1905] 2 Ch. 460; 93 L. T. 158; 54 W. R. 75—Swinfen Eady, J.

Where two of three defendants in an action

applied to have the name of one of three co-plaintiffs struck out on the ground that they had entered into a binding agreement with such co-plaintiff for the compromise of the action so far as she was concerned, the Court refused to make the order. *Ib.*

Joinder of—Libel—Separate Causes of Action.—Where a libel is published in the same words and in the same document of different persons, they cannot be joined as plaintiffs in one action of libel. *Smurthwaite v. Hannay* (63 L. J. Q.B. 737; [1894] A.C. 494) followed, and *Booth v. Briscoe* (2 Q.B. D. 496) considered and explained. *Peddie v. Kyle*, [1900] 2 Ir. R. 265—Q.B. D.

Refusal of Joint-Promisee to Join in Action as Plaintiff—Joinder as Defendant.—A joint-promisee who, after tender of an indemnity against costs, has refused to be joined as plaintiff in an action brought by his co-promisee to enforce a right in which they are jointly interested, may be properly joined as a defendant to the action. *Cullen v. Knowles*, 67 L. J. Q.B. 821; [1898] 2 Q.B. 380—Bigham, J.

Action by Firm—Statement of Names and Addresses of Persons Constituting Firm—Affidavit Verifying Statement—Power to Order Cross-examination on Affidavit—Jurisdiction to Direct Trial of Issue as to Co-partners.—Where, in an action in which the writ is issued in the name of a firm, a statement of the names and addresses of the persons constituting such firm has been furnished under Order XLVIII.A, rules 1 and 2, there is no jurisdiction either to direct the person making such affidavit to attend for cross-examination on the affidavit, or to order an issue to be tried to determine the question as to the persons constituting such firm. *Abrahams v. Dunlop Pneumatic Tyre Co.*, 74 L. J. K.B. 14; [1905] 1 K.B. 46; 91 L. T. 11—C.A.

(b) Defendants.

Joinder of—Separate Causes of Action.—The plaintiff was engaged by H. to act at a theatre of which D. was lessee and manager. In an action brought by him against H. and D. in respect of an alleged slander spoken by one defendant on one occasion and by the other defendant on another occasion, and also in respect of an alleged conspiracy between them wrongfully to dismiss him from his employment,—*Held*, that these claims could not be joined in one action. *Pope v. Hawtrey*, 85 L. T. 263—C.A.

— Cause of Action—Separate Remedies—Action on Prospectus of Company—Company and Directors—Executors of Deceased Director.—A person who has taken shares in a company on the faith of a prospectus which contains, as he alleges, in material matters misrepresentations and suppression of facts, can join in one action claims against the company to have the allotment of shares made to him cancelled and his money repaid, and also claims against the directors who had issued the prospectus and the executors of a deceased director for damages, the cause of action being as regards all the defendants the same thing—namely, the issue of the prospectus. *Gower v. Couldridge* (67

L. J. Q.B. 251; [1898] 1 Q.B. 348) and *Thompson v. London County Council* (68 L. J. Q.B. 625; [1899] 1 Q.B. 840) distinguished. *Frankenburg v. Great Horseless Carriage Co.*, 69 L. J. Q.B. 147; [1900] 1 Q.B. 504; 81 L. T. 684; 7 Manson, 347—C.A.

Libels—Severing of Damages.—In an action for libel by the plaintiff against three defendants the jury found a verdict for the plaintiff with 110*l.* damages, and they apportioned the damages, by permission of the Judge, between the three defendants—100*l.* against C, and 5*l.* each against A and B:—*Held*, that the jury had no power to sever the damages, and that Order XVI. rule 4 had made no difference in that respect. *Dawson v. McClelland*, [1899] 2 Ir. R. 486—C.A.

Conspiracy.—Persons who conspire illegally to watch and beset a place with a view to persuade workmen not to work, or to cease working for a person, may be sued jointly in one and the same action. *Sadler v. Great Western Railway* (65 L. J. Q.B. 462; [1896] A.C. 450) distinguished. *Walters v. Green*, 68 L. J. Ch. 730; [1899] 2 Ch. 696; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742—Stirling, J.

Counterclaim—Cause of Action by Defendant Jointly with Another Person.—The defendant in an action is not entitled to set up a counterclaim in respect of a cause of action which he jointly with another person claims to have against the plaintiff, making the other person a defendant to the counterclaim. *Pender v. Taddei*, 67 L. J. Q.B. 703; [1898] 1 Q.B. 798; 78 L. T. 581; 46 W. R. 452—C.A.

One Injury or Damage Caused by Independent Torts.—In an action to recover damages for injury caused to the plaintiffs' house in consequence of an excavation made by the defendants in the course of constructing a sewer in the roadway fronting the house, the defendants in their defence set up that the injury to the house was not caused by the act of the defendants, but by the default of a waterworks company in leaving their main in the roadway insufficiently stopped. Thereupon the plaintiffs applied under Order XVI. rule 7 for an order allowing them to join the waterworks company as defendants in the action:—*Held*, that the causes of action against the defendants and the waterworks company were separate and distinct, and could not be joined in one action. *Bennetts v. McIlwraith* (65 L. J. Q.B. 632; [1896] 2 Q.B. 464) explained. *Thompson v. London County Council*, 68 L. J. Q.B. 625; [1899] 1 Q.B. 840; 80 L. T. 512; 47 W. R. 433—C.A.

"Actio personalis moritur cum persona."—In an action it was held that the plaintiff had been induced by the fraudulent misrepresentations of certain defendants to take shares in a company to his damage, and the defendants were ordered to pay to the plaintiff the amount paid by him in respect of the shares with interest less the value of the shares, and an enquiry was directed to ascertain such value. The defendants appealed, two of them joining in their appeal, and the others appealing separately. After the appeals were opened, and before the arguments were concluded, one of the two appellants who joined in their appeal died:—*Held*, that the rule

Actio personalis moritur cum persona applied, and that the proceedings could not be continued against the personal representatives of the deceased appellant. *Davoren v. Wootton*, [1900] 1 Ir. R. 273—C.A.

Partners Sued in Name of Firm—Separate Defences by Partners—Death of Partner—Form of Defence.—Where one of two partners sued in the name of their firm dies, the surviving partner is not entitled to deliver a defence as an individual, but must defend for the firm and in the firm's name. *Ellis v. Wadeson*, 68 L. J. Q.B. 604; [1899] 1 Q.B. 714; 80 L. T. 508; 47 W. R. 420—C.A.

Co-defendants—Judgment in Default of Appearance against One—Subsequent Proceedings against Other.—A plaintiff, by entering judgment in default of appearance against one of two joint defendants, does not abandon his right to proceed to judgment against the other defendant. *Pym v. Coyle*, [1903] 2 Ir. R. 457—K.B. D.

Indemnity—Costs.—In an action against an adjoining owner and his builder for an injunction restraining interference with light, the builder severed his defence, and appeared separately:—*Held*, that the builder, being justified in severing, was entitled to have solicitor-and-client costs paid by his co-defendant. *Born v. Turner*, 69 L. J. Ch. 593; [1900] 2 Ch. 211; 48 W. R. 697—Byrne, J.

(c) Representative.

Representative Action—Class—Public Right—Attorney-General.—Where there is a common interest and a common grievance a representative action is in order if the relief sought is in its nature beneficial to all whom the plaintiffs propose to represent; and the rule is not limited to persons having a beneficial proprietary interest. And if the alleged rights of the class represented are being denied or ignored, it is of no moment whether or not the nominal plaintiffs have been wronged in their individual capacity. The Attorney-General is not a necessary party to such an action. *Bedford (Duke) v. Ellis*, 70 L. J. Ch. 102; [1901] A.C. 1; 83 L. T. 686—H.L. (E.)

Growers of produce alleging statutory rights in a market, claiming a declaration on the construction of the statute, and an injunction and account, held entitled to be joined as co-plaintiffs. *Ib.*

Observations by LORD MACNAGHTEN on *Temperton v. Russell* (62 L. J. Q.B. 300; [1893] 1 Q.B. 435). *Ib.*

Unascertained Persons—Representation.—A. and R., having executed a disentailing deed and a deed of appointment of a fund in Court representing proceeds of sale of part of the settled property, petitioned for payment out:—*Held*, that, immediate relief being sought, it was not premature to determine the construction of the will, and that the trustees of the will represented unascertained persons. *Cardigan v. Curzon-Howe*, 70 L. J. Ch. 763; [1901] 2 Ch. 479; 49 W. R. 715—Byrne, J.

Representation Order—Articles of Association—Rights of Preference Shareholders.]—Upon an originating summons issued by a company against one of its preference shareholders on behalf of the class to determine questions affecting the rights of that class, the Court will not nominate such shareholder to represent the class unless he has been previously nominated and selected for that purpose by a meeting of the preference shareholders. *Morgan's Brewery Co. v. Crosskill*, 71 L. J. Ch. 585; [1902] 1 Ch. 898; 10 Manson, 235—Buckley, J.

Interests of Unborn Children—Representation by Trustees.]—A condition subsequent in a settlement caused the forfeiture of a previous gift in the event of a marriage at any time without consent, and defeated the interest of the children as well as that of the tenant for life. On a summons raising this question, the trustees of the settlement sufficiently represent the interests of children otherwise unrepresented, whether in existence or not, who may be entitled under the trusts of the settlement. *Whiting's Settlement, In re; Whiting v. De Rutzen*, 74 L. J. Ch. 207; [1905] 1 Ch. 96—Byrne, J.

(d) *Absent Parties.*

Power to Bind—Bondholders' Action—Compromise—Time-limit for Absent Parties to come in.]—In a bondholders' action to administer a trust fund the Court in 1894 sanctioned a scheme of compromise under which all the bondholders were to receive a certain sum in respect of each bond. The great majority of the holders had come in under the scheme, and after a lapse of six years the railway company applied for an order limiting the time within which the outstanding bondholders must accept the scheme or be held excluded from its benefits:—*Held*, that the Court had jurisdiction to make the order asked, and ordered that the outstanding bondholders must within six months express their acceptance of the scheme or be excluded therefrom. *Saragossa and Mediterranean Railway v. Collingham*, 73 L. J. Ch. 568; [1904] A.C. 159; 52 W. R. 609; 20 T. L. R. 354—H.L. (E.)

Compromise—Time Limit.]—See TRUST.

(e) *Change of Parties.*

Change of Character—Adding Parties.]—The Court being asked to convert an action against the Lords of the Admiralty for an injunction in respect of alleged trespass into a maintainable action, by giving the plaintiffs leave to amend the writ by suing the Lords individually and adding as parties the servants of the Admiralty who were the trespassers, refused such leave and dismissed the action, but without prejudice to any action maintainable by the plaintiffs. *Raleigh v. Goschen*, 67 L. J. Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90—Romer, J.

Adding Defendant—Objection by Plaintiff—Jurisdiction.]—In an action by a beneficiary against one of two trustees liable for breach of trust, the Court will not, against the wish of the plaintiff, add the other trustee as a defendant under Order XVI. rule 11; for, although

such other trustee may be liable to the defendant for contribution as equally liable in respect of the alleged breach of trust, he is not a person "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." *Montgomery v. Foy* (65 L. J. Q.B. 18; [1895] 2 Q.B. 321) distinguished. *McCleane v. Gyles* (No. 2), 71 L. J. Ch. 446; [1902] 1 Ch. 911; 86 L. T. 217; 50 W. R. 387—Buckley, J.

Concurrent Actions—Action in Rem—Foreign Ships—Action by Cargo-owner—Action by Shipowner Abroad—Writ—Power to Add Parties.]—A collision occurred between two Norwegian ships, the *Fernando* and the *Charlotte*, in the North Sea, and the cargo on board the *Fernando* was damaged. The *Charlotte* was arrested upon arrival in England by the plaintiffs alleging that they were the owners of the cargo on board the *Fernando*. A preliminary objection was taken that the plaintiffs were not the owners of the cargo, and this objection was held to be good, and the *Charlotte* was ordered to be released. An application was then made to add the real owners of the cargo as plaintiffs:—*Held*, that the Court had jurisdiction to do so. The *Charlotte* was then arrested in Norway at the instance of the owners of the *Fernando*, and by Norwegian law the master of a vessel was entitled to act in the interests of and to sue on behalf of the cargo-owners, and the liability of a wrongdoing vessel was limited to the value of the ship and freight. The owners of the *Charlotte* gave bail in that amount, and the vessel was released. Upon arrival in this country she was re-arrested in the action by the cargo-owners. The owners of the *Charlotte* moved to set aside the writ upon the ground that there was no jurisdiction to entertain the action, both vessels being foreign vessels, and there being proceedings in the Norwegian Courts, where the plaintiffs could be heard:—*Held*, that the cargo-owners had a right to bring their action in this country. *The Charlotte*, 23 T. L. R. 750—Bargrave Deane, J.

Bankruptcy of Plaintiff Suing for Himself and all other Creditors—Abatement—Application to Dismiss Action—Action in Representative Capacity.]—Where a receiving order followed by an adjudication in bankruptcy had been made against the plaintiff in an action in which the claim on behalf of himself and all other creditors was for an order setting aside an assignment of personal property by way of settlement made by the first defendant upon his wife, the second defendant, previously to his bankruptcy, and the defendants applied for a stay of proceedings in the action:—*Held*, that the action must be dismissed unless the official receiver intervened within a specified time, on the ground that, although the action was brought on behalf of all the creditors, the plaintiff could only sue as a creditor, and that, when he ceased to be such by the assignment by operation of law to his trustee in bankruptcy, he ceased to be a person capable of continuing the action; that he was not a trustee of the right of action, but suing as a creditor in his own right; and that a receiving order and injunction obtained in the action did not operate in the same manner as a judgment in a

creditor's administration action, where the Court undertakes to protect all the creditors. *Wolff v. Van Boelen*, 94 L. T. 502—Kekewich, J. *And see* BANKRUPTCY, col. 74.

Death—Action for Negligence against Solicitor—“*Actio personalis moritur cum persona.*”]—An action by a client for damages for the alleged negligence of a solicitor while acting upon the client's retainer does not die with the solicitor, but survives and may be maintained against the personal representative of the deceased solicitor. *Davies v. Hood*, 88 L. T. 19—Ridley, J.

— after Judgment declaring Defendants liable for Breach of Trust—Order to Continue Proceedings—Application of Co-defendant seeking Contribution.]—In an action against trustees for a breach of trust, one of the defendants paid into Court a sum for which the defendants were subsequently declared liable. Some years after the final judgment in the action a co-defendant, who at the time of the judgment had no means, died entitled, as alleged, to a policy of insurance which then became payable. On the application of the first-mentioned defendant, who desired to seek contribution from the estate of the deceased, the Court made an order for continuing the proceedings against the personal representative of the latter. *Collings v. Wade*, [1903] 1 Ir. R. 89—V.C.

— Sole Plaintiff, a Tenant for Life—Application by Remainderman to be Substituted as Plaintiff.]—The plaintiff as tenant for life under an indenture of marriage settlement executed in 1869, sued in an action of ejectment on the title to recover certain lands. He died in 1895 during the pendency of the action, and his eldest son, as tenant in tail in remainder under the settlement, applied to be substituted as plaintiff:—*Held*, that the applicant did not represent the interest of the plaintiff in the action, that there was no change or transmission of the interest of the plaintiff to the applicant, and that the application must be refused. *Ferrall v. Curran*, [1899] 2 Ir. R. 470—Q.B. D.

(f) *Intervention by Persons not Parties.*

Setting Aside Judgment—Application by Person not Party to Record.]—Where in an action against the administrator of a deceased intestate for money alleged to have been paid by the plaintiff for the use of the deceased, judgment was allowed to be signed by collusion between the plaintiff and the defendant,—*Held*, that a next-of-kin, not a party to the record, whose interest in the assets of the deceased was prejudicially affected by the judgment, had such a specific interest in the deceased's assets as to entitle him to an order in the action setting aside the judgment and giving him leave to intervene. *Mehaffey v. Mehaffey*, [1905] 2 Ir. R. 292—K.B. D.

Fidelity Bond—Right to Sue by Person not a Party to the Contract.]—A bank, who were mortgagees of A's estate, appointed B receiver under their statutory power conferred by the Conveyancing Act, 1881, and B and the defendant corporation entered into a bond with the

bank conditioned for B's due discharge of his duty as statutory receiver. A was not a party to this bond. B having made default, the bank were paid off the full amount of their demand out of the mortgaged estate:—*Held*, that A and the bank were entitled to sue on the bond for the amount of the default. *Kenney v. Employers' Liability Assurance Corporation*, [1901] 1 Ir. R. 301—C.A.

(g) *Interested Person.*

Contingent Liabilities—Distribution—Retention of Assets—Practice.]—On an application for an order directing the distribution of a testator's estate among the residuary legatees, notwithstanding the existence of a possible future claim against the estate for calls on shares of a company which are not fully paid up, the company are not proper parties to the proceedings. *King, In re; Mellor v. South Australian Land Mortgage and Agency Co.*, 76 L. J. Ch. 44; [1907] 1 Ch. 72; 95 L. T. 724—Neville, J.

(h) *Third-Party Procedure.*

Third-Party Notice—Service out of Jurisdiction—Jurisdiction of Court.]—Leave to serve a third-party notice out of the jurisdiction can only be given in cases where the claim of the defendant covered by the third-party notice is of such a character that if it had been made by an independent action for the like purpose, an order could have been made for service of the writ out of the jurisdiction under Order XI. rule 1. *McCheane v. Gyles (No. 1)*, 71 L. J. Ch. 183; [1902] 1 Ch. 287; 86 L. T. 1; 50 W. R. 876—C.A.

Claim for Contribution—Action against One of Two Trustees for Breach of Trust—Third Party in Ireland.]—Action brought by a beneficiary under a settlement made in 1874 in Ireland, between persons domiciled and resident in Ireland, seeking to make the survivor of the two trustees of the settlement liable for an alleged breach of trust. The defendant was in England, and was served there. His co-trustee had died in 1877, and his executrix was resident in Ireland. The defendant issued a third-party notice, claiming contribution from the executrix on the ground that the co-trustee was equally liable with him in respect of the alleged breach of trust, he having been a trustee at the time when it was stated to have occurred:—*Held*, that leave ought not to be given to serve the third-party notice in Ireland. *Id.*

Marine Insurance—Re-insurance.]—Where in an action on a policy of marine insurance the defendants sought under Order XVI. rule 48 to bring in as a third party the underwriter of a policy of re-insurance on the same subject-matter,—*Held*, that the third-party procedure was not applicable to such a case, inasmuch as a contract of re-insurance was not one of “indemnity” within the meaning of the rule. *Nelson v. Empress Assurance Corporation*, 74 L. J. K.B. 699; [1905] 2 K.B. 281; 93 L. T. 62; 53 W. R. 648; 10 Com. Cas. 237; 10 Asp. M.C. 68; 21 T. L. R. 555—C.A.

Contract of Indemnity—Undertaking by Shipowner to Indemnify Charterer.]—A charterparty

provided that the shipowner should keep the charterers indemnified to the same extent as the shipowner would be indemnified by the Protection and Indemnity Club, in which the ship was entered, against claims and risks covered by such Indemnity Club. Such claims and risks included damage to goods and loss consequent on seizure. The vessel was seized as trading with an enemy, and claims were made against the charterers by the owners of goods on board:—*Held*, that the charterers were not entitled to bring in the shipowner as a third party, the liability of the charterers to the owners of the goods and of the shipowner to the charterers not being necessarily the same or dependent on the same considerations. *Dunn v. Donald Currie & Co.*, 6 Com. Cas. 118—Bigham, J.

Counterclaim—Plaintiff Claiming to be Entitled to Contribution or Indemnity—Adding Person not Party to Action as Third Party.—The provisions of Order XVI. rule 43, which enable a defendant who claims to be entitled to contribution or indemnity over against any person not a party to the action, by leave of the Court or a Judge, to bring in such person as a third party to the proceedings, apply to a plaintiff who, by reason of a counterclaim being set up by the defendant, claims to be entitled to contribution or indemnity over against a person not a party to the action. *Levi v. Anglo-Continental Gold Reefs of Rhodesia*, 71 L. J. K.B. 789; [1902] 2 K.B. 481; 86 L. T. 857; 50 W. R. 625—C.A.

Action for Libel—Counterclaim by Defendant in respect of Alleged Libel against Him by Plaintiff's Agent—Joinder of Third Party.—“Relief relating to or connected with the original subject of the cause or matter.”—The plaintiffs, a registered company, and their managing director, carrying on business as dealers in motor cars, brought an action against the defendant, who was the managing director of another registered company carrying on a similar business, claiming damages in respect of an alleged libel written by the defendant, and caused by him to be published in two trade journals concerning the plaintiffs and their motor cars. The defendant, while admitting that he had written the statements complained of, which he said was done in the course of and concerning a long controversy in the motoring press with regard to the respective merits of the plaintiffs' cars and those manufactured by his company, each company puffing their own wares and decrying those of trade rivals, counterclaimed as follows: That the plaintiffs by their agent falsely and maliciously wrote and caused to be published in one of the trade journals a statement which, as the defendant alleged, meant that he was a man who did not pay wagers when he had lost them, and was a dishonourable man with whom it was not safe to have any dealings. The defendant accordingly joined the plaintiffs' agent as a defendant to his counterclaim, and asked for damages:—*Held*, that, upon the true construction of section 24, sub-section 3 of the Judicature Act, 1873, the counterclaim did not seek “relief relating to or connected with the original subject of the cause or matter.” and ought therefore to be struck out. *Edge v. Weigel*, 97 L. T. 447—C.A.

Damage by Collision—Action against Tug and Tow—Notice by Tug for Indemnity over against Tow—Tug Held Solely to Blame—Tow Dismissed from Action—Appeal by Tug Withdrawn—Right of Tow to Appeal from Judgment against Tug.—In an action against the owners of a tug, and of a barge which was being towed by the tug, to recover damages caused to the plaintiffs' cargo by collision, in which action a third-party notice for indemnity against all damages and costs had been served by the tug-owners on the barge-owners, the tug was held solely to blame and the barge-owners were dismissed from the action. The tug-owners were held liable also to pay to the plaintiffs the costs payable by them to the barge-owners. As between the tug-owners and the barge-owners the latter were held to be liable to indemnify the tug-owners in respect of all the damages and the costs. The tug-owners gave notice of appeal against the judgment holding the tug to blame, but subsequently withdrew the appeal. The barge-owners appealed both against the judgment in favour of the plaintiffs against the tug-owners and also against the judgment holding them liable under their indemnity:—*Held*, that neither under the Judicature Acts nor under the third-party procedure provided by Order XVI. were the barge-owners entitled to appeal against the judgment holding the tug solely to blame. *The Millwall* (No. 1), 74 L. J. P. 61; [1905] P. 155; 93 L. T. 426; 53 W. R. 471; 10 Asp. M.C. 110; 21 T. L. R. 346—C.A.

Towage—Contract of Indemnity by Tow—Negligence of Tug—Damage to Cargo of Tow—Action by Cargo-owner against Tug—Judgment against Tug—Liability of Tow under Indemnity for Costs.—The owners of certain sulphate of ammonia instructed a firm of lightermen to convey it in a barge to a ship and to engage a tug for the purpose. While the tug was towing the barge with the cargo on board, the barge collided with another barge, and the cargo was damaged. The owners of the cargo brought an action against the owners of the barge and the owners of the tug, in which the owners of the tug served a third-party notice on the owners of the barge, claiming to be entitled to be indemnified by them, upon the ground that the towage was upon their usual terms that they would not be answerable for any loss or damage which might happen to any barge or its cargo while in tow, and that their customers undertook to indemnify them from any such loss or damage. At the trial of the action, the President found that the owners of the barge were free from blame and ordered the owners of the cargo to pay their costs, and further found that the damage was due to the negligence of the tug, and, holding that there was no privity of contract between the owners of the cargo and the owners of the tug, gave judgment for the owners of the cargo against the owners of the tug for the damage, together with their costs and the costs payable by them to the owners of the barge. The judge further held that, under the terms of the contract between the owners of the barge and the owners of the tug, the owners of the tug were entitled to be indemnified by the owners of the barge not only in respect of the damage and the costs of the owners of the cargo, and the costs payable by the owners of the cargo to the owners of the barge, but also in respect of their own costs in

defending the action:—*Held*, on appeal by the owners of the barge, that, there being no privity of contract between the owners of the tug and the owners of the cargo, the owners of the tug were liable to the owners of the cargo, but were entitled to be indemnified by the owners of the barge; and, as they had given the owners of the barge full notice of the claim and full opportunity of intervening and paying or resisting it, and had acted reasonably in defending the action, they were entitled to recover not only the actual damage, but also the costs payable by them to the owners of the cargo and their own costs in the action. *The Millwall* (No. 2), 74 L. J. P. 82; [1905] P. 155; 93 L. T. 429; 53 W. R. 471; 10 Asp. M.C. 113; 21 T. L. R. 346—C.A.

— **Collision—Damage—Contract of Indemnity.**—A steamship was brought from the entrance of a dock to her berth by two tugs, and was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dock master sent two men from the two tugs to loosen the barge's headfast, and directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propeller of the steamship, and sustained such damage that the barge sank with her cargo. In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters and crews of the tugs should cease to be under the dock owners' control in connection with the towage, and become subject to the orders and control of the master or person in charge of the vessel and be the servants of the owners thereof:—*Held*, that the steamship owners were not liable, as third parties, to indemnify the dock owners, as the contract to supply the two tugs was made with the ship repairers, and not with the steamship owners; but, whether that were so or not, the contract for the supply of the two tugs was at an end, and therefore the two men from the two tugs, directed by the dock master to loosen the headfast, had resumed their position as servants of the dock owners, and the action of the third tug under the direction of the dock master was independent of the transporting contract, which applied only to the two tugs. *The Kate*, 75 L. J. P. 104; [1906] P. 317; 96 L. T. 89; 10 Asp. M.C. 347—Bargrave Deane, J. Affirmed in C.A., 76 L. J. P. 134; [1907] P. 296; 97 L. T. 502; *post*, SHIPPING.

Costs.—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, and what purported to be a true copy was produced. This copy subsequently proved to be defective. The third party to an action against the defendant for a contravention of the pro-

visions in the building scheme had sold the property to the defendant, and upon such sale had written a letter agreeing to indemnify the defendant, as purchaser, against all "costs, damages, and expenses" which the defendant might suffer or incur "by reason of the building stipulations and conditions being other than those set out in the copy." The issue whether by virtue of such indemnity the third party was liable to pay the costs of the whole proceedings was tried subsequently to the hearing of the action:—*Held*, that the costs were within the discretion of the Court, and that under the contract of indemnity the defendant was entitled to recover from the third party all costs for which he was liable—that is to say, the costs of the plaintiff as between party and party and his own costs as between solicitor and client. *Hooper v. Bromet*, 89 L. T. 37—Farwell, J. *And see* VENDOR AND PURCHASER.

Indemnity for Costs by.—*See* COSTS, col. 577.

(i) *Suing in Forma Pauperis.*

Assignment of Solicitor—Official Solicitor.—It is no part of the duties of the official solicitor as such to act as solicitor to a plaintiff suing *in forma pauperis* who does not suggest the name of any other solicitor to be assigned to him. *Moutrie v. Mitchell*, 70 L. J. K.B. 401; [1901] 1 K. B. 596; 84 L. T. 187; 49 W. R. 274—C.A.

In the absence of special circumstances the official solicitor will not be assigned as solicitor to a plaintiff suing *in forma pauperis* *Ib.*

Costs—Taxation of, in House of Lords—Liability to Costs as between Solicitor and Client.—Where a solicitor had been retained by and acted for a successful pauper appellant (since deceased) in the House of Lords, but, in accordance with the practice in the House of Lords as laid down in *Johnson v. Lindsay* ([1892] A.C. 110), the respondent in the House of Lords was not liable for party and party costs, — *Held*, on an application by the solicitor against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords, that the solicitor was entitled to recover from the client's estate the ordinary costs which a solicitor is entitled to charge—namely, costs to be taxed as between solicitor and client. *Raphael, In re; Salomon, ex parte*, 68 L. J. Ch. 309; [1899] 1 Ch. 853; 80 L. T. 226; 47 W. R. 330—Kekewich, J. Reversed on facts, 68 L. J. Ch. 765; 81 L. T. 479—C.A.

Appeal in Forma Pauperis.—*See* APPEAL, col. 24.

Breach of Trust—Parties.—*See* TRUST AND TRUSTEE.

Foreign Sovereign.—*See* INTERNATIONAL LAW.

2. WRIT OF SUMMONS.

Specially Indorsed Writ—Liquidated Damages—Penalty—Bond for Lump Sum—Condition to Refrain from Several Acts in Obedience to In-

junction.]—In an action to recover 100*l.*, money due upon a bond for that amount, the condition of which was that the defendant should, in obedience to an injunction of the High Court, refrain from trespassing on certain lands or the walls, gates, or fences thereof, and pulling down or removing, or otherwise injuring the same, or inciting others to commit any such trespasses, it appeared that the bond was executed by the defendant upon his release from imprisonment for disobedience to the injunction, which was in the same terms as those set out in the condition of the bond.—*Held*, that the sum payable by the bond became payable on a single event only—namely, on disobedience to the injunction—and was therefore liquidated damages, and not a penalty, and consequently the plaintiff was entitled to proceed by writ specially indorsed under Order III. rule 6, and to apply for final judgment under Order XIV. rule 1. *Strickland v. Williams*, 68 L. J. Q.B. 241; [1899] 1 Q.B. 382; 80 L. T. 4—C.A.

— **Action for Rent by Personal Representatives.**]—In an action by personal representatives of an intestate for rent accrued due from his tenants since his death, the writ is not specially indorsed unless it contains an averment that the intestate's interest was for a term of years. *Murphy v. Murphy*, [1903] 2 Ir. R. 329—K.B. D.

— **Amendment without Leave.**]—Where a plaintiff by amendment under Order XXXVIII. rule 2 converts an ordinary into a specially indorsed writ, he cannot obtain final judgment upon the amended writ under Order XIV. without service of the amended writ upon the defendant. *Guinness v. Caraher* ([1900] 2 Ir. R. 505) followed. *Roberts v. Plant* (64 L. J. Q.B. 847; [1895] 1 Q.B. 597) considered. *Haigh v. Purcell*, [1908] 2 Ir. R. 56—C.A.

Service within the Jurisdiction on Officer or Clerk—Foreign Corporation—Carrying on of Business within the Jurisdiction.]—A foreign shipping company, with an agent in this country occupying offices of which the rent and other expenses, including salaries of clerks, income tax, legal charges, advertising, printed forms, postage and telegrams, are paid by the company, although such agent carries on other business in addition to that of the company, is resident within the jurisdiction in such circumstances as to make service of a writ on such agent good service within the meaning of Order IX. rule 8. *La Bourgogne*, 68 L. J. P. 104; [1899] A.C. 431; 80 L. T. 845; 8 Asp. M.C. 550—H.L. (E.)

Service within Jurisdiction on Head Officer of Corporation—Foreign Corporation—Residence—Carrying on Business within Jurisdiction—Exclusive Occupation of Stand at Exhibition for Nine Days.]—A foreign trading company rented a stand at an exhibition in this country of goods of the kind manufactured by them. The company had their name on the stand, and had the exclusive use of it during the exhibition. A representative of the company and a clerk were in attendance at the stand, where exhibits of the goods manufactured by the company were on view, and where orders for such goods were received and accepted. The exhibition was for a period of nine days only.—*Held*, nevertheless, that the company were carrying on business at

the stand under such circumstances as to make them resident within the jurisdiction so as to make service upon their representative good service on the company under Order IX. rule 8. *Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft für Motor*, 71 L. J. K.B. 284; [1902] 1 K.B. 342; 86 L. T. 472; 50 W. R. 226—C.A.

Action Commenced in England against Scottish Corporation—Service on Manager of Branch Office in England—“Statutory provision regulating service of process.”]—An action was brought in the High Court against a Scottish corporation, which had a branch office in England, where it carried on business. The corporation was incorporated by Acts of Parliament, which contained no provision as to service of process upon it. The writ of summons was served upon the manager of the branch office of the corporation in England under Order IX. rule 8:—*Held*, that the Citation Amendment (Scotland) Act, 1882, which relates exclusively to process issued from the Courts of Scotland and contains no provision applicable to the service of process issuing from an English Court, was not a “statutory provision regulating service of process” within Order IX. rule 8, and that the writ had been rightly served under that rule. *Logan v. Bank of Scotland*, 73 L. J. K.B. 794; [1904] 2 K.B. 495; 91 L. T. 252; 53 W. R. 39; 20 T. L. R. 640—C.A.

Substituted Service—Writ for Service within the Jurisdiction—Defendant out of Jurisdiction at Date of Application.]—The Court has jurisdiction under Order IX. rule 2 to make an order for substituted service of a writ of summons issued for service within the jurisdiction where the defendant, having been within the jurisdiction when the writ was issued, has since gone abroad, although it does not appear that the defendant went abroad to evade service of the writ. (RIGBY, L.J., dissenting.) *Wilding v. Bean* (60 L. J. Q.B. 10; [1891] 1 Q.B. 100) distinguished. *Jay v. Budd*, 66 L. J. Q.B. 863; [1893] 1 Q.B. 12; 77 L. T. 335; 46 W. R. 34—C.A.

— **Order for, at Places Abroad and within the Jurisdiction.**]—In ordering substituted service of a writ on a person out of the jurisdiction the kind of service ordered need not be restricted to service out of the jurisdiction, but may be extended to include substituted service within the jurisdiction. *Western Suburban Permanent Benefit Building Society v. Rucklidge*, 74 L. J. Ch. 751; [1905] 2 Ch. 472; 93 L. T. 664; 54 W. R. 62—Swinfen Eady, J.

— **Scotland or Ireland—Defendant Domiciled or Ordinarily Resident in—Appointment of Agent to Accept Service within the Jurisdiction.**]—A person domiciled or ordinarily resident in Scotland or Ireland may appoint an agent to accept service of a writ of summons within the jurisdiction on his behalf. Service within the jurisdiction upon such an agent is good personal service within the jurisdiction upon the principal. *Tharsis Sulphur Co. v. Societe des Metaux* (58 L. J. Q.B. 435) followed. *British Wagon Co. v. Gray* (65 L. J. Q.B. 75; [1896] 1 Q.B. 35) distinguished. *Montgomery v. Liebenihal*, 67 L. J. Q.B. 313; [1898] 1 Q.B. 487; 78 L. T. 211; 46 W. R. 292—C.A.

Service out of the Jurisdiction—“Necessary

or proper party to an action properly brought.”]

—A defendant who is merely a trustee for the plaintiff, and against whom no relief is really sought or right claimed to be enforced, and who would more properly be joined as a co-plaintiff in the action, is not a person against whom the action is “properly brought,” so as to justify an order for service out of the jurisdiction on another defendant as a “necessary or proper party to an action properly brought,” under Order XI, rule 1 (g) of the Rules of the Supreme Court, 1883. *Deutsche National Bank v. Paul*, 67 L. J. Ch. 156; [1898] 1 Ch. 283; 78 L. T. 35; 46 W. R. 243—Stirling, J.

— **Insufficient Disclosure of Facts—Discretion of Court.**—This was an action brought against four persons for relief in respect of a breach of trust in improper investment of trust funds. The first three defendants were partners in a firm of solicitors practising in Calcutta; the fourth was the legal personal representative of the survivor of the two trustees who were alleged to be responsible for the breach of trust. He was resident in England, and had been duly served. An order had been made for service out of the jurisdiction upon the first three defendants upon affidavits which only stated that the money was in their hands when invested, and the investment was really made by them. The three defendants now moved to discharge the order. It appeared from the evidence on this motion that the defendants’ firm had only acted as solicitors for the trustees, the business having been brought in and entirely conducted by a deceased member of the firm:—*Held*, that the order for service must be discharged because (1) the affidavits on which the order was obtained did not sufficiently disclose the facts; (2) the first three defendants were not necessary or proper parties to the action; (3) the case was not one in which the Court ought, in the exercise of its discretion, to order the case to be tried in England. *Plaskitt v. Eddis*, 79 L. T. 136—North, J.

— **Injunction.**—In an action against M., a vendor of cycles within the jurisdiction, and L. and F., cycle manufacturers in England, for an injunction to restrain the defendants from infringing in Ireland the plaintiffs’ patent, and for damages, it appeared that L. and F. supplied M. with cycles having the article complained of as an infringement attached. The plaintiffs alleged that these cycles were sold by M. as agent for L. and F., while the latter alleged that the cycles were sold by them to M. for resale by him. L. and F. also alleged that the plaintiffs’ invention had been anticipated, and was not novel. M. had been duly served with the writ within the jurisdiction:—*Held*, that an order giving leave to issue a concurrent writ and to serve it on L. and F. out of the jurisdiction had been rightly made. *Joynt v. McCrum*, [1899] 1 Ir. R. 217—V.C.

— **“Action founded on any breach of contract.”**—An action by a mortgagee, framed as a claim for a declaration that the plaintiff is entitled to a charge on property, the subject-matter of the action, that the charge may be enforced by foreclosure, for all necessary accounts and enquiries, and for further and other relief, is not an action “founded on any breach of contract” within the meaning of

Order XI, rule 1 (e) of the Rules of the Supreme Court, 1883. *Deutsche National Bank v. Paul*, 67 L. J. Ch. 156; [1898] 1 Ch. 283; 78 L. T. 35; 46 W. R. 243—Stirling, J.

— **Contract to be Performed within Jurisdiction.**—In order to constitute a contract one which “according to the terms thereof ought to be performed within the jurisdiction” within Order XI, rule 1 (e), it is not necessary that it should be stated in express terms in the contract that it is to be performed within the jurisdiction, but it is sufficient if it appears from the general terms of the contract, having regard to the surrounding circumstances, that it is to be so performed. The rule laid down to the above effect in *Reynolds v. Coleman* (56 L. J. Ch. 903; 36 Ch. D. 453), and followed in *Rein v. Stein* (61 L. J. Q.B. 401; [1892] 1 Q.B. 753), has not been overruled or affected by the decision of the House of Lords in *Comber v. Leyland* (67 L. J. Q.B. 884; [1898] A.C. 524). *Comber v. Leyland* (*supra*) explained. *Duval v. Gans & Pick*, 73 L. J. K.B. 907; [1904] 2 K.B. 685; 91 L. T. 308; 53 W. R. 106; 20 T. L. R. 705—C.A.

— There cannot be a breach within the jurisdiction of a contract such as to justify service out of the jurisdiction of a writ of summons or notice thereof, under Order XI, rule 1 (e), unless some part of the contract is by its terms to be and can only be performed in the United Kingdom. *Comber v. Leyland*, 67 L. J. Q.B. 884; [1898] A.C. 524; 79 L. T. 180—H.L. (E.)

— **Contract Alleged to be made in Ireland with Agent—Construction.**—The plaintiff entered into a contract with a steamship company in Ireland for the through carriage of certain live stock from Londonderry to York. The carriage necessitated the live stock being taken to Liverpool, and thence by two lines of railway to their destination:—*Held*, on the construction of the contract and on the facts, that there were three independent contracts with the steamship company and the two railway companies, that the contracts with the railway companies were made and to be performed in England, and that consequently an order giving leave to issue and serve a writ out of the jurisdiction in an action for a breach at York of one of these contracts could not be maintained, and should be discharged. *M’Gettigan v. North-Eastern Railway*, [1899] 2 Ir. R. 375—Q.B. D.

— **Determination of Contract by Letter Written and Posted Abroad.**—Where a contract, intended to be performed in this country, is determined by a letter written and posted abroad by one of the parties and addressed to the other party in this country, the Court has no power under Order XI, rule 1 (e) to allow service out of the jurisdiction of a writ or notice thereof, in an action founded upon such determination of the contract. *Cherry v. Thompson* (41 L. J. Q.B. 243; L. R. 7 Q.B. 573), *Mathews v. Alexander* (Ir. R. 7 C.L. 575), and *Hamilton v. Barr* (18 L. R. Ir. 297) followed. *Holland v. Bennett*, 71 L. J. K.B. 490; [1902] 1 K.B. 867; 86 L. T. 485; 50 W. R. 401—C.A.

— **Agent in England of Foreign Company—**

Implied Covenant to Continue Agency.]—The plaintiffs, who carried on business in London, were employed by a Spanish insurance company who had no office in this country to act as their agents for the United Kingdom and for certain other countries, under an agreement made abroad. Under the agreement, which was to continue for five years, the defendants were to put the plaintiffs in credit at a bank in London, into which the plaintiffs were to pay moneys received on behalf of the defendants. The defendants agreed not to undertake any business whatever coming within the jurisdiction of the agreement (with certain exceptions) without the intervention of the plaintiffs, who were to be paid by commission. An arbitration clause provided for the settlement of any dispute by a Swiss tribunal. After the agreement had been in operation for about a year a representative of the defendants came to this country charged with the duty of considering the position of the agency business, and he, while in this country, wrote to the plaintiffs determining the agency:—*Held*, first, that there was a breach of the agreement within the jurisdiction; and secondly, that the agreement was one “which, according to the terms thereof, ought to be performed within the jurisdiction” within the meaning of Order XI. rule 1 (e), inasmuch as there was an implied obligation on the defendants to abstain from doing anything in this country which would interfere with the performance by the plaintiffs of the agency business. *Mutzenbecher v. La Aseguradora Espanola*, 75 L. J. K.B. 172; [1906] 1 K.B. 254; 94 L. T. 127; 54 W. R. 207; 22 T. L. R. 175—C.A.

— Prima Facie Evidence of Breach within Jurisdiction.]—Where application is made for leave to serve a writ out of the jurisdiction, or to discharge an order for such service, the Court is not called upon to try the merits of the action, but the affidavits should shew a *prima facie* cause of action within the jurisdiction, and disclose a substantial question which the plaintiff *bona fide* desires to try. Sufficient information should be given to make clear the ground on which the Court is asked to proceed. *Chemische Fabrik vormals Sandoz v. Badische Anilin- und Soda-Fabrik*, 90 L. T. 733; 20 T. L. R. 552—H.L. (E.)

— Contract in England—Charge on Land in Brazil—Some Defendants Properly Served within the Jurisdiction—Foreigner Resident Abroad—“Necessary or proper party.”]—Where an action is properly brought to enforce a contract made in England under which the plaintiffs allege that they are entitled to a charge on land and other property in Brazil and for a receiver, and some of the defendants are properly served within the jurisdiction, to allow service of notice of the writ upon a foreigner resident abroad who is a “necessary or proper party” within the terms of Order XI. rule 1 (g) is not to extend the jurisdiction *in personam*, but to enable the old jurisdiction to be exercised in a case in which at one time it could not have been exercised by reason of defective rules of procedure. *Norris v. Chambres* (30 L. J. Ch. 285; 29 Beav. 246; affirmed, 3 De G. F. & J. 588) distinguished. *Bawtree v. Great North-West Central Railway* (14 Times L. R. 448) applied. *Duder v. Amsterdamsch Trustees*

Kantoor, 71 L. J. Ch. 618; [1902] 2 Ch. 132; 87 L. T. 22; 50 W. R. 551—Byrne, J.

— Claim to Injunction as to Something to be Done within Jurisdiction—Libel in Newspaper—Small Circulation of Newspaper within Jurisdiction—Subject of Libel no Longer in Existence—Apprehension of Repetition of Libel.]—Order XI. rule 1 (f), which provides that service out of the jurisdiction of a writ of summons may be allowed whenever any injunction is sought as to anything to be done within the jurisdiction, makes the allowance of such service a matter for the discretion of the Court, and does not entitle a plaintiff to obtain it as of right from the mere fact that his writ claims an injunction; and before allowing such service the Court should be satisfied not only that the plaintiff has a good cause of action for an injunction, but also that there is a reasonable probability that he will obtain an injunction. *Watson v. “Daily Record” (Glasgow)*, 76 L. J. K.B. 448; [1907] 1 K.B. 853; 96 L. T. 485; 23 T. L. R. 333—C.A.

The plaintiffs were a firm of soap manufacturers domiciled in England, and it had been proposed that they and other firms should amalgamate and form what was called a “soap trust.” The defendants were a newspaper company having their registered office in Scotland, and the circulation of their newspaper was confined to Scotland, except that a few dozen copies were on sale in the extreme north of England. The defendants in their newspaper severely criticised the proposed soap trust and the firms concerned in it, and in two issues of the newspaper they published statements about the plaintiffs which were alleged to be libellous. The proposed soap trust had since been abandoned, and had ceased to be a topic of public interest, and the defendants stated that they had no intention of repeating these statements. The plaintiffs brought an action for libel against the defendants, claiming in the writ damages and an injunction, and applied, under Order XI. rule 1 (f), for leave to issue the writ against the defendants and serve it upon them out of the jurisdiction:—*Held*, that, in these circumstances, the Court, in the exercise of its discretion under the rule, ought not to grant the application. *De Bernales v. New York Herald* (62 L. J. Q.B. 385; [1893] 2 Q.B. 97n.), observations explained. *Id.*

— Patent—Infringement—Foreign Manufacturers—Soliciting Orders in England—Using, Exercising, or Vending Invention—Prima Facie Evidence of Breach within the Jurisdiction.]—A foreign company owning English letters patent for the manufacture of certain articles commenced an action against another company, also domiciled abroad, for alleged infringement of those letters patent. Subsequently the plaintiffs obtained an order for service upon the defendants out of the jurisdiction. That order the defendants moved to discharge. It was admitted that the defendants had by their agents solicited from persons in England orders for articles to be executed and delivered abroad; but it was contended that this did not amount to using, exercising, or vending the invention claimed by the plaintiffs’ letters patent:—*Held*, that the evidence before the Court shewed information coming from perfectly trustworthy

persons which pointed to infringement by the defendants of the plaintiffs' letters patent within the jurisdiction; that the Legislature had not imposed upon the Court the duty of trying the action before giving leave for service on the defendants out of the jurisdiction in order to have the parties before the Court; that if there was *prima facie* evidence the necessary conditions had been fulfilled that there had been a breach within the jurisdiction; and that there were sufficient facts to raise the question, which the Court was not bound at present to finally decide—namely, that the acts of the defendants amounted to infringements. *Badische Anilin- und Soda-Fabrik v. Chemische Fabrik vormals Sandoz*, 88 L. T. 490—C.A.

— **Action against Owners of English Tug and Owners of Foreign Tow—Service Abroad on Owners of Tow—"Necessary or proper party" to Action.**—A collision occurred on the high seas between an English steamship and a French barque, which was in tow of an English steam-tug. There was no collision between the steamship and the tug. The owners of the steamship commenced an action in England against the owners of the tug and the owners of the French vessel, and duly served the owners of the tug within the jurisdiction:—*Held*, that leave could be given to the plaintiffs under Order XI. rule 1 (g) to issue a concurrent writ against, and serve notice thereof out of the jurisdiction upon, the owners of the French vessel as "proper parties" to the action within the meaning of the rule. *The Duc D'Aumale* (No. 1), 72 L. J. P. 11; [1903] P. 18; 87 L. T. 674; 51 W. R. 332; 9 Asp. M.C. 359—C.A.

— **Action to Enforce Charging Order.**—Leave to issue a writ for service out of the jurisdiction, under Order XI. rule 1 (e), cannot be granted in an action to enforce a charging order on shares by sale. *Moritz v. Stephan* (36 W. R. 779) approved. *Kolchmann v. Meurice*, 72 L. J. K.B. 289; [1903] 1 K.B. 534; 88 L. T. 369; 51 W. R. 356—C.A.

— **Enticing Defendant within the Jurisdiction—Setting Aside Service.**—If a person has been induced by fraud of any kind to come within the jurisdiction for the concealed purpose of serving him with a writ in an action, the Court will set aside the service as an abuse of the process of the Court. Where an invitation was issued to the defendant, who was a foreigner resident abroad and the general manager abroad of an English company, by the directors of the company to come within the jurisdiction with a real intention to discuss certain matters in difference between them and the defendant, although the directors also intended to serve him with a writ, and the defendant came and was served with a writ, the Court refused to set aside the service. *Watkins v. North American Land and Timber Co.*, 20 T. L. R. 534—H.L. (E.)

Default in Appearance—Amendment of Writ by Addition of Plaintiff—Filing in Central Office—Personal Service—Notice of Motion for Judgment.—There is nothing in the Rules of Court which requires an amended writ of summons to be personally re-served on a non-appearing defendant who was personally served with the original writ. The amended writ

therefore can *prima facie* be filed in the Central Office against a non-appearing defendant under Order LXVII. rule 4, without any personal re-service on him, but the Court in each case has a discretion to require stricter service, either as a term of granting leave to amend or as a condition of giving judgment by default, if the nature of the amendment is such as to raise a new case against the non-appearing defendant. *Hartley, In re; Nuttall v. Whitaker* ([1891] 2 Ch. 121), *Gee v. Bell* (56 L. J. Ch. 718; 35 Ch. D. 160), *Webster v. Myer* (54 L. J. Q.B. 101; 14 Q.B. D. 231), *Trilling v. Blythe* (68 L. J. Q.B. 350; [1899] 1 Q.B. 557), and *The Cassiopeia* (48 L. J. P. 89; 4 P. D. 188) discussed and explained. *Jamaica Railway v. Colonial Bank*, 74 L. J. Ch. 410; [1905] 1 Ch. 677; 92 L. T. 548; 53 W. R. 564—C.A.

Appearance—Undertaking to Enter—Attachment.—See SOLICITOR.

3. ORIGINATING SUMMONS.

Benefit of Written Contract and Option to Repurchase Vested in Trustee for Bankrupt—"Written instrument"—"Interested."—A summons was taken out under Order LIV.A by the trustee of a bankrupt who claimed an interest under a contract of sale of certain real estate and option of repurchase conferred on the bankrupt, asking certain questions which involved the construction of the written document:—*Held*, first, that the contract was an instrument within the meaning of the rule; secondly, having regard to the decision in *Buckland v. Papillon* (15 L. T. 378), that the plaintiff was a person interested within the meaning of the rule; thirdly, that the scope of the rule was not limited to cases where an action might be brought, but that the limit was the discretion of the Court on the question of construction provided by rule 4; and fourthly, that, having regard to *Palmer v. Johnson* (51 L. T. 211), the execution of the conveyance which had taken place did not destroy the right of repurchase contained in the contract. *Mason v. Schuppisser*, 81 L. T. 147—Stirling, J.

Construction of Agreement—Question of Fact.—On a summons under Order LIV.A to determine whether under the description of part of an estate mentioned in an agreement for the distribution of the estate the plaintiff was entitled to a right of way over a private road,—*Held*, that the Court was not precluded from determining this question of fact by reason of the procedure being under Order LIV.A. *Nicholls v. Nicholls*, 81 L. T. 811—Stirling, J.

Construction of Document—Questions of Fact—Jurisdiction.—An originating summons under Order LIV.A, rule 1, is not the proper mode of procedure in a case where questions both of fact and of construction of a written instrument arise, and where the decision of the questions of construction will not necessarily put an end to the litigation. *Lewis v. Green*, 74 L. J. Ch. 632; [1905] 2 Ch. 340; 93 L. T. 303; 54 W. R. 93—Warrington, J.

Trustee Convicted of Felony—Removal from Trusteeship.—The Court has jurisdiction on an

application by originating summons to make an order for the removal from the trust of a trustee who has been convicted of felony but who is unwilling to retire. *Danson, In re*, 48 W. R. 73—Byrne, J.

Question Arising in the Administration of Estate.—A supported and took care of B, an aged relative, for some years, during which time she received income of B to an amount exceeding the expenditure upon her. After the death of A and B,—*Held*, that the question whether A's executors were bound to account to B's administrator for the income so received was not a question arising in the administration of A's estate within Order LV. rule 4 (g) [English Order LV. rule 3 (g)]. *Herrick v. Cooper*, [1899] 1 Ir. R. 321—V.C.

Covenant to Pay Annuity—Evidence that Annuitant is Alive—Jurisdiction.—The Court has no jurisdiction under Order LIV. A to make a declaration on an originating summons as to what evidence (if any) ought to be furnished to a person liable to pay an annuity to shew that the annuitant is alive. *Hunt v. Hunt*, 97 L. T. 822—C.A.

4. JOINDER OF CAUSES OF ACTION.

Joinder of Plaintiffs—Different Causes of Action—Right to Relief Arising out of Same Transaction or Series of Transactions.—The plaintiff in an action brought by him on his own behalf and also on behalf of himself and all other the shareholders of a company against the directors of the company, the company being added as a defendant, alleged in his statement of claim that the directors, intending by deceit and fraud to cheat such members of the public as could be induced to purchase shares in the company at prices beyond their real value, had declared and paid a dividend of 100 per cent. on the shares of the company; that such dividend was not paid out of the profits of the company, nor did the profits admit of such payment, but was paid out of capital; that the plaintiff, believing that the dividend was paid out of profits, purchased shares in the company, and in consequence suffered damage. The plaintiff then, in the statement of claim, repeated on behalf of himself and the other shareholders of the company the statement as to the payment of the dividend out of capital, and alleged that such payment was *ultra vires* and illegal. The plaintiff claimed—first, on his own behalf, damages against the directors in respect of loss occasioned to him by their deceit and fraud; and secondly, on behalf of himself and the other shareholders, a declaration that the declaration of the dividend of 100 per cent. was *ultra vires* and illegal, and that the directors were liable to make good to the company all moneys paid out of its capital.—*Held*, that in substance the action was brought by two different plaintiffs in respect of two different causes of action, and that the right to relief in the two cases did not arise out of the same transaction or series of transactions within the meaning of Order XVI. rule 1, and therefore the claims could not be joined in one action under the provisions of the rule. *Stroud v. Lawson*, 67 L. J. Q.B. 718;

[1898] 2 Q.B. 44; 78 L. T. 729; 46 W. R. 626—C.A.

Claim for Damages—Action of Conspiracy—Separate Defendants Joining Conspiracy at Different Dates.—Where an action is brought against a number of defendants jointly for an illegal conspiracy, the fact that separate defendants joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, as joining separate causes of action against separate defendants, there being in substance only one cause of action—namely, the conspiracy to injure. *O'Keefe v. Walsh*, [1903] 2 Ir. R. 681—C.A.

Deceit—Conspiracy.—A plaintiff joined two causes of action founded on deceit and a statutory liability under the Directors' Liability Act, 1890, against three defendants, with a separate cause of action founded on conspiracy against two only of such defendants:—*Held*, on the authority of *Sadler v. Great Western Railway* (65 L. J. Q.B. 462; [1896] A.C. 450), that such a joinder of separate causes of action was inadmissible. *Gower v. Couldridge*, 67 L. J. Q.B. 251; [1898] 1 Q.B. 348; 77 L. T. 707; 46 W. R. 214—C.A.

Recovery of Land—Joinder of other Causes of Action—Joinder of Plaintiff after Issue of Writ—Leave of Court—Irregularity—Waiver.—Where the indorsement on a writ of summons is irregular by reason of a claim for the recovery of land being joined with other causes of action without the leave of a Court or Judge, contrary to the provisions of Order XVIII. rule 2, leave to amend the writ by adding a plaintiff so as to validate the claims may be given after the issue of the writ; and, further, such irregularity is capable under Order LXX. of being waived by a defendant. *Lloyd v. Great Western and Metropolitan Dairies*, 76 L. J. K.B. 924; [1907] 2 K. B. 727; 97 L. T. 384; 23 T. L. R. 570—C.A.

Allegation of Joint Tort—Alternative Allegation of Separate Torts.—The plaintiff was injured by a collision between two vehicles, and brought an action against the respective owners. The statement of claim alleged that the injury to the plaintiff was caused by the joint negligence of the two defendants, and it also alleged in the alternative negligence on the part of each defendant causing the injury. No application was made to strike out either of the defendants, and the case went to trial:—*Held*, that after verdict and judgment it was too late to object to the jurisdiction to try the action on the ground that torts were alleged severally against the two defendants. *Bullock v. London General Omnibus Co.*, 76 L. J. Q.B. 127; [1907] 1 K.B. 264; 95 L. T. 905; 23 T. L. R. 62—C.A.

After the alteration of rule 1 of Order XVI. following on the decision in *Smurthwaite v. Hannay* (63 L. J. Q.B. 737; [1894] A.C. 494) the joinder, in an action of tort, of defendants against whom the right to any relief, in respect of or arising out of the same transaction, is claimed, whether jointly, severally, or in the alternative, is authorised by rule 4 of the Order. *Sanderson v. Blyth Theatre Co.* (72 L. J. K.B. 761; [1903] 2 K.B. 533) applied.

Sadler v. Great Western Railway (65 L. J. Q. B. 462; [1896] A.C. 450) distinguished. *Ib.*

5. PLEADINGS AND PARTICULARS.

Statement of Claim—Filing—Amendment of Claim on Writ—Necessity for Re-filing Statement of Claim.]—A writ of summons was issued indorsed with a claim for an injunction to restrain a breach of a restrictive covenant. The defendant did not enter an appearance, and in consequence a statement of claim was filed under Order LXVII. rule 4. Subsequently the indorsement on the writ was amended, and the writ as amended with a copy of the statement of claim was personally served on the defendant, but the statement of claim, in which no alteration had been made, was not re-filed:—*Held*, that the service of the amended writ after filing the statement of claim was of no avail, and that the plaintiffs must file another statement of claim before moving for judgment in default of appearance. *Southall Development Syndicate v. Dunsdon*, 96 L. T. 109—Kekewich, J.

Judgment Obtained by Fraud—Fresh Action to Set Aside.]—As a general rule, an action to set aside a judgment as having been obtained by fraud ought not to be stopped summarily under Order XXV. rule 4. *Wyatt v. Palmer*, 68 L. J. Q.B. 709; [1899] 2 Q.B. 106; 80 L.T. 639; 47 W. R. 549—C.A.

An action will lie to set aside a judgment on the ground of its having been obtained by fraud, although such judgment was obtained by default; but, inasmuch as a shorter method of doing it in chambers in such a case has been provided by Order XXVII. rule 15, it may be a question whether a plaintiff who adopts the more dilatory method of an action will not be put upon terms. *Ib.*

Striking Out.]—An application to strike out a statement of claim under Order XXV. rule 4, on the ground that it discloses no reasonable cause of action, is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief he claims. *Hubbuck v. Wilkinson, Heywood & Clark*, 68 L. J. Q.B. 34; [1899] 1 Q.B. 86; 79 L. T. 429—C.A.

Disclosing no Reasonable Cause of Action—Gaming Transactions.]—In an action to recover a sum of money the defendant, before putting in a statement of defence, applied to strike out the statement of claim indorsed on the writ as disclosing no reasonable cause of action, and to dismiss the action as being frivolous and vexatious, and made an affidavit that the claim was in respect of bets made between him and the plaintiff. The plaintiff admitted that the transactions were gaming transactions:—*Held*, that the action, being one which was forbidden by the Gaming Acts, ought not to be allowed to proceed. *Kershaw v. Sievier*, 21 T. L. R. 40—C.A.

“Reasonable cause of action”—Agreement not to be Performed within a Year—

Statute of Frauds.]—In an action brought upon an alleged breach of agreement, it appeared from the statement of claim that the agreement was one which was not to be performed within one year from the making thereof, but there was nothing in the statement of claim or the particulars to indicate the existence of any memorandum or note of the agreement in writing to satisfy the requirements of section 4 of the Statute of Frauds. Upon an application by the defendant that the statement of claim should be struck out under Order XXV. rule 4, —*Held*, that the statement of claim disclosed a reasonable cause of action, and therefore ought not to be struck out. *Fraser v. Pape*, 91 L. T. 340; 20 T. L. R. 798—C.A.

Proceeding in Lieu of Demurrer—Right to Begin.]—On a proceeding in lieu of demurrer under Order XXV. rule 2, the party who by his pleading raises the point of law has the right to begin. *Stevens v. Choun*, [1901] 1 Ch. 894; 84 L. T. 796—Farwell, J.

Defence—Case set up by Plaintiff—Discovery—Privilege—Documents Relating Solely to Defendant's Case.]—Where a defendant by his defence pleads an independent transaction which would defeat the plaintiff's claim, such as a plea of purchase for value without notice, without any particulars, the plaintiff is entitled to particulars of the alleged transaction, though the documents carrying out the transaction are privileged from discovery as relating solely to the defendant's title; but the plaintiff is not entitled to inspection of the documents. *Milbank v. Milbank*, 69 L. J. Ch. 287; [1900] 1 Ch. 376; 82 L. T. 63; 48 W. R. 339—C.A.

Per VAUGHAN WILLIAMS, L.J.—Particulars under the Judicature Act are allowed as amendments of the pleadings, and, *semble*, the particulars asked for would amount to a pleading within Order XXXI. rule 15. *Ib.*

Striking Out—Frivolous and Vexatious—Abuse of Process of Court.]—In an action for specific performance of an agreement to purchase leasehold property, the Court, upon the pleadings and correspondence, having come to the conclusion that the defence was a dishonest one and put in for the purpose of gaining time, ordered it to be struck out under Order XXV. rule 4, and gave immediate judgment for the plaintiffs. *Mackellar v. Hornsey*, 49 W. R. 301—Buckley, J.

Abuse of Process of Court—Admission of Liability—Payment into Court with Denial of Liability.]—Where the defendant in an action delivers to the plaintiff a letter containing an admission of his liability, and along with it a formal defence of payment into Court with a denial of liability, the defence will, in the absence of an order of the Court specially authorising it, be struck out as being embarrassing and an abuse of the process of the Court. *Critchell v. London and South-Western Railway*, 76 L. J. K.B. 422; [1907] 1 K.B. 860; 96 L. T. 603—C.A.

Motion for Judgment in Default of Defence—Joinder of Motions.]—Where a plaintiff moves under Order XXXI. rule 21 to have a defendant's defence struck out for non-com-

pliance with an order to answer interrogatories, there is no objection to his joining with such motion a motion for judgment as upon his statement of claim in default of defence, but such motion for judgment must be set down and two separate orders should be made. *Salomon v. Hole*, 53 W. R. 588—Warrington, J.

Counterclaim—Action by Trustee—Unliquidated Claim by Defendants against Cestui que Trust—Defence.—In an action by a trustee a counterclaim by the defendant against the *cestui que trust* for an unliquidated amount may be relied upon as a defence to the plaintiff's claim or part of it. *Banks v. Jarvis*, 72 L. J. K.B. 267; [1903] 1 K.B. 549; 88 L. T. 20; 51 W. R. 412—D.

Reply—Set-off and Counterclaim in Reply.—A plaintiff, against whom a defendant by counterclaim alleges a cause of action the existence of which the plaintiff denies in his reply, may in the reply, alternatively, counterclaim against the defendant on the footing that the cause of action exists, though it arose, if at all, before the date of the writ. *Toke v. Andrews* (51 L. J. Q.B. 281; 8 Q.B. D. 428) followed. *Gibbs v. Neville*, 69 L. J. Q.B. 514; [1900] 2 Q.B. 181; 82 L. T. 446; 48 W. R. 532—C.A.

Co-defendants—Judgment by Consent against one Defendant—Merger of Cause of Action.—A judgment obtained by consent against one of two co-defendants in an action where each defendant enters an appearance is a bar to further proceedings against the other defendant. Observations of BOWEN, L.J., in *Hodgson, In re*; *Beckett v. Ramsdale* (55 L. J. Ch. 241; 31 Ch. D. 177), adopted and applied. *M'Leod v. Power*, 67 L. J. Ch. 551; [1898] 2 Ch. 295; 79 L. T. 67; 47 W. R. 74—Byrne, J.

If a defendant wishes to take advantage of his co-defendant having consented to judgment he ought to plead this fact. *Id.*

Particulars—Payment into Court by Defendants—Marine Insurance—Action brought by Underwriters for Return of Claims Paid on Policies—Alleged Fraud.—An action was brought by a large number of underwriters to recover from their assured—(a) damages for conspiracy and fraud, and (b) the amounts of claims paid by them on policies of marine insurance in consequence of the alleged fraudulent misrepresentations of the assured over a period of many years. The assured in their defence denied liability and brought into Court sums of money specified in a schedule and allocated to the various underwriters who were suing. On the underwriters applying for particulars of the items so brought into Court, *Held*, that the underwriters were entitled to particulars. *Boulton v. Houlder* (No. 1), 9 Com. Cas. 75—C.A.

Reasonable Ground for Belief—Directors' Liability.—Where to an action claiming compensation under the Directors' Liability Act, 1890, in respect of alleged false statements in a prospectus, the defendant pleads that he had reasonable ground for believing the statements to be true, he may be ordered to give particulars of the ground of such belief. *Alman v. Oppert*, 70 L. J. K.B. 745; [1901] 2 K.B. 576; 84 L. T. 828; 8 Manson, 316—C.A.

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Contributory Negligence and Inevitable Accident.—Where, in an action for negligence, the defendants pleaded in general terms inevitable accident and contributory negligence, the Court ordered particulars. *Martin v. M'Taggart*, [1906] 2 Ir. R. 120—K.B. D.

Claim to Ownership without Setting out Title—Embarrassing Statement of Claim.—The plaintiffs, being owners of a mill, claimed to be owners of a watercourse, alleging that by a deed of 1805 their predecessors in title became possessed of the mill and watercourse, and that the watercourse had ever since belonged to the mill. The defendants, before delivering their defence, applied for further and better particulars on the ground that the plaintiffs ought to set out their title, and that the statement of claim was embarrassing:—*Held*, that no further particulars were necessary for pleading, and that the statement of claim was not embarrassing. *Pledge v. Pomfret*, 74 L. J. Ch. 357; 92 L. T. 560—Joyce, J.

Action for Libel.—See DEFAMATION.

Trespass on Land—Right of Way—Presumption of Lost Grant—Date of Lost Deed—Parties Concurring in Grant.—In claiming a right under the presumption of a lost grant it is not necessary to allege the date or other particulars of the grant, but if the claimant relies on it as having been made before or after any particular date he must say so definitely. *Hendy v. Stephenson* (10 East, 55) not followed. *Palmer v. Guadagni*, 75 L. J. Ch. 721; [1906] 2 Ch. 494; 95 L. T. 258—Swinfen Eady, J.

Foreign Government—Plaintiff—Submission to Jurisdiction—Concession Funds—Action to Appoint New Trustee—Counterclaim for Moneys Due under Concession.—A foreign sovereign who brings an action against his concessionnaires for the mere appointment of a new trustee of funds subject to the trusts of the concession does not thereby submit to the jurisdiction *quoad* a counterclaim for moneys payable under the concession, and such a counterclaim will be struck out on his application. *Held*, further, as a matter of discretion in the particular case, that, independently of the question of jurisdiction, a counterclaim so foreign to the subject-matter of the action must be struck out under Order XIX. rule 3. *South African Republic v. Transvaal Northern Railway*, 67 L. J. Ch. 92; [1898] 1 Ch. 190; 77 L. T. 555; 46 W. R. 151—North, J.

6. INTERLOCUTORY PROCEEDINGS.

(a) Summons for Directions.

Foreclosure.—The Court has jurisdiction to make an order for foreclosure in chambers on a summons under Order XV. Whether there is jurisdiction to make the usual order for accounts and enquiries, foreclosure or sale, on the hearing of a summons for directions under Order XXX., *quære*; but if such an order is made without objection on the hearing of a summons for directions under that Order, it cannot subsequently be set aside solely on the

ground of want of jurisdiction. *Horton v. Bosson*, 80 L. T. 435—C.A.

Notice of Application—Security for Costs after Judgment—Proceedings before Official Referee—Jurisdiction.]—A summons for directions taken out under Order XXX. of the Rules of the Supreme Court ceases to operate with the trial of the action, so that an application for security for costs for subsequent proceedings—for example, the taking of an account before an official referee ordered at such trial—must be made by separate summons, and cannot be made on notice under rule 5 of Order XXX. *Brown v. Haig*, 74 L. J. Ch. 591; [1905] 2 Ch. 379; 93 L. T. 99; 54 W. R. 26—Kekewich, J.

But the Court has jurisdiction under Order LXV. rule 6 to order security for such costs in a proper case on a proper application. *Ib.*

Application by Defendant on Notice under Summons—Order Striking out Statement of Claim and Dismissing Action—“Interlocutory matter or thing.”]—When a summons for directions has been taken out, an order striking out the statement of claim in an action, on the ground that it discloses no reasonable cause of action and dismissing the action as frivolous, may be made in chambers on the application of a defendant, by notice under the summons for further directions, inasmuch as such application has reference to an “interlocutory matter or thing” within Order XXX. rule 5, that rule not being confined to the special matters mentioned in rule 2 of the same order. *Pepperell v. Hird*, 71 L. J. Ch. 282; [1902] 1 Ch. 477; 50 W. R. 491—Byrne, J.

No Summons for Directions—Statement of Claim—Judgment in Default of Defence.]—K. commenced an action against C. for an injunction. C. appeared. K. having no motion obtained an interim injunction, delivered a statement of claim to C. without taking out a summons for directions as required by Order XXX. rule 1 (b). C. failed to deliver a defence, and K. moved for judgment in default of defence, under Order XXVII. rule 11. At the hearing of the motion C. contended that it should be dismissed as irregular, since it and the delivery of the statement of claim were steps in the action, and they were taken without first taking out a summons for directions:—*Held*, that C. was not entitled to have the motion dismissed. K.’s procedure was irregular, but C.’s only remedies were to take out a summons to have the action dismissed under Order XXX. rule 8, or to move to have the notice of motion set aside as irregular. *Kemp v. Colman*, 80 L. T. 54—D.

(b) Ordinary Summons.

Summons to Vary Certificate—Decision of Judge in Chambers.]—Upon a summons to vary the certificate of a Master in respect of an item which the Judge in chambers has adjudicated upon, it is open to the Judge before whom the summons comes, in open Court, to reconsider and reverse the previous decision in chambers. *Howlings v. Graham*, 70 L. J. Ch. 568; 84 L. T. 497—Joyce, J.

Adjournment into Court—Costs.]—A party to

a summons in chambers in the Chancery Division has a right to have the summons adjourned into Court, but his right, in cases where the rules do not make an order by the Judge in person necessary, is subject to the discretion of the Court as to the costs of the adjournment, which will not be exercised against him merely because his application has failed. *Lloyd’s Bank v. Princess Royal Colliery Co.* (No. 2), 82 L. T. 559; 43 W. R. 427—Byrne, J.

Summons to Enforce Award—Service on Foreigner out of the Jurisdiction.]—*See* ARBITRATION.

(c) Summary Judgment.

Order XIV.—Judgment Signed against One Defendant.]—Rule 5 of Order XIV. does not apply to the case of an action against two persons in the alternative, where one or other of them only can be made liable, so that if judgment is signed against one, the rule does not enable a plaintiff to proceed against the other. *Morel v. Westmorland (Earl)*, 73 L. J. K.B. 93; [1904] A.C. 11; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38—H.L. (E.)

—Leave to Defend—Payment into Court.]—Judgment should only be ordered under Order XIV. where, assuming all the facts in favour of the defendant, they do not amount to a defence in law. *Jacobs v. Booth’s Distillery Co.*, 85 L. T. 262; 50 W. R. 49—H.L. (E.)

Where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him, or by being put under terms to pay money into Court as a condition of obtaining leave to defend. *Ib.*

—Leave to Defend upon Defendant giving Security to Satisfaction of Master—Decision of Master as to Sufficiency of Security Tendered—Appeal from Master.]—Where leave to defend is given under Order XIV. rule 6, upon security being given by the defendant to the satisfaction of the Master, no appeal lies from the decision of the Master as to the sufficiency of the security tendered. *Hoare v. Morshead*, 72 L. J. K.B. 724; [1903] 2 K.B. 359; 89 L. T. 125; 52 W. R. 87—C.A.

—Leave to Sign Judgment—Payment into Court—Receiving Order—Secured Creditor.]—Money paid into Court under an order under Order XIV. giving the defendant leave to defend upon the terms that the plaintiff may sign final judgment if the money is not paid in is money paid in as security to abide the event of the action. Accordingly, if the defendant files a bankruptcy petition before the event is determined, the trustee in his bankruptcy is not entitled to payment out of the money. *Ford, In re; MacLister, ex parte*, 69 L. J. Q.B. 690; [1900] 2 Q.B. 211; 82 L. T. 625; 43 W. R. 638; 7 Manson, 281—Wright, J.

—Improper and Vexatious Action—Stay of Execution—Mortgage—Foreclosure Action—Second Action for Principal and Interest while

First Action Pending—Application for Judgment under Order XIV.]—It is an abuse of the process of the Court for a mortgagee to commence an action in the King's Bench Division against his mortgagor to recover the amount of the principal and interest due under the covenant in the mortgage deed while there is still pending in the Chancery Division a foreclosure action between the same parties in respect of the same mortgage deed, although the writ in this latter action contains no claim for payment of principal and interest. *Poulett (Earl) v. Hill (Viscount)* (62 L. J. Ch. 466; [1893] 1 Ch. 277) followed. *Williams v. Hunt*, 74 L. J. K.B. 364; [1905] 1 K.B. 512; 92 L. T. 192—C.A.

— Money-lender—Action to Enforce Security—Interest Charged Prima Facie Excessive.]—In an action by a money-lender to enforce a security taken in respect of money lent and interest thereon, it appeared, upon an application by the plaintiff for final judgment under Order XIV., that the interest charged on the loan was *prima facie* excessive:—*Held*, that the action was not within the operation of Order XIV. since it involved a further enquiry, which could not be made upon that application, as to whether the transaction was harsh and unconscionable within the meaning of section 1, subsection 1 of the Money-lenders Act, 1900, and the defendant entitled to relief under that Act. *Wells v. Allott*, 73 L. J. K.B. 1023; [1904] 2 K.B. 842; 91 L. T. 749; 53 W. R. 195; 20 T. L. R. 694—C.A.

— Excessive Bonus—Harsh and Unconscionable Transaction.]—The plaintiff, who was a money-lender, lent to the defendant at various times sums of money amounting in all to 940*l.*, which, with a cash bonus of 100*l.* agreed to be paid to the plaintiff, made a debt of 1,040*l.* Upon each advance the defendant gave to the plaintiff a bonus in the shape of shares in a company. In this way the plaintiff received from the defendant shares to the value of 1,800*l.*, and he also held an undertaking to deliver a number of other shares. The defendant brought an action in the Chancery Division to have these transactions re-opened, and the plaintiff sued in the King's Bench Division to recover the 1,040*l.* Upon an application in this latter action for judgment under Order XIV., the defendant alleged that the transactions were harsh and unconscionable and that he was entitled to relief under the Money-lenders Act, 1900. The Master and Judge gave the defendant leave to defend upon bringing 1,040*l.* into Court:—*Held*, that the case was not one for Order XIV., and that the defendant must have unconditional leave to defend. *Dott v. Bonnard*, 21 T. L. R. 166—C.A.

— Action on Foreign Judgment—Substantial Question for Trial.]—Leave should not be given to sign judgment under Order XIV. unless it is clear that there is no real substantial question to be tried. Therefore when, in an action on a foreign judgment, the defendant made an affidavit that the judgment had been obtained by fraud,—*Held*, that the plaintiff should not be allowed to sign judgment under Order XIV. *Codd v. Delap*, 92 L. T. 510—H.L. (E.)

— Action Referred to Master with Consent of Parties—Appeal from Master to Court of Appeal.]—No appeal from the decision of a Master, to

whom an action has been referred with the consent of the parties, under Order XIV. rule 7, lies direct to the Court of Appeal. Whether any appeal lies to the Divisional Court in such a case—*q.v.* *Fraser v. Fraser* (No. 1), 73 L. J. K.B. 6; [1904] 1 K.B. 56; 89 L. T. 491; 52 W. R. 147; 20 T. L. R. 54—C.A.

— Appeal to Divisional Court.]—Where an action in the King's Bench Division has been referred to a Master, with the consent of the parties, under Order XIV. rule 7, a motion lies to a Divisional Court, under Order XL. rules 6 and 6a, to set aside the judgment which he has directed to be entered, and to enter some other judgment. *Fraser v. Fraser* (No. 2), 74 L. J. K.B. 183; [1905] 1 K.B. 368; 92 L. T. 341; 53 W. R. 310; 21 T. L. R. 186—C.A.

Reference to Master by Consent—Power to Give Costs.]—See *Haycocks, Lim. v. Mulholland*, 73 L. J. K.B. 125.

Writ Specially Indorsed—Ejectment for Non-payment of Rent—Motion for Final Judgment—Amendment of Indorsement.]—In an action to recover possession of land from J. C. for non-payment of rent, the indorsement of the writ stated that the plaintiff's claim was to recover possession of No. 13 M. Square, Dublin, and that one year's rent was due—90*l.* On motion for final judgment, leave was given to the plaintiff to amend the writ and to sign final judgment for recovery of possession, with costs of the action and of the motion. The indorsement as amended stated that the plaintiff claimed to recover possession of No. 13 M. Square, Dublin, held from the plaintiff's predecessor under lease dated October 13, 1882, made between W. N. G. and E. C., at the rent of 90*l.*, that one year's rent was due, of which the particulars were given, and that all the lessor's interest was vested in the plaintiff:—*Held*, that the writ as amended was not specially indorsed, and also that the plaintiff should not have been allowed, at the time of moving for judgment, to amend so as to change an ordinary writ into a specially indorsed writ. *Guinness v. Caraher*, [1900] 2 Ir. R. 505—C.A.

(d) Motion.

Exhibits to Affidavit in Support—Service of Copies of Exhibits.]—Upon a motion for attachment it is not within the terms of Order LII. rule 4 necessary in all cases to serve, together with the notice of motion and the copy of the affidavit upon which the motion is founded, copies of the exhibits to the affidavit so as to impose upon a moving party not serving copies of the exhibits the absolute result of having his motion dismissed for irregularity. *Carter v. Roberts*, 72 L. J. Ch. 655; [1903] 2 Ch. 312; 89 L. T. 239; 51 W. R. 520—Byrne, J.

A party, however, moving to attach, who did not furnish copies of such exhibits as were reasonably necessary to enable the respondent to understand and know the nature of the evidence that would be brought against him, would be in peril of having his motion dismissed on the ground that he had not sufficiently brought the matter before the respondent. *Hutchings, In re* (22 L. J. N.C. 174;

W. N. (1887), p. 254), distinguished. *Rosenbaum v. Belson* (86 L. J. N.C. 309; W. N. (1901), p. 124) commented on. *Ib.*

Undertaking—Remedy for Breach—Committal or Attachment—Service of Order containing Undertaking.]—The proper method of enforcing an undertaking given in Court, whether affirmative or negative, is committal, and not attachment. Notice of motion for committal must be personally served; but service of the order containing the undertaking is not necessary. *D. v. A. & Co.*, 69 L. J. Ch. 382; [1900] 1 Ch. 484; 82 L. T. 47; 48 W. R. 429—Cozens-Hardy, J.

(e) *Short Cause.*

Affidavits in Support.]—In actions coming on as short causes without pleadings or notice of motion, copies of the affidavits in support should be left with the papers for the use of the Judge. *Church Stretton Mineral Water Co., In re*, 52 W. R. 375—Byrne, J.

Setting Down for Trial—Motion for Judgment.]—A debenture-holder's action on a summons for directions had been ordered by a Master to be set down for trial without pleadings to be heard as a short cause; judgment to be applied for on minutes; the evidence to be taken by affidavit. Two days' notice of motion was served on the defendants, and an objection was taken at the hearing that this was not in compliance with the Master's order, and that ten days' notice of trial ought to have been given under Order XXXVI. rule 14:—*Held*, that the order was defective in that it did not give the plaintiff leave to serve notice of trial, but, assuming that leave to serve such notice was implied in the order, it remained that the order was to set down the action for trial, and that ten days' notice must be given. *Pringle & Co., In re; Pawnall v. Pringle & Co.*, 89 L. T. 743—Buckley, J.

(f) *Payment into and out of Court.*

(i.) *Payment into Court.*

Admission of Liability—Defamation—Death of Defendant—Abatement of Action.]—In an action of libel the defendant, without denying liability, paid a sum of money into Court, saying that the amount so paid was sufficient to satisfy the plaintiff's claim. While the money was still in Court, and before trial of the action, the defendant died. The legal personal representatives of the defendant made an application by way of originating summons for an order as to whom the money in Court should be paid:—*Held*, that the Court had jurisdiction to declare to whom the money should be paid, and that, under the circumstances, it should be paid to the plaintiff. *Brown v. Feeney*, 75 L. J. K.B. 494; [1906] 1 K.B. 563; 94 L. T. 460; 54 W. R. 445; 22 T. L. R. 893—C.A.

Defamation—Death of Plaintiff—Abatement of Action—Payment out of Court.]—In an action of libel the defendant pleaded an apology in mitigation of damages under section 1 of the Libel Act, 1843, and, admitting liability, paid a sum of money into Court, saying that the amount so paid was sufficient to satisfy the

plaintiff's claim. While the money was still in Court, and before trial of the action, the plaintiff died. The defendant made an application by way of originating summons for an order that the money should be paid out of Court to him; and there was a cross-application by the personal representatives of the plaintiff for payment out to them. The Judge having decided that, under the circumstances, the money should be paid out to the personal representatives of the plaintiff, the Court declined to interfere with the exercise of his discretion. *Brown v. Feeney* (75 L. J. K.B. 494; [1906] 1 K.B. 563) applied. *Maarwell v. Wolseley (Viscount)*, 76 L. J. K.B. 163; [1907] 1 K.B. 274; 96 L. T. 4; 23 T. L. R. 157—C.A.

Mention of Amount Paid in to Jury.]—In an action for personal injuries the defendants admitted liability and paid a sum into Court:—*Held*, that the amount paid in should not be mentioned to the jury. *Jaques v. South Essex Waterworks Co.*, 20 T. L. R. 563—Lord Alverstone, C.J.

Counterclaim—Taking Money Out.]—In an action for a liquidated demand, brought by plaintiffs carrying on business outside the jurisdiction, the defendants admitted the claim and lodged in Court the full amount thereof, but set up a counterclaim for damages to a greater amount. The Court granted an application under Order XXII. rule 6 for an order restraining the plaintiffs from drawing out the money so lodged until the matter in dispute in the counterclaim should be disposed of, notwithstanding that security for costs had been given by the plaintiff. *Cyprian Fabre & Co. v. Hall*, [1905] 2 Ir. R. 132—K.B. D.

Denial of Liability—Co-defendants.]—Where two defendants are sued on a joint tort and one defendant pays into Court with a denial of liability a sum sufficient to satisfy the plaintiff's claim, such payment does not disentitle the plaintiff to judgment for costs against the other defendant. *Penny v. Wimbledon Urban Council*, 68 L. J. Q.B. 704; [1899] 2 Q.B. 72; 80 L. T. 615; 47 W. R. 565; 68 J. P. 406—C.A.

A local authority, acting under the powers of section 150 of the Public Health Act, 1875, employed a contractor to make up a road in their district. The contractor in doing the work left obstructions upon the road unguarded. The plaintiff was thereby injured. In an action against the local authority and the contractor both defendants, who delivered separate defences, denied liability. The contractor with his defence paid 75*l.* into Court. The jury awarded 50*l.* damages to the plaintiff, which sum was paid out of the money in Court:—*Held*, that the payment into Court by the contractor afforded no defence to the local authority, and did not disentitle the plaintiff to judgment against them for costs. *Ib.*

Before Defence—Right to Costs.]—The defendant in an action to recover the balance of an account paid money into Court in satisfaction of the plaintiff's claim before defence. The plaintiff accepted the money so paid into Court and gave the defendant notice that he had done so within the four days limited by Order XXII. rule 7, but on the same day the defendant's

solicitors gave notice that they would not sign a consent to the action being withdrawn from the short cause list unless the plaintiff gave an undertaking to pay the defendant's costs incurred between the date of the payment of money into Court and its acceptance by the plaintiff:—*Held*, that Order XXII. rule 7 applied to such a case, and that the Judge at the hearing could not order the plaintiff to pay the costs in question. *Lomer v. Waters*, 67 L. J. Q.B. 653; [1898] 2 Q.B. 326; 79 L. T. 81—C.A.

With Defence—Two Defendants.—Where an action to recover damages for personal injuries has been brought against a district council and their contractor, and they have delivered separate defences denying liability, but the contractor has paid money into Court with a denial of liability, the district council cannot, upon a verdict being found for the plaintiff for a less amount than the sum paid in, avail themselves of such payment and escape judgment being entered against them for costs. *Penny v. Wimbledon Urban Council*, 67 L. J. Q.B. 754; [1898] 2 Q.B. 212; 78 L. T. 748; 62 J. P. 582—Bruce, J.

Separate Causes of Action—Payment into Court generally—Particulars of Cause of Action in Respect of which Money Paid in.—The plaintiffs, who were shipowners, claimed against the defendants, who were the charterers of one of the plaintiffs' ships—first, the balance of freight under the charter-party; secondly, a sum alleged to have been overpaid to the defendants' stevedores, who were employed by the plaintiffs at the port of loading in pursuance of the charterparty upon the faith that they charged no more than other stevedores of good standing at those ports; and thirdly, damages for demurrage. The defendants, while denying liability, brought into Court 250*l.* as sufficient to satisfy the plaintiffs' claim. The plaintiffs applied for an order for particulars of the payment into Court:—*Held*, that, as the three claims were in respect of separate causes of action, the plaintiffs were entitled to particulars stating how much was paid into Court in respect of each head of claim. *James Tucker Steamship Co. v. Lamport and Holt*, 23 T. L. R. 10—C.A.

General Payment into Court—Costs.—Twelve persons, a mortgagor and his mortgagees in possession, joined as co-plaintiffs in an action to recover damages for injuries to the mortgaged properties by a flood caused by the defendants' negligence. The defendants, while denying liability, paid into Court 100*l.*, but without apportioning the amount amongst the several plaintiffs. The defendants afterwards admitted their liability, and the action was referred to an official referee, who found against the claim of the mortgagor, but awarded the other plaintiffs several small sums amounting in all to 79*l.* 10*s.*, and ordered that judgment should be entered for the defendants with costs from and after the date of the payment into Court, after deducting therefrom the plaintiffs' costs up to that date:—*Held*, that the plea of payment into Court was a good plea, although it did not apportion the amount paid in to the various causes of action, and that the judgment of the official referee was therefore correct. *Benning*

v. Ilford Gas Co., 76 L. J. K.B. 681; [1907] 2 K.B. 290; 97 L. T. 102; 23 T. L. R. 435—D.

Two Causes of Action—Counterclaim—Money Accepted—Satisfaction—Right to Continue Action and Counterclaim.—Under Order XXII. rule 1, money can be paid into Court only in respect of a claim for debt or for damages; it cannot be paid in in respect of an action brought to establish a right and obtain an injunction. *Coote v. Ford*, 68 L. J. Ch. 508; [1899] 2 Ch. 93; 80 L. T. 697; 47 W. R. 489, 548—C.A.

Where a plaintiff brings an action for damages and an injunction, and the defendant pays money into Court "in respect of the matters complained of," with a denial of liability, and sets up by way of counterclaim a right adverse to that claimed by the plaintiff, the latter cannot, by taking the money out of Court "in satisfaction of the claim in respect of which it is paid in," convert the payment into Court into an admission of his title so as to put an end to the whole of the action and the counterclaim. *Ib.*

Semble, a plaintiff in an action for damages and an injunction, who takes out of Court money which has been paid in in respect of the damages with a denial of liability, can go on with the rest of his action, and will not be deprived of his costs if he succeeds in establishing his right but fails to prove that he has sustained damages to a greater amount than the sum paid into Court. *Ib.*

If the entire claim or cause of action is satisfied by payment into Court, it would seem that the proceedings are not available for a plea of *res judicata*; but if either party were to attempt to re-open the matter, the appropriate defence of the other would be an application to the Court to stay proceedings either under rule 6 of Order XXII. or as an abuse of the process of the Court. *Coote v. Ford*, *supra*, *per* Stirling, J.

Libel—Newspaper—Failure of Defence under Libel Act—Claim to Treat Money Paid in as General Payment into Court.—In an action for a libel contained in a newspaper, the defendants pleaded that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action they had published a full apology, and they brought into Court 5*l.*, and said that that sum was sufficient to satisfy the plaintiff's claim. At the trial of the action the defendants' case was conducted on the basis that the defence was under section 2 of the Libel Act, 1843. The jury found that the libel was published without actual malice, but not without gross negligence, and that the apology and the amount paid into Court were both sufficient. The Judge having entered judgment for the plaintiff,—*Held*, on appeal, that, as the defence was intended to be, and at the trial was treated as, a defence under the Libel Act, 1843, the defendants were not entitled to treat the payment into Court as a general payment into Court under Order XXII. rule 1, and that the plaintiff was therefore entitled to judgment. *Oxley v. Wilks*, 67 L. J. Q.B. 678; [1898] 2 Q.B. 56; 78 L. T. 728—C.A.

— **Insufficiency of Apology.**—In a libel action judgment was given for the plaintiff for 35*l*. The defendants had paid 50*l*. into Court with their plea of apology. It was admitted, however, by them that the apology was insufficient:—*Held*, that the defence must be treated as one that had altogether failed; that the plaintiff never having had an opportunity of taking the money out of Court without accepting the apology, was entitled to his costs. *Sley v. Tillotson*, 62 J. P. 505—Bruce, J.

Money Received by Defendant, but Paid Away.—The plaintiff and defendant were co-trustees. In August, 1893, the plaintiff became absolutely entitled to the whole of the trust estate. Shortly afterwards the plaintiff and defendant transferred certain shares (forming part of the trust estate) into the name of the defendant. The defendant sold and transferred these shares to a purchaser, and received the purchase-money. The plaintiff moved for an order that the defendant should pay the purchase-money into Court (the defendant alleging, and the plaintiff denying, that it had ceased to be trust-money). The defendant, in his affidavit in answer to the motion, said that, before any question was raised, he in good faith paid away all the purchase-money, and that he had no power over the shares; but did not say that he had no power over the purchase-money:—*Held*, that he must be ordered to pay the purchase-money into Court. *Benson, In re; Elletson v. Pillers*, 63 L. J. Ch. 5; [1899] 1 Ch. 39; 79 L. T. 590; 47 W. R. 264—North, J.

Payment into Court—Verdict for Less Amount—Taxation.—*See* COSTS.

Costs—Denial of Liability—Judgment for Plaintiff for Less than Amount Paid into Court—Costs of Action—Order for Payment out of Court—Discretion.—Where a plaintiff after the defendant has, with a denial of liability, paid money into Court in satisfaction of the plaintiff's claim, proceeds with the action and recovers judgment for an amount which carries costs but is less than that paid into Court, he is entitled to the costs of the action up to the time of payment into Court and to the costs of the issues upon which he has succeeded, and the defendant is entitled to the general costs of the action subsequent to the date of such payment into Court. *Powell v. Vickers, Sons & Maxim*, 76 L. J. K.B. 122; [1907] 1 K.B. 71; 95 L. T. 774; 23 T. L. R. 78—C.A.

Where money has been paid into Court, with a denial of liability, in satisfaction of the plaintiff's claim, the plaintiff, if he recovers less than the sum paid in, is *prima facie* entitled, under Order XXII. rule 6 (c), to have paid out to him so much of the sum as is necessary to satisfy the claim which he has established, but he is not absolutely entitled to an order to that effect, inasmuch as the Judge has a discretion under the rule upon proper evidence to order the money to remain in Court. *Ib.*

Costs of Issue—Payment into Court with Denial of Liability—Verdict for Amount Paid in—Costs of Issues.—In an action for damages for personal injuries caused by the negligence of the defendants' servant, the defendants by their statement of defence denied any negligence on the

part of their servant, and, while denying liability, paid money into Court. At the trial the jury returned a verdict for the plaintiff for the exact amount that the defendants paid into Court:—*Held*, that the plaintiff was entitled to an order that the defendants should pay to him his costs of and occasioned by the issue of negligence raised by the defence. *Fitzgerald v. Tilling*, 96 L. T. 718—C.A. *And see* COSTS.

(ii.) *Payment out.*

Estate Duty—Tenant for Life.—When payment out of Court is authorised of funds in which one of the petitioners had a life interest now released, the practice of the Court is to retain a sufficient sum of money to satisfy the amount of estate duty payable in the event of the death of the tenant for life within twelve months of the date of the release. *Taylor v. Poncia*, 49 W. R. 596—Cozens-Hardy, J.

Fund under 20*l*.—Where a person entitled to a fund in Court has died intestate, the Court will not allow the fund to be paid out to the person entitled to take out letters of administration to the estate of the intestate, but who has not done so, even although the fund is under 20*l*. *Hinings v. Hinings* (2 H. & M. 32) not followed. *Frogley v. Phillips*, 50 W. R. 184—Byrne, J.

Payment Out to Wrong Person—Stop Order—"Default" of Paymaster-General.—The words "guilty of any default" in section 5 of the Court of Chancery (Funds) Act, 1872, point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his direction and superintendence. Consequently, where a person entitled to a fund in Court has not obtained a stop order on the fund, and it has been paid out to a wrong person, the Paymaster-General is not guilty of default within the meaning of the section, and the Treasury cannot be called upon to replace the fund in Court out of the Consolidated Fund. *Bath v. Bath*, 70 L. J. Ch. 270; [1901] 1 Ch. 460; 84 L. T. 107; 49 W. R. 341—Kekewich, J. In C.A., but not on this point, 71 L. J. Ch. 500; 86 L. T. 435; 50 W. R. 535.

(g) *Discovery. See* DISCOVERY.

(h) *Inspection of Property.*

Identification of Subject-matter in Dispute—Production to Witness out of Jurisdiction.—The Court or a Judge may, either under Order XXXVII. rule 5 or under Order L. rule 3, in any cause or matter, where it shall appear to be necessary for the purposes of justice, order that the property which is the subject-matter in dispute shall be sent out of the jurisdiction for the purpose of identification by witnesses who are to be examined on commission. *Chaplin v. Puttick*, 67 L. J. Q.B. 516; [1893] 2 Q.B. 160; 73 L. T. 410; 46 W. R. 481—C.A.

Interlocutory Application for Order to Enter upon and Make Excavations in Defendant's Land—Action to Restrain Interference with the

Plaintiffs' Water Supply.—The plaintiffs applied by motion for an order permitting them to enter upon the defendants' land in order to inspect a certain shaft, and if necessary sink other shafts for the purpose of ascertaining whether water which came to the surface at a certain spring flowed underground in a known and defined channel:—*Held*, without deciding whether the plaintiffs might or might not be entitled to make the necessary inspection and excavations at some time, that there was no sufficient evidence to justify the Court in making any order on the motion. *Bradford Corporation v. Ferrand* (No. 1), 86 L. T. 497—Farwell, J.

Trial—Passing-off Goods—Probability of Deception—Evidence—View by Judge.—In an action to restrain the defendant from running omnibuses so got up as to be a colourable imitation of the plaintiffs' omnibuses, the plaintiffs offered no evidence of actual deception or probability of deception; but the Judge, having inspected the omnibuses, and come to the conclusion on their appearance that the defendant's omnibuses were calculated to deceive, granted an injunction:—*Held*, on appeal, that a Judge is not entitled to place his impression derived from a view in the place of such evidence as should be given to support an action of deceit, and that the plaintiffs' case failed for want of evidence. *London General Omnibus Co. v. Lavell*, 70 L. J. Ch. 17; 83 L. T. 453—C.A.

A view under Order L. rule 4 is not intended to take the place of evidence, but is merely to enable the tribunal to understand the questions raised, and to follow and apply the evidence. *Ib.*

(i) *Staying Proceedings.*

Abuse of Process of Court—Indorsement on Writ—Striking Out.—Where certain claims in an indorsement on a writ in an action are an abuse of the process of the Court, the better course is not to strike out those paragraphs only in which the claims in question are contained, but to strike out the writ altogether and leave the plaintiff to take such other proceedings as he may be advised. *Huntly (Marchioness) v. Gaskell*, 75 L. J. Ch. 66; [1905] 2 Ch. 656—C.A. Affirming, 93 L. T. 297; 21 T. L. R. 752—Kekewich, J.

Frivolous and Vexatious Applications—Interlocutory Proceedings before Judgment—Order to Prevent—Costs.—Before the trial of the action the defendant made twenty-four interlocutory applications with reference to pleadings, discovery, and the like. Most of these applications had been dismissed with costs, and the remainder had proved abortive owing to some irregularity in service or the failure of the defendant to appear. None of the costs incurred in these applications had been paid by the defendant:—*Held*, that there was jurisdiction to make an order prohibiting any further application by the defendant under the summons for directions, or on any matters of procedure, without the leave of the Judge in chambers, and an order was made to that effect. *Grepe v. Loam* (57 L. J. Ch. 435; 37 Ch. D. 168) applied. *Kinnaird (Lord) v. Field* (No. 1),

74 L. J. Ch. 554; [1905] 2 Ch. 306; 93 L. T. 147; 54 W. R. 3—C.A.

— **Parties Resident out of the Jurisdiction—Cause of Action Arising out of the Jurisdiction—Inconvenience.**—The power of the Court to stay an action which is vexatious and oppressive and an abuse of the process of the Court will be exercised where an action is brought by a person residing out of the jurisdiction against a person residing out of the jurisdiction in respect of matters which occurred out of the jurisdiction, if it appears that the effect of bringing the action in the English Court will be to subject the defendant to any injustice or unfair disadvantage to which he would not be subjected if proceedings were taken in another accessible and competent Court. *Logan v. Bank of Scotland*, 75 L. J. K.B. 218; [1906] 1 K.B. 141; 94 L. T. 153; 54 W. R. 270; 22 T. L. R. 187—C.A.

The inconvenience of trying the action in the English Court may be so great as to constitute such injustice or unfair disadvantage to the defendant. *Ib.*

— **Interlocutory Application in County Court—Subsequent Action in High Court raising same Question.**—Where an action was brought in good faith to try a legal point which ought to be tried, a motion, under Order XXV. rule 4, to dismiss the action as frivolous and vexatious and an abuse of the process of the Court, on the ground that the point was *res judicata*, having been raised and determined in previous proceedings, was dismissed with costs in any event. *Lea v. Thursby*, 90 L. T. 265—C.A.

— **Litigating Identically Same Question in Subsequent Action.**—The defendant recovered judgment in an action in a County Court against the plaintiff, and subsequently entered into a compromise under which he executed a deed whereby he released the plaintiff from the judgment debt and covenanted not to tax the costs or take any proceedings to enforce the judgment so long as certain instalments were regularly paid by the plaintiff. The instalments were regularly paid, but the defendant carried in his bill for taxation by the district Registrar upon the ground that the deed of release had been obtained from him by the fraud of the plaintiff. The County Court Judge heard an objection to the taxation, and held that the defendant had been induced by the fraud of the plaintiff to execute the deed; and directed the taxation to proceed. The plaintiff then commenced an action in the County Court claiming a declaration that the defendant had released him from payment of the judgment debt and costs, and also an injunction restraining the defendant from taking any proceedings to enforce payment of the judgment debt and costs. The district Registrar made an order staying the action, and striking out the statement of claim as being frivolous and vexatious and an abuse of the process of the Court. On appeal from an order of a Judge in chambers affirming the district Registrar's order, —*Held*, that, as the County Court Judge had jurisdiction to determine, in the proceedings before him, the question whether the defendant had been induced by the fraud of the plaintiff to execute the deed, and had determined that

question, and as identically the same question was raised in the present action, the Court would order the action to be stayed as being frivolous and vexatious, and an abuse of the process of the Court. *Stephenson v. Garnett*, 67 L. J. Q.B. 447; [1898] 1 Q.B. 677; 78 L. T. 371; 46 W. R. 410—C.A. And see *Goodson v. Grierson*, [1908] 1 K.B. 761—C.A.; and *Norton v. Norton*, 77 L. J. Ch. 312; [1908] 1 Ch. 471—C.A.

— **Action to Revoke Grant of Probate—Laches—Acquiescence.**—A person claiming to be sole next-of-kin of a testator who died ten years before, having made a will leaving his property, very small in amount, to a stranger, brought an action to revoke the grant of probate made to the executor in common form. The plaintiff was shortly after the death of the testator aware of the existence of the will and of its terms, but took no step to contest the will, and allowed the executor to administer the estate. No grounds were alleged for disputing the will. The Court held that it would be contrary to settled principle to allow the plaintiff to proceed with the action, which was groundless and vexatious, and made an order staying further proceedings. *Mahon v. Quinn*, [1904] 2 Ir. R. 267—Andrews, J.

— **Proceedings Brought with Ulterior Motive.**—The motive of a party who commences proceedings before a Court, however reprehensible, is not enough to make it an abuse of process or a fraud upon the Court, unless it be shewn that the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others. *King v. Henderson*, 67 L. J. P.C. 134; [1898] A.C. 720; 79 L. T. 37; 47 W. R. 157; 5 Manson, 308—P.C.

Inherent Jurisdiction of Court—Action Commenced in England—Cause of Action Arising in India—Frivolous and Vexatious—Abuse of Process of Court—Staying Proceedings in England.—In 1902 a deed of separation was executed between the plaintiff, who was then domiciled in India, and her husband. The defendant, a solicitor practising in Madras, was trustee of the deed. The husband made default in paying an allowance under the deed. While the defendant was in England on a holiday in 1906 he was, on the eve of leaving for India, served with the writ in this action, by which the plaintiff charged him with wilful or negligent conduct in his capacity of solicitor when acting for her in India against her husband. At the time of the issue of the writ the plaintiff was temporarily in England. On motion by the defendant to stay or dismiss the action as frivolous and vexatious and an abuse of the process of the Court, *Held*, that the action ought to be dismissed, and the plaintiff must be left to take any proceedings she thought fit against the defendant in India. *Logan v. Bank of Scotland* (75 L. J. K.B. 218; [1906] 1 K.B. 141) applied. *Egbert v. Short*, 76 L. J. Ch. 520; [1907] 2 Ch. 205; 97 L. T. 90; 23 T. L. R. 558—Warrington, J.

Action in Foreign Country—Application to Stay Action in England.—Only very special circumstances will justify the Court in staying an action here on the ground that proceedings

are pending in a foreign Court out of the King's dominions. Where, therefore, probate proceedings were pending in France and subsequently a probate action in respect of the same will was commenced in England—the plaintiffs not being the same in both cases—the Court refused to stay the English action. *Bryan, In the goods of; Board of Education v. Reubell*, 20 T. L. R. 290—Jeune, P.

Action in King's Bench Division—Action brought in Chancery Division by Defendant in King's Bench Division—Cross-actions—Refusal to Stay Chancery Proceedings.—A money-lender issued in the King's Bench Division a specially indorsed writ claiming £500. on a promissory note signed by the defendant. The borrower admitted the facts, but said that various transactions between him and the money-lender were harsh and unconscionable, and a week after the issue of the writ in the King's Bench Division issued a writ against the money-lender in the Chancery Division asking that these transactions might be reopened, and for an account. On a motion by the money-lender that the Chancery action might be dismissed with costs, as an abuse of the process of the Court, or stayed, *Held*, that the motion failed. Although the money-lender's proceedings in the King's Bench Division came first in point of time, and although the King's Bench Division could decide all other questions between the parties on a counterclaim by the borrower, yet the Chancery Division had the better machinery for taking accounts, which, moreover, were assigned to it by the Judicature Act, 1873, s. 34, sub-s. 3, and as a general rule it was preferable to allow that action to go on in which the burden of proof rested on the plaintiff. Both actions must continue, unless the King's Bench transferred or stayed the King's Bench action, or until the Court of Appeal, which controlled both Divisions, had pronounced judgment. *Thomson v. South-Eastern Railway* (51 L. J. Q.B. 322; 9 Q.B. D. 320) approved. *Rechnitzer v. Samuel*, 95 L. T. 75—Buckley, J.

Tender by Debtor of Amount—Act of Bankruptcy Committed by Debtor.—The plaintiff, who had obtained two judgments against the defendant for 32*l.* and 41*l.* respectively, served on the defendant a bankruptcy notice in respect of the judgment for 41*l.* The defendant tendered to the plaintiff the amount due on the judgment for 32*l.*, which the plaintiff refused to accept. Upon the application of the defendant, the Judge at chambers made an order staying all proceedings on the judgment for 32*l.*, upon payment of that amount. When this order was made the defendant had committed an available act of bankruptcy, which was known to the plaintiff and brought to the notice of the Judge:—*Held*, that if the Judge had power to make such an order he had not properly exercised his discretion, and the order ought not to have been made. *Brook v. Emerson*, 95 L. T. 821—C.A.

Arbitration Clause.—*See* ARBITRATION, col. 32.

— **Step in Proceedings.**—*See* ARBITRATION, cols. 34–5.

Company in Voluntary Liquidation.—*See* COMPANY, col. 475.

(j) *Injunction.*

Interlocutory Relief—Motion for Injunction by Defendant before Counterclaim—Relief Arising from Same Cause of Action—Contract—Mandatory Injunction to Restrain Interference with Occupation of House.]—Where an action is brought by a plaintiff relying on a cause of action—for example, a contract—and the defendant wants relief arising from the same cause of action—not necessarily the same relief—he may by motion in the same action, before counterclaim delivered, obtain interlocutory relief until the trial. *Collison v. Warren*, 70 L. J. Ch. 382; [1901] 1 Ch. 812; 84 L. T. 482—C.A.

Where the plaintiff, the proprietor of an hotel, had executed a deed of assignment of all his property to a trustee for the benefit of his creditors, and had been retained as manager by the trustee under a power in that behalf contained in the deed, and subsequently dismissed, the Court, at the instance of the trustee of the deed, the defendant in the action, granted an injunction to restrain the plaintiff until the trial from interfering with or disturbing the trustee in his occupation of the hotel. *Spurgin v. White* (2 Giff. 473) followed. *Ib.* And see **INJUNCTION**.

(k) *Receiver.*

Appointment of—Service of Summons—Party for whom no Appearance has been Entered.]—Where a plaintiff has obtained judgment against a defendant on default of appearance, a summons taken out by him for the appointment of a receiver of property of the defendant cannot be served by filing it with the proper officer in accordance with Order LXVII. rule 4, but falls within rule 5 of that order, as being a document of which personal service is required. *Tilling v. Blythe*, 68 L. J. Q.B. 350; [1899] 1 Q.B. 557; 80 L. T. 44; 47 W. R. 273—C.A.

Rights and Duties—Receiver Appointed in an Action—Sale by Mortgagee under Order Outside the Action—Purchase by Receiver.]—The general principle that a receiver cannot, without special leave, purchase the property of which he is receiver, applies equally where the sale is not under a decree in the action in which the receiver was appointed, but is by a mortgagee selling with leave of the Court under his power of sale. *Nugent v. Nugent*, 77 L. J. Ch. 271; [1908] 1 Ch. 546—C.A.

Costs—Judgment—Taxation Unfinished.]—The Court has jurisdiction independently of section 25, sub-section 8 of the Judicature Act, 1873, to appoint a receiver to protect an equitable fund out of which costs are payable by an order of the Court, although the costs are not yet taxed and the order does not specify any particular fund. *Cummins v. Perkins*, 68 L. J. Ch. 57; [1899] 1 Ch. 16; 79 L. T. 456; 47 W. R. 214—C.A.

Protection of Fund—Separate Estate—Married Woman.]—Where an action brought by a married woman had been dismissed with costs, to be paid out of her separate estate, the

Court appointed a receiver of the share of an estate coming to the married woman to the amount of the bill of costs delivered by the solicitors, although the taxation of the bill had not been completed by the granting of a certificate. *Ib.*

Ejectment Action—Defendant in Possession—Disputed Title—Tenants—Discretion.]—Under section 25, sub-section 8 of the Judicature Act, 1873, the Court has jurisdiction to appoint a receiver in an ejectment action where the title to real property is in dispute. On such an application all the circumstances must be considered, and where it appears on the materials then before the Court that the plaintiff will probably succeed in the action, and that the tenants on the property will run a risk of having to pay their rents twice, the Court will appoint a receiver till the trial of the action. *Foxwell v. Van Grutten* (66 L. J. Ch. 53; [1897] 1 Ch. 64) distinguished. *John v. John*, 67 L. J. Ch. 616; [1898] 2 Ch. 573; 79 L. T. 362; 47 W. R. 52—C.A.

Public-house—Licences in Jeopardy—Landlord and Tenant—Ejectment—Disputed Title.]—By an agreement in writing the tenant of a public-house agreed with the landlords, a firm of brewers, that he would do nothing to jeopardise the licences; that he would reside on the premises and would not close them except for the period required or allowed by law; and that he would upon quitting the premises assign over and take all steps to transfer the licences to the landlords. In breach of this agreement the tenant, during the continuance of the tenancy, shut up and left the premises, thereby jeopardising the licences. The landlords commenced an action for recovery of possession, and moved for the appointment of an interim receiver in order to preserve the licences:—*Held*, that the Court had power under the Judicature Act, 1873, s. 25, sub-s. 8, to appoint, pending the dispute, a receiver of the licences and of the rents and profits, giving the receiver possession of the premises so far as the same might be necessary for the preservation of the licences. *Charrington v. Camp*, 71 L. J. Ch. 196; [1902] 1 Ch. 386; 86 L. T. 15—Joyce, J.

Recovery of Land—Enforcing Judgment—Writ of Possession—Leave of Court.]—Where a mortgagee of leaseholds has obtained the appointment by the Court of a receiver, the lessor who by leave of the Court brings an action for recovery of the land against the lessee, and recovers judgment, cannot proceed to enforce the judgment as against the receiver in possession by writ of possession without the leave of the Court. *Morris v. Baker*, 73 L. J. Ch. 143; 52 W. R. 207—Buckley, J.

Writ of Possession—Time.]—Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because Order XLI. rule 5 had not been complied with. *Savage v. Bentley*, 90 L. T. 641—Farwell, J.

Interference with—Stranger to Action—Injunction.]—The Court will restrain all improper

interference with one of its receivers, whether such interference be by a party or by a stranger to the action in which the receiver has been appointed. Any deliberate act that is calculated to injure property under the protection of the Court by means of a receiver amounts to such improper interference, even though the act be not in itself one which the Court would restrain if done against the property of a private individual. *Dixon v. Dixon*, 73 L. J. Ch. 103; [1904] 1 Ch. 161; 89 L. T. 272—Swinfen Eady, J.

The Court will restrain a man from inducing the servant of the receiver of a business to leave his employment and to engage himself in the service of an opposition business, even though such leaving involve no breach of contract on the part of the servant. *Ib.*

Indemnity—Action Charging Receiver with Misconduct—Dismissal of Action—Defence—No Benefit to Estate—Costs of Defence.—A receiver is not entitled to be indemnified against every action that may be brought charging fraud against him personally, but only in cases where in defending himself as receiver in an action brought in respect of the estate he is also defending the estate. The nature of the indemnity in such circumstances is similar to that given in the case of trustees. *Dunn, In re; Brinklow v. Singleton*, 73 L. J. Ch. 425; [1904] 1 Ch. 648; 91 L. T. 135; 52 W. R. 345—Byrne, J.

Where an action charging a person with gross personal fraud both as administrator *pendente lite* and also as receiver of an estate was, in default of appearance by the plaintiff at the trial, dismissed with costs, and the plaintiff was unable to pay the costs, the receiver was not allowed out of the estate the costs of his defence of the action, on the ground that the defence had not and could not have resulted in any benefit to the estate. *Walters v. Woodbridge* (47 L. J. Ch. 516; 7 Ch. D. 504) discussed, and principle applied. *Ib.*

Debenture-holders' Actions, in.—See COMPANY, col. 435.

Mandamus.—See MANDAMUS.

Pension, to Receive.—See PENSION. See also EXECUTION; EXECUTOR; PARTNERSHIP.

(l) Transfer of Action.

Action in Queen's Bench Division under Fatal Accidents Act, 1846, against Shipowners—Decree in Admiralty Division for Limitation of Liability.—An action in the Queen's Bench Division under the Fatal Accidents Act, 1846, against shipowners, to recover damages for the loss of a husband by reason of the negligent management of their ship, will not be transferred to the Admiralty Division upon the ground that a decree has been made there under section 503 of the Merchant Shipping Act, 1894, for the limitation of the liability of the owners of the ship. *Roche v. London and South-Western Railway*, 68 L. J. Q.B. 1041; [1899] 2 Q.B. 502; 81 L. T. 315; 48 W. R. 1; 8 Asp. M.C. 588—C.A.

Transfer to Commercial List.—Where a Judge of the Queen's Bench Division charged with commercial business orders the transfer of a cause to the Commercial List, an appeal lies to the Court of Appeal upon the ground that the cause is not a commercial cause. *See Insurance Co. v. Carr*, 69 L. J. Q.B. 954; [1901] 1 K.B. 7; 83 L. T. 517; 49 W. R. 55; 9 Asp. M.C. 138; 6 Com. Cas. 11—C.A.

Transfer of Proceedings.—See CROWN, col. 662.

(m) Discontinuance of Action.

"The Court or a Judge"—Master.—The words "the Court or a Judge" in Order XXVI. rule 1, do not mean only the Judge in person, and an order made by a Master in the Chancery Division is an order made by the Court or a Judge. *Lloyd's Bank v. Princess Royal Colliery Co.* (No. 2), 82 L. T. 559; 48 W. R. 427—Byrne, J.

Leave to Discontinue Action—Costs of Auxiliary Proceedings before Another Tribunal.—A plaintiff seeking to discontinue an action upon the terms of paying the defendant's costs in that action will not be compelled as part of his bargain to pay the costs incurred by the defendant in auxiliary proceedings taken by the plaintiff before another tribunal, arising out of the same case, and the result of which caused the plaintiff to discontinue his action. *Lloyd's Bank v. Princess Royal Colliery Co.* (No. 1), 81 L. T. 533; 48 W. R. 460—Byrne, J.

(n) Dismissal of Action.

Abuse of Process of Court—Indorsement on Writ—Striking Out.—Where certain claims in an indorsement on a writ in an action are an abuse of the process of the Court, the better course is not to strike out those paragraphs only in which the claims in question are contained, but to strike out the writ altogether and leave the plaintiff to take such other proceedings as he may be advised. *Huntly (Marchioness) v. Gaskell* (No. 1), 75 L. J. Ch. 66; [1905] 2 Ch. 656; 93 L. T. 785; 54 W. R. 164; 22 T. L. R. 20—C.A.

Illegality—Power of Court to take Notice of—New Trial—Questions not Raised in Court Below.—It is the right and duty of the Court at any stage of a cause to consider, and, if it be proved, to act upon, an illegality which may be fatal to the contention of either party to the litigation, so as to prevent the process of the Court from being used to establish a claim which ought not to be enforced. But in a case in which a Court of Appeal, after argument and before judgment, raised of its own motion the question of the illegality of the contract upon which the action was brought, which had not been raised in argument before them, the Judicial Committee, though considering the circumstances very suspicious, declined to give judgment upon questions which had not been raised in the Court below, and sent the case back for a new trial. *Connolly v. Consumers' Cordage Co.*, 89 L. T. 347—P.C.

Dismissal of Frivolous and Vexatious Action

—**Amendment of Claim—Affidavit.**—*See* STAYING PROCEEDING, *supra*; and *Salaman v. Secretary of State for India, ante*, CROWN.

(o) *Undertaking.*

No Time Limited for Fulfilment—Breach—Committal—Supplemental Order.—Ordinarily, where an undertaking is given, not fixing any time, for payment of money into Court or to a joint account at a bank, an order fixing a time is required before the undertaking can be enforced. But there may be cases of contempt for non-payment so gross as to justify committal without such an order. *D. v. A. & Co.*, 69 L. J. Ch. 332; [1900] 1 Ch. 484; 82 L. T. 47; 48 W. R. 429—*Cozens-Hardy, J.*

(p) *Security for Costs.*

Bankruptcy of Plaintiff—Libel against Newspaper—Previous unsuccessful Action against another Newspaper Founded on Similar Statements.—The plaintiff sued the proprietors of a newspaper for libel. He had previously brought a similar action against another newspaper on similar statements and was unsuccessful. The plaintiff had been adjudicated a bankrupt and had not paid the costs in the first action:—*Held*, that the plaintiff could not be ordered to give security for the costs of the action. *Le Mesurier v. Ferguson*, 20 T. L. R. 32—C.A.

Insolvent Plaintiff—Assignment for Benefit of Creditors—Assignment of Cause of Action—Nominal Plaintiff.—The plaintiff, being insolvent and having brought an action against the defendants, executed a deed whereby he assigned to a trustee for the benefit of his creditors all his property, estate, and effects (with one insignificant exception), consisting of the goodwill and assets of his business of a tile and mosaic merchant, including the stock and book debts of the business, and also all the beneficial interest and property in the action brought by him against the defendants, but the right, property, or interest of the trustee therein was not to arise until judgment had been obtained or the plaintiff had effected terms of settlement. The plaintiff covenanted with the trustee to prosecute the action diligently against the defendants, and not to arrange terms of settlement without the trustee's consent in writing, and also to settle the action, if occasion should arise, upon such terms as the trustee should consider fair and reasonable:—*Held*, that the plaintiff was merely a nominal plaintiff suing for the benefit of third persons, and therefore that he must give security for the defendants' costs of the action. *Lloyd v. Hathern Station Brick Co.*, 35 L. T. 158—C.A.

— **Nominal Plaintiff—Trustee for Benefit of Creditors.**—An insolvent person, who brings an action as trustee under a deed of assignment executed by a debtor for the benefit of his creditors, may be ordered to give security for the costs of the action. He is not within the principles which exempt a trustee in bankruptcy, or a liquidator of a company, or an executor or administrator, from the general rule that an insolvent plaintiff bringing an

action, not for his own benefit, but merely on behalf of another or others, must give security for the costs of the action. The fact that, by the terms of the deed of assignment, the trustee is entitled to retain out of the debtors' assets the costs, charges, and expenses of distributing the assets among the creditors, makes no difference in this respect. *Reader or Greener v. Kahn*, 75 L. J. K.B. 660; [1906] 2 K.B. 374; 95 L. T. 481; 22 T. L. R. 694—C.A.

Foreigner out of Jurisdiction—General Enquiry—Claimant against Fund in Court.—In the case of a person claiming against a fund in Court under an enquiry in ordinary circumstances, the Court will not order security for costs to be given by a claimant who is a foreigner resident out of the jurisdiction; but where the circumstances are such that the claimant is in the position of plaintiff he will be ordered to give security, the case being then analogous to a case of interpleader. *Milward & Co., In re*, 69 L. J. Ch. 247; [1900] 1 Ch. 405; 82 L. T. 339—C.A.

Bond of Foreign Company.—There is no general rule of practice that the bond of a foreign company cannot be accepted as a sufficient security for costs. *Aldrich v. British Griffin Chilled Iron and Steel Co.*, 74 L. J. K.B. 23; [1904] 2 K.B. 850; 91 L. T. 729; 53 W. R. 1; 21 T. L. R. 1—C.A. *And see* Costs, col. 571.

On Appeal from Official Referee.—*See* ARBITRATION, col. 43.

7. TRIAL.

Special Jury.—61 & 62 Vict. c. 6 is the *Special Juries Act*, 1898.

Notice of—Assizes—Notice of Trial less than Ten Days before First Day of Assizes, but Trial not to take place till Expiration of Ten Days.—Upon a summons for directions under Order XXX. an order was made that the defendant should take notice of trial on November 26 for the next Liverpool Assizes, but that the action should not be tried before December 7. The assizes commenced on November 28—that is to say, less than ten days after the notice of trial was to be given:—*Held*, that there was jurisdiction under Order XXX. rule 2 to make the order. *Baxter v. Holdsworth*, 68 L. J. Q.B. 154; [1899] 1 Q.B. 266; 47 W. R. 179; 79 L. T. 434—C.A.

Place of—Discretion.—The Court of Appeal will not interfere with an order of a Judge at chambers fixing the place of trial of an action, except a clear case is made out against it. *Thorogood v. Newman*, 23 T. L. R. 97—C.A.

Trial with a Jury—Short Cause—Right to Trial with a Jury.—Upon an application under Order XVI. for leave to enter final judgment, the Judge made an order giving unconditional leave to defend and ordered the action to be put into the short cause list. The defendant then applied, on the summons for directions, for an order for a trial with a jury, but the Judge refused to make the order:—*Held*, that although the Judge might have given leave to defend upon the terms that the trial should be without a jury, yet, as this had not been

done, the defendant was entitled to an order for a trial with a jury under Order XXXVI. rule 6. *Wolfe v. De Braam*, 81 L. T. 533; 48 W. R. 161—C.A.

— **Injunction and Damages.**—In an action charging several defendants with a conspiracy to compel the plaintiff to sell his property at a price below its value, by boycotting, threats, intimidation, and other unlawful means, the plaintiffs sought an injunction and also damages for the injuries already done. One of the defendants asked to have the issues of fact and the amount of damages ascertained and assessed by a jury:—*Held*, that the action must be treated as substantially one for unliquidated damages; and that it was a proper case in which, in the exercise of its discretion, the Court should direct the issues of fact and the amount of damages to be ascertained and assessed by a jury. *De Freyne v. Fitzgibbon*, [1904] 1 Ir. R. 400—C.A. Affirmed, 20 T. L. R. 454, *sub nom.* *De Freyne v. Johnston*, H.L. (Ir.)

— **Action in Chancery Division—Counterclaim for Slander, Libel, and Malicious Prosecution—Defendant's Right to Trial by Jury.**—A defendant to an action in the Chancery Division, who counterclaims for libel, slander, or any of the other matters mentioned in rule 2 of Order XXXVI., is not by virtue of that rule entitled to have the action and counterclaim transferred to the King's Bench Division for trial by a Judge with a jury; but the Court, in the exercise of its discretion under rule 7 (a) of the same Order, will, at the defendant's request, generally direct the issues raised by the counterclaim, so far as they relate to libel, slander, or the other matters mentioned in rule 2, to be tried by a Judge with a jury. *Kinnaird (Lord) v. Field (No. 2)*, 74 L. J. Ch. 692; [1905] 2 Ch. 361; 93 L. T. 190; 54 W. R. 85; 21 T. L. R. 682—C.A.

— **Jury Expressing Opinion in Favour of Plaintiff after Hearing Plaintiff's Case only—Right of Defendant to New Trial.**—The mere communication by the jury who are trying an action of an opinion in favour of the plaintiff during or at the close of the plaintiff's case before the defendant's evidence is heard is not of itself such misconduct on the part of the jury as will justify counsel for the defendant in refusing to go on with the case before that jury and entitle the defendant to a new trial. *Campbell v. Hackney Furnishing Co.*, 22 T. L. R. 318—D.

— **Leave to Defend Given Unconditionally as to Mode of Trial—Right of Defendant to Trial with Jury.**—Where on a summons under Order XIV. an order has been made giving the defendant leave to defend without any condition or direction as to the mode of trial, the Judge at chambers cannot on a subsequent summons deprive the defendant of his right under Order XXXVI. rule 6 to have the action tried with a jury. *Wolfe v. De Braam*, 48 W. R. 161—C.A.

— **Person in Contempt—Right of Hearing.**—The general rule that a person who is in contempt cannot be heard to make any application to the Court applies *prima facie* to voluntary applications by him—that is, when he comes

to the Court asking for something. The rule does not prevent a person who is in contempt from appealing against an order, made after the contempt was committed, on the ground that the order was made without jurisdiction. *Gordon v. Gordon*, 73 L. J. P. 41; [1904] P. 163; 90 L. T. 597; 52 W. R. 389; 20 T. L. R. 272—C.A.

Per COZENS-HARDY, L.J.—Whether for this purpose there is in principle any sound distinction between contempt committed before and contempt committed after the order which the person in contempt seeks to challenge—*quære*. *Ib.*

— **Illegality Disclosed—Duty of Court.**—Where on the trial of an action the plaintiffs' case discloses that the transaction which is the basis of the claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim, even where the defendant has not pleaded the illegality. *Buchanan v. Faber* (4 Com. Cas. 223) considered. *Gedge v. Royal Exchange Assurance*, 69 L. J. Q.B. 506; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M.C. 57; 5 Com. Cas. 229—Kennedy, J.

— **Nonsuit—Discontinuance.**—A plaintiff has no longer the old common-law right of election to be nonsuited at the trial. He cannot at that stage of the proceedings discontinue his action without the leave of the Court or a Judge. *Fox v. "Star" Newspaper Co.*, 69 L. J. Q.B. 117; [1900] A.C. 19; 81 L. T. 562; 48 W. R. 321—H.L. (E.)

— **Passing-off Goods—Probability of Deception—Evidence—View by Judge.**—In an action to restrain the defendant from running omnibuses so got up as to be a colourable imitation of the plaintiffs' omnibuses, the plaintiffs offered no evidence of actual deception or probability of deception; but the Judge, having inspected the omnibuses, and come to the conclusion on their appearance that the defendant's omnibuses were calculated to deceive, granted an injunction:—*Held*, on appeal, that a Judge is not entitled to place his impression derived from a view in the place of such evidence as should be given to support an action of deceit, and that the plaintiffs' case failed for want of evidence. *London General Omnibus Co. v. Lavell*, 70 L. J. Ch. 17; [1901] 1 Ch. 135; 88 L. T. 453—C.A.

A view under Order L. rule 4 is not intended to take the place of evidence, but is merely to enable the tribunal to understand the questions raised, and to follow and apply the evidence. *Ib.*

— **Agreement to Refer—Authority of Counsel.**—*See* BARRISTER, col. 158.

8. NEW TRIAL.

— **Verdict against Evidence.**—Where a question of fact is left to the jury, and they have answered it reasonably, their verdict cannot be disturbed. But where the verdict is one that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, or if the Court is not satisfied that the real question to be determined was so left to them that their verdict

was given upon the determination of that question, the Court may set aside the verdict and order a new trial. *Jones v. Spencer*, 77 L. T. 536—H.L. (E.)

Setting Aside Verdict of Jury.—In discharging the verdict of a jury, the Court must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the Judge, should have returned it. *Cox v. English, Scottish, and Australian Bank*, 74 L. J. P.C. 62; [1905] A.C. 163; 92 L. T. 483—P.C.

Improper Admission of Evidence—No Substantial Wrong or Miscarriage.—The defendants, husband and wife, were sued for slander spoken by the defendant Mrs. B. of the plaintiff. Mrs. B. at first denied the speaking of the words; but afterwards, at the invitation of S., Mrs. B. wrote two apologies, one to S. and another to A., a person implicated, but did not apologise to the plaintiff. The male defendant was not present when the apologies were written, and there was no evidence that he was aware of the apologies. The male defendant subsequently made an offer of 10*l.* to the plaintiff to settle the case, accompanied with a threat if the plaintiff did not accept the offer. At the trial the speaking of the words was proved by two witnesses, and neither of the defendants was examined. The Judge admitted the apologies as evidence, subject to objection. The jury found for the plaintiff:—*Held*, that the apologies of the wife were not admissible in evidence, but *held*, further, that even if they were wrongly admitted there was evidence without them sufficient to sustain the verdict; and no substantial wrong or miscarriage had been occasioned; and that the verdict should stand. *Bray v. Ford* (65 L. J. Q.B. 213; [1896] A.C. 44) considered. *Tait v. Beggs*, [1905] 2 Ir. R. 525—C.A.

Evidence not Submitted to the Jury—Power of Court.—Section 438 of the Jamaica Civil Procedure Code, which is in identical terms with Order XL, rule 10, under the Judicature Act, and permits the Court on a motion for judgment or on an application for a new trial to draw inferences of fact not inconsistent with the finding of the jury, and, if it has sufficient materials, to give judgment, does not authorise the Court to take away questions from the jury which are questions of fact properly for their consideration, or to decide upon evidence the meaning and effect of which were not brought before the jury. *Royal Mail Steam Packet Co. v. George*, 69 L. J. P.C. 107; [1900] A.C. 480; 82 L. T. 539—P.C.

Discovery of Fresh Evidence.—A new trial will not be granted upon the ground that fresh evidence has been discovered, which could not with reasonable diligence have been discovered before the trial, unless that fresh evidence is so conclusive as to make it practically certain that the verdict would be different if it were adduced. *Young v. Kershaw*, 81 L. T. 531—C.A.

Non-disclosure of Deed—No Application for Discovery.—Application for a new trial, on the ground of the non-disclosure of a deed—no

case of fraud or surprise having been made out and no application made in the action for discovery of documents—refused. *Turnbull v. Duval*, 71 L. J. P.C. 84; [1902] A.C. 429; 87 L. T. 154—P.C.

Verdict—Damages—Inconsistent Findings—Judgment.—The respondent sued the appellants, in person and as tutor to his minor son, for damages on the ground of negligence resulting in the death of his wife and the child's mother, to whom tartar emetic instead of bismuth had been supplied by the appellants. The jury found—first, that the death was accelerated, but not to any appreciable extent, by such negligence; secondly, that the respondent had suffered no damage by his wife's death; and thirdly, that the child suffered damage by his mother's death, which they assessed at \$1,000:—*Held*, that there was no inconsistency in these findings; that they did not amount to an award of damages to the infant, it being the province of the Judge to say whether on the facts the plaintiff can recover the assessed damages from the defendant; and that as the jury found that the death, which was the foundation of the damage, had only to an inappreciable extent been accelerated by the appellants' negligence, the damage could only be inappreciable. *Kerry v. England*, 67 L. J. P.C. 150; [1898] A.C. 742—P.C.

— — — **Power of Court of Appeal to Modify Damages without Consent of both Parties.**—On an application for a new trial the Court of Appeal has no power, without the consent of both parties, to alter the amount of damages awarded by the jury. *Belt v. Lawes* (53 L. J. Q.B. 249; 12 Q.B. D. 356) overruled. *Watt v. Watt*, 74 L. J. K.B. 438; [1905] A.C. 115; 92 L. T. 480; 53 W. R. 547; 69 J. P. 249; 21 T. L. R. 386—H.L. (E.)

Security for Costs—Motion for New Trial.—The Court will now order security for the costs of a motion for a new trial in the same circumstances as security for the costs of any other appeal will be ordered, and the rule of practice laid down in *Heckscher v. Crosley* (60 L. J. Q.B. 75; [1891] 1 Q.B. 224) will no longer be followed. *Wightwick v. Pope*, 71 L. J. K.B. 709; [1902] 2 K.B. 99; 86 L. T. 750; 50 W. R. 531—C.A.

Costs of Application.—*See Costs*, col. 593.

Order—Appeal to House of Lords.—*See APPEAL*, col. 27.

9. JUDGMENTS AND ORDERS.

Action for a Declaration—Sanitary Authority — Sewer — Right to Drain into Sewer.—The plaintiffs were owners of certain land and proposed to lay it out as building land, and prepared a plan shewing sewers, and claimed that as owners of the premises they were entitled to connect their sewers with the defendants' sewer. The defendants contended that the construction of such sewers was outside section 22 of the Public Health Act, 1875. A writ was then issued asking for a declaration that the plaintiffs were entitled to connect their proposed sewers with the sewer of the defen-

dants:—*Held*, that, although there is jurisdiction under Order XXV. rule 5 to make a declaratory order, the jurisdiction is one to be exercised with extreme caution; that, as no portion of the estate had been built on and no drains or sewers constructed, it was inexpedient to make a declaration that the plaintiffs had a legal right to connect their sewers when made with that of the defendants. *Faber v. Gosworth Urban Council*, 88 L. T. 549; 67 J. P. 197; 1 L. G. R. 579—Swinfen Eady, J.

— **Invalidity of Patent—Discretion of Court—Petition for Revocation.**—The Court, in the exercise of its discretion as to declaratory judgments under rule 5 of Order XXV. of the Rules of the Supreme Court, refused to allow a company which deemed itself liable for infringement of letters patent to bring an action after the letters patent had expired merely for a declaration that the patent was invalid *ab initio*. *North-Eastern Marine Engineering Co. v. Leeds Forge Co.*, 75 L. J. Ch. 720; [1906] 2 Ch. 498; 95 L. T. 178; 22 T. L. R. 724—C.A. Affirming, 54 W. R. 370—Joyce, J.

Per CURIAM.—The mere fact that a patent has expired is not a sufficient reason why a petition for its revocation should not be presented under section 26 of the Patents, Designs, and Trade Marks Act, 1883. *Ib.*

— **Liability to Perform Contract.**—Where sufficient reason is shewn, parties to a mercantile contract are entitled to ask the Court for a declaration whether they are bound by the contract or not. Therefore where a contract (if it had been binding) would have continued in force for a year and a-half and the breach of it would have involved the plaintiffs in heavy damages, the Court in an action brought by them claiming a declaration that they were not bound to perform the contract granted the declaration as prayed. *Société Maritime v. Venus Steam Shipping Co.*, 9 Com. Cas. 289—Channell, J.

— **Public Authorities Protection.**—The plaintiff erected a fence round a piece of land. The local authority pulled down the fence and afterwards wrote a letter asserting their claim to the land. More than six months after this letter the plaintiff brought an action against them for a declaration that the land belonged to him and an injunction to restrain them from trespassing on it. By his statement of claim he alleged that the defendants had pulled down his fence; that they claimed that the land formed part of the highway, and that this claim prevented him from selling the land:—*Held*, that the assertion of the defendants' claim to the land gave the plaintiff no cause of action, and therefore that he could not take advantage of the power given to the Court by the Rules of the Supreme Court, Order XXV. rule 5, to make a merely declaratory judgment; that the only act of the defendants which gave him any cause of action was the pulling down of the fence; that the Public Authorities Protection Act, 1893, applied; the action was brought too late, and must be dismissed with costs as between solicitor and client. *Offin v. Rockford Rural Council*, 75 L. J. Ch. 348; [1906] 1 Ch. 342; 94 L. T. 639; 54 W. R. 244; 4 L. G. R. 595; 70 J. P. 97—Warrington, J.

— **Mortgagee in Possession—Charter—Ship Arrested and Freight Attached in Proceedings taken in Foreign Court by Creditors of Mortgagors—Judgment Declaratory of English Law for Use in Foreign Proceedings.**—Mortgagees of a ship, having taken possession under their mortgage, chartered the vessel for a voyage to a French port. On her arrival at her destination the ship was arrested and the freight attached in the hands of the consignees of the cargo, in proceedings instituted in the French Courts against the mortgagors—a limited company which had gone into liquidation—by certain creditors of such company, who alleged that the ship and freight were the property of the mortgagors. In an action brought by the mortgagees against the plaintiffs in the French proceedings claiming under Order XXV. rule 5 a judgment declaratory of the validity of the mortgage and the rights of the mortgagee in possession to the ship and to freight earned by her, with the object of using such judgment in the French proceedings, the learned Judge—with certain amendments—gave the judgment asked for. *The Manor (No. 2)*, 72 L. J. P. 64; 89 L. T. 218; 9 Asp. M.C. 482—Bucknill, J.

Declaratory Order—Perpetuation of Testimony.—See *West v. Sackville*, *ante*, EVIDENCE, col. 822.

Judgment by Consent Obtained by False Statement—Action of Review—Costs of Former Action—How far Recoverable.—A successful plaintiff in an action of review, brought to set aside a judgment wrongfully obtained in a former action, is, if he has paid the costs of the former action, entitled in the action of review to recover the party and party costs of the former action, inasmuch as he is entitled to be placed in the same position as if the former action had been brought to its legitimate conclusion in his favour. *Sturrock v. Littlejohn*, 68 L. J. Q.B. 165—D.

Claim for Unliquidated Damages—Judgment for Defendants at Trial of Action Reversed by Court of Appeal, and instead thereof Judgment Ordered to be Entered for Plaintiff for Amount to be Assessed by Referee—Interest—Date of Judgment from which Interest to Run—Antedating Judgment.—Judgment for defendants at the trial of an action for unliquidated damages was reversed by the Court of Appeal, and it was ordered that instead thereof judgment should be entered for the plaintiff for such sum as damages as should be assessed by a referee to be agreed upon by the parties. The parties subsequently agreed that the damage should be a certain agreed sum and interest. The plaintiff applied to the Court of Appeal that judgment should be entered for him for the agreed amount and interest from the date of the judgment at the trial of the action in the first instance:—*Held*, that judgment must be entered for the plaintiff for the agreed amount and interest from the date on which the judgment was pronounced in the Court of Appeal. *Borthwick v. Elderslie Steamship Co. (No. 2)*, 74 L. J. K.B. 772; [1905] 2 K.B. 516; 93 L. T. 387; 53 W. R. 643; 10 Asp. M.C. 121; 21 T. L. R. 630—C.A.

Judgment Signed against One of Two Defendants—Joint Liability Negatived—Principal and Agent—Alternative Remedy—Election.—In an action against a husband and wife on the foot-

ing of a joint liability the plaintiff, on certain admissions made by the wife, obtained judgment against her for 4*l.* in respect of the amount claimed, with leave to defend as to the residue, the husband being given unconditional leave to defend as to the whole amount, and the action was remitted for trial to the County Court. At the trial the jury found that the plaintiff gave credit to the husband alone, and negatived the joint liability. The County Court Judge entered judgment against the husband for the claim, less the amount for which judgment had been signed against the wife, and the Divisional Court (LORD ALVERSTONE, C.J., and KENNEDY, J.; *dissentiente* JELF, J.) affirmed his decision:—*Held*, that on the finding of the jury the judgment against the wife for an indivisible part of the claim was a complete bar to the claim against the husband, and that the County Court Judge was wrong in entering judgment against the husband. *Morel Brothers v. Westmorland (Earl)* (72 L. J. K.B. 66; 73 L. J. K.B. 93; [1908] 1 K.B. 64; [1904] A.C. 11) applied. *French v. Howie*, 75 L. J. K.B. 980; [1906] 2 K.B. 674; 95 L. T. 274—C.A.

Joint Debtors—Judgment Signed against One Defendant.—A took out a summons under Order XIV. rule 2, against B, C, and D, who were alleged to be jointly indebted to him. B took no further part in the proceedings, but C and D shewed cause by filing affidavits. On the hearing of the summons leave was given to sign judgment against B, and liberty to C and D to defend. A signed judgment against B:—*Held*, although B, C, and D were sued as jointly liable, and judgment was signed against B, yet that was not a bar to further proceedings against C and D, the general rule of law, as laid down in *McLeod v. Power* (67 L. J. Ch. 551; [1898] 2 Ch. 295) being no longer applicable to cases falling under Order XIV. rule 5. *Walton v. Topakyan*, 53 W. R. 657—C.A.

Judgment against Agent—Setting Aside—Reviving Rights against Principal—Election.—Two defendants, M. & W., having been sued in the High Court for goods sold and delivered, judgment was entered against M., and the action as against W. was remitted for trial to the County Court. At the trial it was found that the debt was contracted by W. alone, and that M. had merely acted as his agent. Judgment was postponed, and the judgment against M. was set aside. The learned County Court Judge then entered judgment against W.:—*Held*, that the judgment against W. was wrong, as the plaintiffs had conclusively elected to enforce their remedy against M. *Cross v. Matthews*, 91 L. T. 500; 20 T. L. R. 603—D.

Account—Extraneous Matters in—Disallowance of Entries.—Where the scope and ambit of an account are finally determined by an order of the Court, entries relating to matters outside the order must be disallowed. *Bennicourt v. Le Gendre*, 69 L. J. P.C. 21; [1900] A.C. 173—P.C.

Service—Notice of Judgment in Lieu of.—The Court having ordered an unregistered society to be wound up, in view of the numerous members and to save expense, allowed service of the judgment by circular on members whose addresses were known, and by advertisement

on members whose addresses were unknown. *Lead Co.'s Workmen's Fund Society, In re; Lowes v. Lead Smelting Co.*, 73 L. J. Ch. 628; [1904] 2 Ch. 196—Warrington, J.

Enforcing Order—Lancaster Palatine Court—Defendant out of Jurisdiction.—In order to enforce against a defendant an order for leave to issue a writ of attachment made by the Court of the County Palatine of Lancaster, the defendant having submitted to the jurisdiction, but being out of the jurisdiction of that Court, application should be made to the High Court under the Court of Chancery of Lancaster Act, 1850, s. 15. *Dunmore v. Wharam*, 67 L. J. Ch. 221; 73 L. T. 38; 46 W. R. 366—Byrne, J.

Judgment for Recovery of Money—Enforcing—Four-day Order.—A judgment in the form that the plaintiff recover money from the defendant cannot be supplemented or enforced under Order XLII. rule 3 by a subsequent four-day order for payment by the defendant, and it makes no difference that the defendant is a defaulting trustee. *Drewett v. Edwards* (87 L. T. 622) and *Hulbert v. Cathcart* (63 L. J. Q.B. 121; [1894] 1 Q.B. 244) followed and approved. *Oddy, In re; Major v. Harness*, 75 L. J. Ch. 141; [1906] 1 Ch. 93; 94 L. T. 146; 54 W. R. 291—C.A.

Sale by the Court—Debenture-holder's Action—Property Forming Debenture-holder's Security in Jeopardy—Motion for Judgment on Admissions in Pleadings.—On motion for judgment on admissions in the pleadings in a debenture-holder's action in which the plaintiff sued on behalf of himself and all other debenture-holders, and the debenture-holders were entitled to a charge on the company's property, the Court directed a sale of the company's property under Order LI. rule 1b, upon proof of the company's insolvency and the jeopardy of the property comprising the debenture-holder's security, although the principal moneys secured by the debentures were not due, no interest thereon being in arrear for six months, and no resolution having been passed, or order made, for the winding up of the company. In such a case the admitted allegations of the statement of claim should be verified by affidavit. *Day and Night Advertising Co., In re; Upward v. Day and Night Advertising Co.*, 45 W. R. 362—Cozens-Hardy, J.

Order for Sale of Land—Appointment of Person to Convey—Form of Order.—Form of order and mode of execution of conveyance where the Court orders a sale of land and a person entitled, being a party to the proceeding, refuses to execute the deed. *Beale v. Bragg*, [1902] 1 Ir. R. 99—V.C.

Writ of Possession—Costs.—Under section 5 of the Judicature Act, 1890, the Court or Judge has power on summons to order that the costs of a writ of possession shall be taxed and paid by the unsuccessful defendant to the plaintiff in an action for possession of land. *Dartford Brewery Co. v. Moseley*, 75 L. J. K.B. 279; [1906] 1 K.B. 462; 94 L. T. 263; 54 W. R. 333; 22 T. L. R. 304—C.A.

Mistake—Power of Court to Rectify in Order pending Appeal.—The Court has power to

rectify a mistake or omission in an order, even though an appeal against such order is pending in the Court of Appeal at the time of such application to rectify, and in spite also of the fact that the application to rectify is made by the party who is appealing against the order as drawn up. *E. v. E. (otherwise T.)*, 72 L. J. P. 44; [1903] P. 88; 88 L. T. 570—Jeune, P.

Amendment—Power of Court—Inherent Jurisdiction—Accidental Slip or Omission.]—The plaintiffs in an action recovered judgment with costs for an amount to be ascertained by a referee. The amount was ascertained and final judgment entered for the amount so found, with costs. In preparing the plaintiff's bill of costs the referee's fees were accidentally omitted, and the Taxing Master's certificate passed for a sum which did not include these fees:—*Held*, that notwithstanding the final judgment and certificate, the Court had power under Order XXVIII. rule 11, and *semble* also by its inherent jurisdiction, to make an order referring the fees for taxation and amending the Master's certificate, if necessary. *Fritz v. Hobson* (49 L. J. Ch. 735; 14 Ch. D. 542) approved. *Chessum v. Gordon*, 70 L. J. K.B. 394; [1901] 1 K.B. 694; 84 L. T. 137; 49 W. R. 309—C.A.

Action of Review—Apparent Error.]—The High Court has now no jurisdiction to review its own order by means of an independent action on the ground of error of law apparent upon the face of the order, but the party complaining must appeal to the Court of Appeal. *Bright v. Sellar* (No. 1), 72 L. J. K.B. 921; [1904] 1 K.B. 6; 89 L. T. 431; 52 W. R. 148; 20 T. L. R. 12—C.A.

Setting Aside on Ground of Fraud.]—An action to set aside a judgment on the ground of fraud ought not to be allowed to proceed unless the plaintiff can produce evidence shewing a reasonable probability of the alleged fraud being established; but (*per* VAUGHAN WILLIAMS, L.J.) such evidence need not necessarily be of such a character that it would be evidence in the action itself. *Birch v. Birch*, 71 L. J. P. 58; [1902] P. 130; 86 L. T. 364; 50 W. R. 437—C.A.

— **Obtained by Perjury.]**—A judgment obtained in an action will not be set aside in a subsequent action brought for that purpose upon mere proof that the judgment was obtained by perjury. *Baker v. Wadsworth*, 67 L. J. Q.B. 301—D.

— **Obtained by Fraud.]**—The Court has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose. *Cole v. Langford*, 67 L. J. Q.B. 698; [1898] 2 Q.B. 36—D.

Interest on.]—See *Burland v. Earle*, 74 L. J. P.C. 156; [1905] A.C. 590.

10. DISTRICT REGISTRY.

Judgment Entered in—Jurisdiction to Rectify.]—A district Registrar has, by rule 6 of Order XXXV., concurrently with the Master of the High Court, the jurisdiction of a Master to set aside a judgment entered in the district

Registry. *Hood v. Yates* (63 L. J. Q.B. 218; [1894] 1 Q.B. 240) considered. *Townend v. Kirkham*, 67 L. J. Q.B. 5; [1898] 1 Q.B. 51; 77 L. T. 419; 46 W. R. 65—C.A.

Taxation of Costs.]—See COSTS.

11. OTHER MATTERS.

Administration Actions, in.]—See EXECUTOR AND ADMINISTRATOR.

Admiralty, in.]—See SHIPPING.

Appeal from Superior Court.]—See APPEAL.

Arbitration—Reference to.]—See ARBITRATION.

Attachment for Non-compliance with Order.]—See ATTACHMENT.

Bankruptcy, in.]—See BANKRUPTCY.

Company Winding-up, in.]—See COMPANY.

County Court, in.]—See COUNTY COURT.

Divorce Matters, in.]—See HUSBAND AND WIFE.

Ecclesiastical Matters, in.]—See ECCLESIASTICAL LAW.

Execution on Judgment.]—See EXECUTION.

Lands Clauses Acts, under.]—See LANDS CLAUSES ACTS.

Privy Council, before Judicial Committee of.]—See COLONY, cols. 301-306.

Probate Matters, in.]—See WILL.

Trustee Acts, under.]—See TRUST AND TRUSTEE.

PREMIUM.

See INSURANCE.

PRESCRIPTION.

See EASEMENT.

PRESUMPTION.

See EVIDENCE, col. 811.

PRINCIPAL AND ACCESSARY.

See CRIMINAL LAW, col. 647.

PRINCIPAL AND AGENT.

1. *Statute*, 1947.
2. *Authority of Agent*, 1947.
 - (a) *Generally*, 1947.
 - (b) *Power of Attorney*, 1951.
3. *Contracts by Agents*, 1954.

4. *Torts by Agents*, 1956.
5. *Express Trust*, 1959.
6. *Agent's Right of Indemnity*, 1959.
7. *Remuneration of Agent*, 1961.
8. *Secret Profit by Agent*, 1963.
9. *Termination of Agency*, 1966.
10. *Actions against*, 1966.
11. *Particular Agents*, 1967.
 - (a) *Auctioneer*, 1967.
 - (b) *Contractor*, 1967.
 - (c) *Driver*, 1968.
 - (d) *Factor*, 1969.
 - (e) *Insurance Agent*, 1972.
 - (f) *Printers*, 1973.
 - (g) *Receiver for Debenture-holders*, 1973.
 - (h) *Shipbroker*, 1973.
 - (i) *Stockbroker*, 1974.

1. STATUTE.

6 Edw. 7 c. 34 is the *Prevention of Corruption Act*, 1906.

2. AUTHORITY OF AGENT.

(a) Generally.

Instructions to Procure a Tenant—Authority of House Agent to Enter into Agreement for Lease.—Estate agents as such have no general authority to enter into contracts for their employers. Their business is to find offers and submit them to their employers for acceptance. If any authority to enter into contracts is given in any case it must be proved, and cannot be inferred from the relation existing between the parties. *Thuman v. Best*, 97 L. T. 239—Parker, J.

Bills of Exchange—Authority to Indorse “per pro” for Purpose of Paying Bills into Bank—No Authority to Cash Bills—Agent Cashing Bills.—The plaintiff, who carried on business in Paris and elsewhere as Wys, Muller & Co., had two branches in London, at one of which he had a manager, named C., who had verbal authority to conduct the business of that branch, to receive bills and cheques sent in payment of accounts collected abroad, and to indorse the bills and cheques “per pro Wys, Muller & Co.—H. E. C.,” for the purpose of paying them into the plaintiff's banking account. He had no authority to cash bills or cheques. Certain bills received at the office were indorsed by C., some “Wys, Muller & Co.” only, and some “Wys, Muller & Co., per pro.” C. took these bills to the defendant, to whom he was known as the agent of the plaintiff, and asked him to cash them for him to pay wages and small disbursements. The defendant cashed them and handed the proceeds to C., who misappropriated same. In an action for the conversion of the bills the jury found that C. had no authority to indorse otherwise than per procurator; that the plaintiff did not hold C. out as having general authority to indorse or to cash cheques; that as to the bills indorsed per pro it was done for the purpose of defrauding the plaintiff; and that the defendant was a holder in good faith:—*Held*, that the plaintiff was entitled

to recover the amount of the bills. *Gompertz v. Cook*, 20 T. L. R. 106—Wright, J.

Libel—Liability of Corporation for its Agent's Tort.—The ordinary doctrines of agency and of master and servant are as applicable to corporations as to private persons, whether they arise in questions of contracts or of torts and frauds. A corporation is therefore liable for the publication by its agent of a libel when the agent is acting in the course and within the scope of his employment. *Dicta* to the contrary effect of LORD CRANWORTH in *Western Bank of Scotland v. Addie* (L. R. 1 H. L. Sc. 145, 167) and of LORD BRAMWELL in *Abrath v. North-Eastern Railway* (55 L. J. Q.B. 457, 458; 11 App. Cas. 247, 250) disapproved. *Citizens Life Assurance Co. v. Brown*, 73 L. J. P.C. 102; [1904] A.C. 423; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497—P.C.

Holding out—Ratification.—B. sold a race-horse to H., a minor, upon the representation by H. that his mother would pay. On former occasions H. had, to B.'s knowledge, purchased horses for which the mother afterwards paid. The mother allowed the son to keep a pack of hounds at her residence, and paid for his equipment as master. She went frequently to races to see her son ride, and was kept informed, when not present, of the results of races in which he engaged. In an action by B. against the mother for the price of the horse, it was contended that the mother's conduct in relation to the son's former purchase transactions and her acquiescence in his sporting proclivities constituted the son her general agent for the purchase of horses. The case was tried twice, owing to a disagreement of the jury at the first trial, and in the interval between the trials the mother entered into negotiations with B. for the return of the horse, a course which B. agreed to accept upon two alternative conditions which the mother agreed to consider; and this incident was relied upon by B. at the second trial as a ratification by the mother of the contract with the son:—*Held*, that the facts proved did not amount to evidence of general agency in the son. *Held*, also, that no multiplication of acts as special agent can convert a special into a general agent so as to bind a principal in a transaction of this kind. *Held*, also, that the negotiations between the trials were not of such a character as to amount to ratification by the mother. *Baxett v. Irvine*, [1907] 2 Ir. R. 462—C.A.

Illegal Distress.—A broker, to whom a warrant of distress was handed by the defendant vestry to be executed, illegally seized certain goods of the plaintiff in executing the warrant. When the plaintiff knew of this he wrote to the defendants demanding reparation, and in reply to his letter the defendants wrote that their solicitors would accept service of any process he thought proper to issue:—*Held*, that this reply was evidence of a ratification by them of the broker's illegal act, and that they were liable in damages. *Carter v. St. Mary Abbott's Vestry*, 64 J. P. 548—C.A.

Unauthorised Borrowing by Manager of Branch Business for Purposes of Business—Use of Borrowed Money in Payment of Business Debts—Right of Lender to Recover from Prin-

Principal Money so Used.—The defendants, who carried on business as shipowners in Liverpool, established a branch business in London under the sole management of one H., with power to sign the firm's name. An account was opened at a London bank in their name, and H. alone drew upon that account. H. being in want of money borrowed various sums at different times from the plaintiff, who lent them for the purposes of the firm. The greater proportion of the sums so borrowed was paid by H. into the defendants' account at the bank, and practically the whole of the amounts so paid in were used by H. for the purpose of paying certain debts for which the defendants were legally liable in respect of the branch business. The sums borrowed by H. were entered in the books as loans by the plaintiff to the defendants, but it did not appear that they had ever seen the entries. In an action by the plaintiff on a bill of exchange, accepted by H. in the defendants' name, and in the alternative for money lent, the defendants pleaded that H. had no authority from them to borrow money:—*Held*, that the plaintiff was, in accordance with the equitable principle laid down by LORD SELBORNE, L.J., in *Blackburn Building Society v. Cunliffe, Brooks & Co.* (52 L. J. Ch., at p. 96; 22 Ch. D., at p. 70), entitled to have an account taken of, and to be repaid by the defendants, so much of the money lent which had been actually used in payment of debts in respect of which the defendants were legally liable. *Bannatyne v. MacIver*, 75 L. J. K.B. 120; [1906] 1 K.B. 103; 94 L. T. 150; 54 W. R. 293—C.A.

Repairs to Ship—Ratification.—Where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them,—*Held*, that it appearing that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed:—*Held*, further, that the shipowner having taken the ship as repaired and sold it, did not thereby ratify the contract. *Appleby v. Myers* (L. R. 2 C.P. 651) followed. *Norman v. The Liddesdale*, 69 L. J. P.C. 44; [1900] A.C. 190; 82 L. T. 331; 9 Asp. M.C. 45—P.C.

Party Invested with Indicia of Ownership—Estoppel—Mortgage—Priority—Conflicting Equities—Negligence—Fraud.—There is no general rule of law that, where one of two innocent parties must suffer for the acts of a third party, that innocent party who has enabled such third party to occasion the loss must himself sustain the loss; but there is a general rule of law that in such a case an innocent party who has enabled the third party to occasion the loss by his neglect of some duty owing from him to the other innocent party must himself sustain the loss. *Rimmer v. Webster*, 71 L. J. Ch. 561; [1902] 2 Ch. 163; 86 L. T. 491; 50 W. R. 517—Farwell, J.

Where, accordingly, an owner of property

invests another person with his indicia of title, neither intending, nor giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third party, the owner is not primarily liable, as between himself and an innocent third party, for any loss occasioned by a dealing with the property, unauthorised by him, between the innocent third party and the person so invested with the indicia of title; for no duty on the part of the owner can be inferred towards the third party, and there cannot accordingly be any neglect of such duty. *Ib.*

Where, however, an owner of property invests another person with his indicia of title, intending, or giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third party in a limited manner, the owner in such a case is primarily liable, as between himself and an innocent third party whom he has neglected to inform of the existence and extent of the limitation, for any loss occasioned by a dealing with the property between the innocent third party and the person so invested with the indicia of title in excess of the limit imposed; for a duty is inferred on the part of the owner to inform the third party, whom he invites to deal with the property, of the existence and extent of the limitation; and for any loss arising from the neglect of such duty the owner is primarily liable as between himself and the third party. *Ib.* And see FACTOR, *infra*, col. 1969.

Payment by Agent on Account—Inference of Promise to Pay Balance.—An agent who has authority to pay a debt of his principal has authority to promise to pay it; and where an agent acting within the scope of his authority makes a payment on account of a debt of his principal, and nothing more is said or done, a promise to pay the balance of the debt will be inferred so as to take the case out of the Statute of Limitations. *Hale, In re; Lilley v. Foad*, 68 L. J. Ch. 517; [1899] 2 Ch. 107; 80 L. T. 827; 47 W. R. 579—C.A.

Coachman Pledging Master's Credit—Liability of Master.—The mere relation of master and coachman does not of itself invest the coachman with ostensible authority to pledge his master's credit for forage. *Wright v. Glynn*, 71 L. J. K.B. 497; [1902] 1 K.B. 745; 86 L. T. 373; 50 W. R. 402—C.A.

Act done for Interests of Agent—Liability of Principal.—Where an act done by an agent on behalf of his principal is authorised by the terms of an authority given to the agent by the principal, the act is binding on the principal as to all persons dealing in good faith and for valuable consideration with the agent, and the principal cannot escape from liability upon the ground that the act was done by the agent in abuse of his authority, for his own purposes, and not in the interest of the principal. *Hambro v. Burnand*, 73 L. J. K.B. 669; [1904] 2 K.B. 10; 90 L. T. 803; 52 W. R. 533; 9 Com. Cas. 251; 20 T. L. R. 398—C.A.

Warranty of Authority—Signature of Contract—Misrepresentation of Fact—Damages.—In order to enable a plaintiff to maintain an action for damages against a defendant who

has purported to sign a contract on behalf of an alleged principal, the plaintiff must prove a representation by the defendant that he was authorised so to sign when in fact he was not authorised, and that such misrepresentation was believed. *Collen v. Wright* (27 L. J. Q.B. 215; 8 E. & B. 647) must be considered as having overruled *Smout v. Ilbery* (12 L. J. Ex. 357; 10 M. & W. 1). *Halbot v. Lens*, 70 L. J. Ch. 125; [1901] 1 Ch. 344; 83 L. T. 702; 49 W. R. 214—Kekewich, J.

Agent, of on Sale of Goods.—See SALE OF GOODS.

Determination of Authority—Liability of Agent after.—See SOLICITOR.

Manager of Estate of.—See LANDLORD AND TENANT, col. 1190.

Partner, of.—See PARTNERSHIP, cols. 1771-3.

Wife, of.—See HUSBAND AND WIFE, col. 997.

(b) *Power of Attorney.*

Construction—General Power of Borrowing.—A power of attorney authorising an agent in England to purchase goods in connection with the business carried on by his principal in the colonies, and either for cash or on credit, and "where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business" to make, draw, and accept bills of exchange, and to sign the name of the principal to any cheques on the London banking account of the principal, does not confer on the agent a general borrowing power. *Montaignac v. Shitta* (15 App. Cas. 357) distinguished. *Jacobs v. Morris*, 70 L. J. Ch. 133; [1901] 1 Ch. 261; 84 L. T. 112; 49 W. R. 365—Farwell, J.

Loan to Agent Secured by Bill of Exchange—Duty to Enquire as to Agent's Authority—Payment into Principal's London Banking Account—Money Had and Received to Use of Lender.—Money borrowed by the agent under the power secured by bills of exchange accepted by him in the name of his principal and paid into the London banking account, and then drawn out by the agent and applied for his own purposes, cannot be recovered from the principal in an action "for money had and received" to the use of the lender in the absence of proof by the lender that the principal knew or had the means of knowledge that the money, whilst it remained in the banking account, was the money of the lender and not of the agent, or else that the principal had the benefit of it. *Moses v. Macferlan* (2 Burr. 1005; 1 W. Bl. 219) and *Marsh v. Keating* (1 Bing. N.C. 198) discussed and applied. *Ib.*

General Power of Borrowing—Excess of Authority—Loan to Agent without Enquiry—Payment into Principal's Banking Account—Misappropriation by Agent—Money Had and Received—Estoppel.—Plaintiff was sole partner in an Australian firm. The defendants had dealt with his firm since 1889. In January, 1899, the plaintiff gave to his agent in England a power of attorney to purchase goods in connection with

the plaintiff's business, and either for cash or on credit, "and for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper, and to sign the plaintiff's name, or his trading name, to any cheques on his banking account in London. The attorney, purporting to act under the power, obtained from the defendants a loan of 4,000*l.*, and accepted bills of exchange for that amount in the name of the firm *per pro* himself. He represented to the defendants that he had full power to borrow, and produced the power, but they accepted his word, and did not read the power. The 4,000*l.* was paid by two cheques of the defendants in favour of the plaintiff's firm. The attorney indorsed these cheques, and paid them into the London banking account of the plaintiff's firm. He afterwards drew out the whole sum, and applied it to his own purposes. The plaintiff brought this action to restrain the negotiation of the bills. The defendants counterclaimed for payment of the money due on the bills, or, in the alternative, for the 4,000*l.*, as money had and received by the plaintiff to their use. The Judge found that the plaintiff had no knowledge of the borrowing by the attorney, and got no benefit from it:—*Held*, first, that the power of attorney conferred no general power to borrow, and the claim for the money due on the bills of exchange failed; secondly, that the defendants must be taken to have had notice of the terms of the power, and that the attorney had no general power to borrow, and they could not recover the 4,000*l.* as money had and received by the plaintiff to their use. *Jacobs v. Morris*, 71 L. J. Ch. 363; [1902] 1 Ch. 316; 86 L. T. 275; 50 W. R. 371—C.A.

Marsh v. Keating (1 Bing. N.C. 198; 2 Cl. & F. 250) discussed. *Per* STIRLING, L.J.—According to the principle of that case, to make a man liable for money of another passed through his banking account as for money had and received to the use of that other, he must know or have had the means of knowing, while it remained to his credit, that it was the money of the other. *Per* VAUGHAN WILLIAMS, L.J.—*Quere*, whether it was meant to decide in that case that knowledge or means of knowledge in such a case was essential to liability. *Ib.*

Power to Mortgage—Excess of Authority—Liability of Donor.—D. gave G. a power of attorney authorising him to buy, sell, charge, and transfer in any form whatsoever any estate, stocks, or funds, "following his letters of instructions and private advices which, if necessary, shall be considered part of these presents." G. executed a mortgage upon property to which D. became entitled upon the death of his mother:—*Held*, that the power authorised the execution of the mortgage, although as between D. and G. the mortgage was unauthorised. *Davy v. Waller*, 81 L. T. 107—North, J.

Mortgagee—Power of Sale—Right to Exercise.—A power of attorney given by a mortgagee authorising the donee of the power to "recover and receive all sums of money" owing or payable to the principal "by virtue of any security" and "to give sign and execute

receipts releases and other discharges for the same" and "to sell any real or personal property now or hereafter belonging" to the principal, does not enable the donee to exercise the power of sale over real property conferred on the mortgagee by his mortgage deed. *Dowson & Jenkins' Contract, In re*, 73 L. J. Ch. 684; [1904] 2 Ch. 219; 91 L. T. 121—C.A.

Power Coupled with an Interest—Revocability—Power of Attorney.]—Where an agreement is entered into for sufficient consideration, and either forms part of a security or is given for the purpose of securing some benefit to the donee of an authority, the authority is irrevocable. *Frith v. Frith*, 75 L. J. P.C. 50; [1906] A.C. 254; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388—P.C.

The appellant was by deeds executed by the tenant for life and tenants in remainder constituted their attorney to receive the rents, manage the estates, and pay the debts of the owners. He entered into possession, and with the consent of the tenant for life created a mortgage on the property, giving the mortgagee a personal guarantee to pay the mortgage debt. Notice to revoke the powers of attorney was given before the mortgage debt was paid. There was no reference in the powers of attorney to the mortgage debt or to the guarantee, and there was no charge or lien in them in favour of the mortgagee, and they formed no part of the mortgagee's security:—*Held*, that the authority conferred upon the appellant was not a power coupled with an interest, and was revocable. *Ib.*

Implied Warranty of Authority—Forged Signature—Transfer of Consols—Bank of England—Liability of Stockbroker—Indemnity.]—One of two trustees of stock standing in their joint names in the books of the Bank of England sold it under a power of attorney, to which the signature of his co-trustee was forged, and the Bank allowed a stockbroker who innocently acted under the power to transfer the stock to other persons. The Bank having been made to replace the stock:—*Held*, that the stockbroker was liable to indemnify the Bank upon the ground that he had impliedly warranted his authority to the Bank. *Oliver v. Bank of England*, 71 L. J. Ch. 388; [1902] 1 Ch. 610; 86 L. T. 248; 50 W. R. 340; 7 Com. Cas. 89—C.A.

The principle laid down in *Collen v. Wright* (27 L. J. Q.B. 215; 8 E. & B. 647) is not confined to the simple case where a professed agent, acting without authority, induces a person to enter into a contract with a supposed principal, but has a wider application, as stated in *Firbank v. Humphreys* (56 L. J. Q.B. 57; 18 Q.B. D. 54), and that principle is not affected by the decision of the House of Lords in *Derry v. Peek* (58 L. J. Ch. 864; 14 App. Cas. 337). *Ib.*

— Authority—Forged Signature—Transfer of Consols—Liability of Stockbroker—Indemnity.]—Where a person, proposing to act as the agent of another, induces a third person to enter into a transaction with him on the faith of such agency, whereas in fact no such agency exists, he is liable for any injury sustained by such third person in consequence of such untrue representation, whether or not he believed he was

acting with the authority of the alleged principal. *Starkey v. Bank of England*, 72 L. J. Ch. 402; [1903] A.C. 114; 83 L. T. 244; 51 W. R. 513; 8 Com. Cas. 142—H.L. (E.)

One of two trustees of stock standing in their joint names in the books of the Bank of England sold it under a power of attorney, to which the signature of his co-trustee was forged, and the bank allowed a stockbroker who innocently acted under the power to transfer the stock to other persons, and were held liable to replace the stock:—*Held*, that the stockbroker was liable to indemnify the bank upon the ground that he had impliedly warranted his authority to the bank. *Ib.*

Execution by Lunatic—Validity.]—See LUNATIC, col. 1433.

3. CONTRACTS BY AGENTS.

Whether Contract one of Agency or of Subordination and Service—Implied Undertaking to Continue Employment.]—Where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission. But if the contract is one of service, then the commission is merely intended to be in the place of salary, and the contract cannot be determined without compensation to the servant. The defendant, who carried on business in India, appointed the plaintiff to be his sole buying agent in Great Britain for ten years, the defendant to send all orders to the plaintiff, who was to receive 8½ per cent. on all goods bought by or for the defendant, whatever their destination in India might happen to be, the commission to be paid quarterly. The plaintiff was to keep proper books of account of all incidental expenses, which were to be paid by the defendant together with the commission every quarter, and in case any firms should refuse to supply goods unless invoiced direct to the plaintiff, he was to be under no obligation to place such orders unless he was fully satisfied that the bank would hand him cash covering such purchases immediately these goods were ready for shipment:—*Held*, that there was no implied contract that the defendant would continue to carry on business for the term of ten years so as to supply the plaintiff with orders. For commercial purposes Rangoon is not in India. *Rhodes v. Forwood* (47 L. J. Ex. 896; 1 App. Cas. 256) and *Turner v. Goldsmith* (60 L. J. Q.B. 247; [1891] 1 Q.B. 544) explained. *Northey v. Trevillion*, 7 Com. Cas. 201—Phillimore, J.

Contract by Agent in Name of Principal, but for Agent's Benefit—Liability of Principal.]—Where an agent is authorised to underwrite policies "in the name and on behalf of" principals, such a mandate does not authorise him to make a contract which, although the agent purports to make it on behalf of the principal, is in fact to enure only for the benefit of the agent. If a person contracts with an agent, it is for him to see as best he can that the agent is acting within his authority. *Hambro v. Burnand*, 72 L. J. K.B. 662; [1903] 2 K.B. 399; 89 L. T. 180; 51 W. R. 652; 8 Com. Cas. 252—Bigham, J.

Contract Made by Person in his Own Name—Intention to Contract for Another without Authority—Ratification by Intended Principal.]

—A contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party so as to render him able to sue or liable to be sued on the contract. *Keighley, Mawsted & Co. v. Durant*, 70 L. J. K.B. 662; [1901] A.C. 240; 84 L. T. 777—H.L. (E.)

Broker and Customer—Authority of Agent to Bind Principal—Evidence—Inference.]

—The fact of a principal allowing an agent to obtain orders for him which he may or may not execute, as he thinks fit—this being well known to the person giving the orders—does not afford any evidence from which the inference of fact can reasonably be drawn that the principal holds out the agent either as having authority to bind him by contracts or as representing that he, the principal, will execute the orders brought to him by the agent:—*So held*, per A. L. SMITH, L.J., and CHITTY, L.J.; COLLINS, L.J., dissenting. *Spencer v. Browning*, 67 L. J. Q.B. 389; [1898] 1 Q.B. 528; 78 L. T. 98; 46 W. R. 369—C.A.

Breach of Duty Outside Agency—Secret Commission—Absence of Fraud—Right of Agent to Retain Commission Received by Him.]

—Where an agent in effecting a sale of property for his principal has, without fraud, received a secret commission or discount in an incidental matter which is not connected with the agent's duty to sell, the principal is entitled to recover from the agent the secret commission or discount, but not commission which has been paid to the agent by way of remuneration for his services in effecting the sale. *Andrew v. Ramsay* (72 L. J. K.B. 865; [1903] 2 K.B. 635) distinguished. *Hippesley v. Knee*, 74 L. J. K.B. 68; [1905] 1 K.B. 1; 92 L. T. 20; 21 T. L. R. 5—D.

Real Property—Agent Authorised to Sell—Commission—Authority to Sign Contract.]

—Instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, are an authority to the agent to make a binding contract, including an authority to sign a contract for sale. *Chadburn v. Moore* (61 L. J. Ch. 674) and *Hamer v. Sharp* (44 L. J. Ch. 53; L. R. 19 Eq. 108) distinguished. *Rosenbaum v. Belson*, 69 L. J. Ch. 569; [1900] 2 Ch. 267; 82 L. T. 658; 48 W. R. 522—Buckley, J.

Repudiation by Purchaser—Fraudulent Intent of Agent—Subsequent Ratification by Principal.]

A principal may, in the absence of fraud on his part, ratify and adopt a contract made by his agent without his authority, notwithstanding that the other parties to it have before ratification repudiated it, and notwithstanding that the agent acted with fraudulent intent. *Tiedemann and Ledermann, Frères, In re*, 68 L. J. Q.B. 852; [1899] 2 Q.B. 66; 81 L. T. 191—D.

Agent's Liability to Third Party—Contract by Agent in Own Name.]

—The defender was appointed sales manager for a cycle company and for a tyre company under separate agree-

ments, in which each company respectively authorised him to appoint travellers at its expense. Thereafter the defender employed the pursuer by a letter in these terms: "I beg to confirm arrangement made with you this day, and appoint you as representative for" the two companies "on following terms—45s. per week salary and 1½ per cent. commission on all orders for cycles sold by us or you. . . Yours truly, J. J. Shannessy." The letter was written on notepaper bearing as a heading the trade name and address of one of the companies:—*Held*, in an action by the pursuer against the defender for payment of commissions, that the latter was personally liable to the pursuer in respect that the letter above set out was signed by him in his own name without qualification, and that it contained no indication that he did not intend to bind himself as principal. *Stewart v. Shannessy*, 2 F. 1288—Ct. of Sess.

Independent Contractor—Abandonment of Possession, Management, and Control.]

—An owner does not abandon or properly transfer the possession, management, and control of a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck. *The Snark*, 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M.C. 50—C.A.

4. TORTS BY AGENTS.

Fraud—Sale of Goods—Conduct of Principal Enabling Agent to Commit the Fraud—Estoppel.]

—The plaintiffs, who were timber merchants, imported timber which they warehoused at the docks. The timber when sold by them was delivered to purchasers by means of delivery orders addressed by the plaintiffs to the dock company. The plaintiffs gave their confidential clerk authority to sign delivery orders for the purpose of carrying through sales and gave the dock company notice to honour delivery orders signed by him. The clerk, by means of delivery orders signed by him in fraud of the plaintiffs, had certain timber at the docks transferred into a fictitious name, and then sold the timber in this fictitious name to the defendants, who acted *bona fide* in the transaction, and he converted the purchase-money to his own use. In an action against the defendants to recover damages for the conversion of the timber,—*Held* (STIRLING, L.J., dissenting), that the plaintiffs had, by their conduct in giving their clerk authority to sign delivery orders, enabled him to commit the fraud, and that therefore the loss must fall upon them. *Farguharson v. King*, 70 L. J. K.B. 985; [1901] 2 K.B. 697; 85 L. T. 264; 49 W. R. 673—C.A.

Dishonest Agent—Honest and Dishonest Acts—Commission—Scope of Agency.]

—An agent entered into an agreement with his principal to sell only the manufactured goods of the latter. In some cases he in fact sold these goods honestly; in others he made a fraudulent secret profit; in others he sold the similar goods of rival manufacturers:—*Held*, that, in taking an account of the moneys due to the principal from the agent as a result of the agency, the agent was bound to account for the profits made by him in selling the goods of

the rival manufacturers, inasmuch as these sales had been made by him within the scope of his agency. *Held*, also, that, since the various transactions of the agency were severable, the agent was entitled to his commission in cases in which he had acted honestly, though not in those in which he had acted dishonestly. *Andrew v. Ramsay & Co.* (72 L. J. K.B. 865; [1903] 2 K.B. 635) distinguished. *Nitedals Tændstikfabrik v. Bruster*, 75 L. J. Ch. 798; [1906] 2 Ch. 671—Neville, J.

Money Collected for Principal Paid into Agent's General Banking Account—Disbursements Paid out of Account—Right of Principal to Follow Money in Bank.]—The B. company collected advance freights on account of the plaintiffs, and the course of business known and assented to by the latter was for the B. company to pay the freights when collected into their general account with the P. bank. They also paid into that account moneys of their own and freights collected for other shipowners. They paid disbursements on behalf of the plaintiffs by cheques drawn on the same account. Accounts were rendered periodically by the B. company to the plaintiffs shewing the freights received and disbursements made and the balance owing to the plaintiffs, or, as sometimes happened, the balance owing by the plaintiffs to the B. company. The B. company having gone into liquidation, and there being a large sum due to the plaintiffs for freights collected by the B. company, the plaintiffs claimed to be entitled to the amount standing to the credit of the B. company with the P. bank, alleging that it was the proceeds of freights collected on their account:—*Held*, that the plaintiffs were not entitled to follow the money in the hands of the P. bank, as there was no fiduciary relationship between the B. company and the plaintiffs, but merely the relationship of debtor and creditor. *Hallett's Estate, In re* (13 Ch. D. 696), considered. *Wilson and Furness-Leyland Line v. British and Continental Shipping Co.*, 23 T. L. R. 397—Walton, J.

Libel—Agent Acting within the Scope of his Employment—Liability of Corporation for its Agent's Tort.]—The ordinary doctrines of agency and of master and servant are as applicable to corporations as to private persons, whether they arise in questions of contracts or of torts and frauds. A corporation is therefore liable for the publication by its agent of a libel when the agent is acting in the course and within the scope of his employment. *Dicta* to the contrary effect of LORD CRANWORTH in *Western Bank of Scotland v. Addie* (L. R. 1 H.L. Sc. 145, 167) and of LORD BRAMWELL in *Abrath v. North-Eastern Railway* (55 L. J. Q.B. 457, 458; 11 App. Cas. 247, 250) disapproved. *Citizens Life Assurance Co. v. Brown*, 73 L. J. P.C. 102; [1904] A.C. 428; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497—P.C.

Misstatements by Agent—Measure of Damages.]—The measure of damages for which an agent is responsible in consequence of his misrepresentations is the actual loss which the principal thereby sustains, and does not include the anticipated profit which the principal might have made if the representation had been true. *Cassaboglon v. Gibb* (52 L. J. Q.B. 538; 11 Q.B. D. 797) approved. *Salvesen v. Rederi*

Aktiebolaget Nordstjernen, 74 L. J. P.C. 96; [1905] A.C. 302; 92 L. T. 575—H.L. (Sc.)

The respondents, foreign shipowners, employed the appellants, shipbrokers, on the usual terms of remuneration to find freight for a steamship. The appellants reported that they had concluded a bargain, whereas no bargain had been concluded. Three days afterwards the respondents learned that the arrangement was not to be carried out. The respondents made no efforts to look for another charter and employed this ship under a current contract at a lower rate. They first brought an action against the intending charterers, having been misled by the appellants that there was a concluded contract. The charterers' defence was that there was no such contract, and the action was abated. Then the respondents brought the present action against the appellants claiming loss of freight and the expenses incurred in the action against the charterers:—*Held*, that the respondents were not entitled to damages for loss of freight, but were entitled to damages for the trouble taken, actual outlay, and expenses of the abortive action. *Collen v. Wright* (26 L. J. Q.B. 147; 8 E. & B. 647) distinguished. *Ib.*

—Statement made in Course of Business—Estoppel.]—M'N., whose motor car was being repaired at the works of M. & Co., communicated to M. & Co. his intention to effect a policy of insurance against the destruction or injury of the motor car by fire while on their premises. Thereupon M. & Co., as was found by the jury at the trial, negligently, carelessly, and without due and proper care, represented to M'N. that they had insured the car for him, which in fact they had not done, in consequence of which representation M'N. refrained from insuring the car. The car, with other goods (which were in fact insured) on the premises of M. & Co., was afterwards destroyed by fire, and M. & Co. were paid the insurance moneys in respect of the goods actually insured:—*Held*, that, on the facts so found, M'N. was entitled to recover damages from M. & Co. for the loss of his car. *M'Neill v. Millen*, [1907] 2 Ir. R. 328—C.A. *And see* INSURANCE AGENT, *infra*, col. 1972.

Misrepresentation by Agent to Principal that Contract Concluded—Shipbroker—Measure of Damages.]—Where a person, by asserting the authority of a principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue to the injury of the person to whom it is made, it must be taken that the agent undertook that it was true, and he is personally liable to the injured person for the damage that he has sustained by loss of bargain. *Rideri Aktiebolaget Nordstjernen v. Salvesen*, 6 F. 64—Ct. of Sess.

A shipbroker, negotiating for a charterparty between a shipowner and a coal merchant, received an offer from the shipowner for a voyage charter at a specified rate per ton, loading to be completed one hundred and twenty hours after arrival at port of loading. The coal merchant agreed to the rate of freight, but insisted that the loading clause should be—loading to be completed within ninety-six hours after berth-

ing. Ultimately, the shipbroker, being willing to take the risk of the difference, wrote to each of the parties that the contract had been concluded on his own terms. The coal merchant repudiated the contract on the ground that his offer was not a firm offer. In an action of damages by the shipowner against the shipbroker,—*Held*, that the shipowner was entitled to rely on the shipbroker's representation that a contract had been completed, and was entitled to recover from the shipbroker, as damages, the difference between the profit which would have been made on the abortive contract and the best terms which could be obtained in the market when the misrepresentation was discovered. *Ib.*

Duty of Agent—Limitation of Duty—Failure to Provide for Event not Contemplated by either Party.]—An agent is bound to take reasonable care in doing what he undertakes to do, but is not bound to meet consequences which are not contemplated in the contract, and the probability of which is as well known to his principal as to himself. *Commonwealth Portland Cement Co. v. Weber, Lohmann & Co.*, 74 L. J. P.C. 25; [1905] A.C. 66; 91 L. T. 813; 53 W. R. 337; 10 Asp. M.C. 27; 21 T. L. R. 149—P.C.

The respondents undertook to lighter and load machinery of the appellants at fixed charges, and to pass the goods through the Custom House without extra payment. It was common knowledge that duties were about to be imposed on imported machinery, and the respondents might have cleared the goods in time to escape the taxation. They did not do so, however, although the goods were cleared within the time prescribed by the Customs regulations:—*Held*, that the respondents were under no legal obligation to anticipate the action of the Government, and were not liable to the appellants for the duty paid, and that the Judge at the trial was right in withdrawing the case from the jury and entering a nonsuit. *Ib.*

Fraudulent Agent—Delivery Order—Estoppel.]—*See TROVER.*

Sale of Stolen Goods by Servant—Conduct of Master.]—*See SALE OF GOODS.*

5. EXPRESS TRUST.

Moneys Entrusted to Agent for Special Purpose—Express Trust—Limitations, Statute of.]—Where a principal has remitted moneys to an agent for the purpose of being invested in the purchase of lands, an express trust is created, and the Statute of Limitations will be no bar to an action brought by the principal against the agent for an account in order to recover the balance for the moneys remitted to him, and not applied for the particular purpose. *North American Land and Timber Co. v. Watkins*, 73 L. J. Ch. 626; [1904] 2 Ch. 233; 91 L. T. 425; 20 T. L. R. 642—C.A. Affirming, 52 W. R. 360—Kekewich, J.

6. RIGHT OF INDEMNITY.

Indemnity of Agent—Stockbroker—Unjustifiable Sale by Broker.]—A stockbroker who, in

the ordinary course of business upon the London Stock Exchange, has rendered himself personally liable to a jobber upon the purchase of stocks on behalf of a principal, and who has contracted for good consideration with his principal that the stocks shall be carried over and not sold before the next settling day, loses his right of indemnity against his principal if before that day in breach of his contract he wrongfully sells the stocks against his principal. *Duncan v. Hill* (42 L. J. Ex. 179; L. R. 8 Ex. 242) and *Lacey v. Hill*; *Scrimgeour's Claim* (42 L. J. Ch. 657; L. R. 8 Ch. 921) discussed. *Hartas v. Ribbons* (58 L. J. Q.B. 187; 22 Q.B. D. 254) distinguished. *Ellis v. Pond*, 67 L. J. Q.B. 345; [1898] 1 Q.B. 426; 78 L. T. 125—C.A.

The plaintiff, a stockbroker, who had purchased for the defendant 35,000l. railway stock upon the London Stock Exchange, upon the carrying-over day upon the Stock Exchange agreed with the defendant to carry over the stock until the then next settling day, and upon the same day purchased for the plaintiff further 10,000l. railway stock for the next settling day. Before the settling day arrived the plaintiff wrongfully and unjustifiably, with the object of closing the account between himself and the defendant, sold the stocks at prices less than the prices at which the 35,000l. stocks had been carried over and the 10,000l. stock had been purchased, and less also than the stocks would have realized if sold on the settling day. In an action by the plaintiff, who, according to the ordinary course of business upon the Stock Exchange, had rendered himself personally liable to the jobber in respect of the stocks, for an indemnity against the loss sustained by him upon the sale of the stocks,—*Held* (RIGBY, L.J., dissenting), that the sale being wrongful and contrary to the plaintiff's agreement with the defendant, he was not entitled to an indemnity. *Per RIGBY, L.J.* (in affirmance of MATHEW, J.), the plaintiff was entitled to be credited in account with the prices at which he purchased for the defendant, being charged by way of damages with the losses arising from the wrongful sales. *Ib.*

The plaintiff, a stockbroker, purchased certain stocks on the London Stock Exchange for the defendant. The plaintiff having paid for the stocks partly with moneys advanced by him by way of loan to the defendant, took delivery of the stocks to himself or his nominees, and held the stocks as security for the moneys advanced by him. The plaintiff, for good consideration, agreed with the defendant that he would not sell the stocks before a certain date. Before the arrival of the agreed date the plaintiff, in breach of his agreement, sold the stocks for prices less than they would have realised if sold on the agreed date:—*Held*, that the plaintiff was entitled to recover the moneys advanced by him in payment of the stocks as money paid for the defendant at his request, but that the defendant was entitled to recover from the plaintiff in account damages in respect of the loss sustained by him by reason of the wrongful sale of the stocks. *Ib.*

— **Betting.]**—*See GAMING*, col. 907.

7. REMUNERATION OF AGENT.

Commission—Introducing Purchaser—Time—Implied Term—Withdrawal by Vendor.]—When all the terms of an agreement are stated except the term as to the time when it is to be carried out, and there is no express stipulation as to the time, then it is an implied term that the agreement is to be performed within a reasonable time. The plaintiff was instructed by the defendant to find a purchaser for his house for 4,000*l.* On January 16 he found one S. ready and willing to pay that sum, who required possession by March 15. The defendant refused the offer on the ground that he could not give up possession on March 15. The jury found that from January 16 to March 15 was a reasonable time:—*Held*, that the plaintiff was entitled to his commission. *Nosotti v. Auerbach*, 79 L. T. 413—Bruce, J.

— Special Bargain—Purchaser Procured—Default of Purchaser—Purchase not Completed.]—The owner of certain houses, who was desirous of selling, made an agreement with an agent in the following terms:—"I agree to accept a sum of 1,150*l.* for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of 1,150*l.* without deduction." The agent found a purchaser who entered into a contract to purchase for 1,250*l.*, but the purchase was never completed owing to the default of the purchaser:—*Held*, that the agent was not entitled to recover commission under the agreement. *Beale v. Bond*, 84 L. T. 313—C.A.

— Payable on Purchase being Completed.]—The defendants, who were mortgagees of an estate, agreed to pay to the plaintiff a commission of 3 per cent. on the purchase money of the estate, with an additional 2 per cent. in the event of the purchase being completed by a certain date. It was agreed that the purchase would be considered completed if a definite offer and acceptance were made. Before the specified date a memorandum of agreement between the intending purchaser and the defendants was signed, by which the former undertook to send professional persons to verify the particulars of the property; and, provided he received a satisfactory report, he undertook to enter into a formal contract for the purchase of the estate for a named sum. The contract for the purchase was not signed until some time after the specified date. In an action to recover the 2 per cent. commission, — *Held*, that, as the memorandum of agreement contemplated a formal contract, the terms of which would require settlement, there was no definite offer and acceptance made on or before the specified date, and the 2 per cent. commission was not payable. *Henry v. Gregory*, 22 T. L. R. 53—Walton, J.

— Agreement to Pay Commission on Properties Purchased—Property Introduced to Principal—Promotion by Principal of Company to Purchase Property.]—The defendant brewery desired to acquire some public-houses in a particular district, and agreed to pay the plaintiff commission on all licensed property they might purchase through his introduction. Subse-

quently the defendants abandoned that idea, and instead promoted a new company, which ultimately acquired certain licensed property originally brought to the notice of the defendants by the plaintiff:—*Held*, that, as the new company was merely ancillary to the old, the commission was payable by the defendants. *Gunn v. Shewell's Brewery Co.*, 50 W. R. 659—C.A.

— "When and if the purchase is completed by private treaty"—Binding Contract by Purchaser—Inability of Purchaser to Carry out Contract.]—The defendant gave to the plaintiff a commission note in these terms:—"If your friend is named and introduced within one week, and becomes the purchaser of the above hotel, you shall be paid as and by way of commission a sum of 50*l.* when and if the purchase is completed by private treaty." The plaintiff introduced his friend, who signed a formal contract to purchase the hotel for 2,000*l.*, of which 200*l.* was paid at once, and the balance was to be paid upon completion. The purchaser, being unable to find the balance of the purchase-money and carry out the contract, was released by the defendant, he retaining the 200*l.* paid as deposit:—*Held*, that, upon the true construction of the contract, the plaintiff was not entitled to the commission. *Chapman v. Winson*, 91 L. T. 17; 53 W. R. 19; 20 T. L. R. 663—C.A.

— Agent Employed to Sell House—Rescission of Employment—Subsequent Sale through Third Party.]—The plaintiffs were employed by the defendant to negotiate the sale of defendant's business on the terms that they were to receive a commission if they found a purchaser, but that if no sale took place there was to be no charge. The plaintiffs advertised the business for sale, and in October, 1904, introduced to the defendant one N. as a possible purchaser, who inspected the premises and stock, but made no offer. In February, 1905, the defendant, with the plaintiffs' approval, decided not to sell. In May, 1905, the plaintiffs claimed and were subsequently paid a small sum for their out-of-pocket expenses in the matter. In June, 1905, the defendant consulted a friend C. as to the sale of the business. C. knew N. and knew he was looking out for a business of the kind, but did not know of his introduction to the defendant by the plaintiffs. He suggested N. as a likely purchaser, and subsequently communicated with N., advising him to purchase. N. inspected the premises and stock, and made an offer, and after some negotiations between the defendant, N., and a third party, a price was fixed at which N. bought the business. The plaintiffs having brought an action claiming commission on the purchase-money, the jury found that the sale really and substantially proceeded from the plaintiffs' acts, and found for the plaintiffs for the commission claimed:—*Held*, that the verdict could not be sustained on the evidence, and that verdict and judgment should be entered for the defendant. *Brandon v. Hanna*, [1907] 2 Ir. R. 212—C.A.

— on Business Done—Termination of Employment—Notice—Subsequent Business.]—By an agreement in writing the plaintiff was engaged by the defendants to represent them in the sale of their goods in certain specified

towns on the terms that the plaintiff was to receive a commission on all business done by the defendants through orders obtained by the plaintiff. The agreement contained no stipulation as to the length of time during which the plaintiff's engagement was to last, nor did it provide for the termination of the engagement by notice:—*Held*, that the engagement could be terminated by a reasonable notice, and that the plaintiff was not entitled to be paid commission on business done by the defendants after the engagement had been terminated. *Barrett v. Gilmour & Co.*, 6 Com. Cas. 72—Phillimore, J.

— on "Hire earned"—Time Charterparty—Cancellation.]—The plaintiff, acting as broker for the defendants, obtained a time charterparty for their ship upon terms of being paid a commission on all hire earned. During the currency of the charterparty litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charterparty, there being no wilful act or default on the part of the defendants in bringing about this result:—*Held*, that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charterparty. *White v. Turnbull*, 78 L. T. 726—C.A.

S. SECRET PROFIT BY AGENT.

Right of Principal to Recover Profit—Company—Promoter—Fiduciary Relation.]—The vendor of certain gold mines corruptly agreed with the agent of the purchasers to pay him a secret commission of 10 per cent., payable by instalments, upon the cash amount, 25,000*l.*, of the purchase-money. Before the whole of the commission became payable under this agreement, the vendor agreed with the agent to pay him a sum of 2,000*l.* in cash down in lieu of the full commission of 2,500*l.* The purchasers, on discovering the fact of the corrupt agreement by their agent and that the 2,000*l.* had been paid to him in lieu of the commission as originally agreed, claimed and received from the agent the 2,000*l.* They also in an action by the vendor for the balance of the purchase-money counterclaimed from the vendor the balance of the agreed commission, 500*l.*:—*Held*, that the effect of the corrupt agreement between the vendor and the purchasers' agent was that the amount of the purchase-money was enhanced by the amount of the secret commission, and that the purchasers were entitled to recover the 500*l.* from the vendor. *Grant v. Gold Exploration and Development Syndicate of British Columbia*, 69 L. J. Q.B. 150; [1900] 1 Q.B. 233; 82 L. T. 5; 48 W. R. 280—C.A. And see COMPANY, cols. 355-6.

— **Right of Principal to Recover back Commission Paid by Himself to Agent.]**—Where an agent in effecting a sale of property for his principal has taken a secret commission from the purchaser, the principal, notwithstanding that he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which

he himself has paid to the agent. *Salomons v. Pender* (34 L. J. Ex. 95; 3 H. & C. 639) applied. *Andrew v. Ramsay & Co.*, 72 L. J. K.B. 865; [1903] 2 K.B. 635; 89 L. T. 450; 52 W. R. 126—D.

Secret Commission—Custom.]—If an agent conducts business in carrying out negotiations between his principal and a person whose interests are adverse to his principal, he cannot receive a commission from the person with whom he is negotiating without the knowledge of his principal, and any custom wide enough to cover such a case will not be upheld by the Court. *Semble*, that even in the case of a broker who merely introduces the vendor to the purchaser, such a custom could not be upheld. *Bartram v. Lloyd*, 88 L. T. 286—Bruce, J.

— **Bribe—Action against Briber—Money Had and Received—Amount Recoverable.]**—The ascertained amount of bribes given by a vendor to the buying agent of a purchaser may be recovered by the purchaser from the vendor as money had and received. The Court will not enquire into the motive of the vendor in giving the bribe, and there is an irrebuttable presumption that the agent was influenced by the bribe. *Semble*, also, that as between vendor and purchaser, the true price of the thing purchased is less than the amount charged by the amount of the bribe. *Hovenden v. Millhoff*, 83 L. T. 41—C.A.

— **Rescission of Contract—Promise to Agent to Bias Him Contrary to his Principal's Interest.]**—The defendant agreed to purchase a pair of horses from the plaintiff, provided the defendant's agent gave a certificate that the horses were sound. The plaintiff secretly offered the defendant's agent a sum of money if the horses were sold, and the agent accepted the offer. The agent gave a certificate that the horses were sound, and the defendant sent the plaintiff a cheque for the price. When the horses were delivered they were found to be unsound, and the defendant returned them to the plaintiff and stopped payment of the cheque. In an action by the plaintiff upon the cheque,—*Held*, that it was immaterial to enquire whether the mind of the agent was biased by the offer made to and accepted by him, that the offer and its acceptance invalidated the agent's certificate and the sale founded upon it, and that the plaintiff could maintain no action upon the contract of sale. *Shipway v. Broadwood*, 68 L. J. Q.B. 360; [1899] 1 Q.B. 369; 80 L. T. 11—C.A.

— **Corrupt Bargain—Confirmation by Principal—Evidence—Necessity of Full Knowledge of all Facts.]**—The defendant, acting through his agent, entered into a contract with the plaintiffs, who were shipbuilders, for the building of a ship. Before the contract was arranged the plaintiffs secretly agreed to give a commission to the defendant's agent. At an interview which afterwards took place between the plaintiffs and the defendant as to the payment by him of money due under this contract, the plaintiffs informed him that they had agreed to pay commission to the agent, and the defendant, after being so informed, paid them a small sum on account. The plaintiffs afterwards brought an action to recover the balance

due to them. At the trial of the action the Court held that, by reason of the plaintiffs' secret agreement to give a commission to the defendant's agent, the contract was one which entitled the defendant to repudiate, but that by what had occurred at his interview with the plaintiffs he had confirmed the contract and debarred himself from repudiating it:—*Held*, that the plaintiffs had not shewn that there had been a full disclosure to the defendant of all the circumstances in connection with the plaintiffs' agreement to pay commission to the agent, and that therefore there had been no such confirmation by the defendant of his contract as debarred him from repudiating it. *Bartram v. Lloyd*, 90 L. T. 357; 20 T. L. R. 281—C.A.

— Concealment of Material Fact—Right to Commission.—A house agent held not entitled to commission upon the sale of property, upon the grounds that he had kept a material fact from the knowledge of his principal, and that he had made a secret profit. *Price v. Metropolitan House Investment and Agency Co.*, 23 T. L. R. 630—C.A. And see *Hippesley v. Knee*, 74 L. J. K.B. 63; [1905] 1 K.B. 1; 92 L. T. 20; 21 T. L. R. 5—D.

Sub-agent—Fiduciary Relation—Secret Commission—Right of Principal to Secret Commission Received by Sub-agent—Money had and Received—Declaration as to Future Payments to Sub-agent under Agreement for Secret Commission.—A firm of shipowners employed stockbrokers as their agents to obtain an advance for them upon the security of certain vessels. The stockbrokers employed a sub-agent to negotiate the advance. The sub-agent knew that in so acting he was procuring the advance for the shipowners and for their benefit, and was acting in their interests. The sub-agent, without the knowledge of either the ship-owners or their agents, the stockbrokers, arranged with the persons whom he procured to make the advance for the payment to him of a commission upon the amount of the advance. Part of such secret commission was paid to the sub-agent:—*Held* (following *De Bussche v. Alt*, 47 L. J. Ch. 381; 8 Ch. D. 286), that a fiduciary relation existed between the shipowners and the sub-agent which entitled them to recover from him so much of the secret commission as had actually been received by him. But *held*, also (following *Lister & Co. v. Stubbs*, 59 L. J. Ch. 570; 45 Ch. D. 1), as regards so much of the secret commission as remained unpaid, that, the persons making the advance not being parties to the action, the shipowners were entitled to no further declaration than that the sub-agent should become indebted to them for any further sums as and when he should receive the same. *Powell v. Jones*, 74 L. J. K.B. 115; [1905] 1 K.B. 11; 92 L. T. 430; 53 W. R. 277; 10 Com. Cas. 36; 21 T. L. R. 55—C.A.

No Evidence of Increased Price of Goods—Action by Principal to Recover from Donor—Liability.—Where a secret commission has been paid to a buyer acting for his principal, the amount of such commission can be recovered at the suit of the principal from the donor, although there is no evidence that the price of the goods has been enhanced by

the amount of the commission. *Cohen v. Kuschke*, 83 L. T. 102—Bruce, J.

9. TERMINATION OF AGENCY.

Commission Agent—Agreement—Custom Requiring Notice.—The defendants, who carried on business in the glove trade, made an agreement with the plaintiff, a commission agent, in these terms: "We will give the 2½ per cent. commission on all business you do for us in London. You let us know to whom you show our samples, and, if business results from the transaction, we will forward your commission quarterly. This refers to orders executed." The defendants terminated this agreement without giving any notice, and the plaintiff brought this action to recover damages. At the trial the plaintiff tendered evidence of a custom in the glove trade that six months' notice must be given to terminate the agency of a commission agent. The Judge rejected that evidence, and directed a verdict and judgment for the defendants:—*Held*, that evidence of the alleged custom, being inconsistent with the terms of the written agreement, was not admissible, and that the defendants were entitled to terminate the agency without notice. *Joynton v. Hunt*, 93 L. T. 470; 21 T. L. R. 692—C.A.

10. ACTIONS AGAINST.

Election—Right to Proceed against Principal.—Two persons were sued in the High Court for the price of goods supplied. Judgment was obtained by default against one; the other had leave to defend, and the action was remitted to the County Court. At the trial the County Court Judge found as a fact that the debt was contracted by the former solely as agent for the latter, and that the plaintiff had given credit to the latter alone, and he adjourned the case to enable an application to be made to set aside the judgment against the agent. This was accordingly done, and the judgment was set aside and the action against both defendants was remitted to the County Court. At the second trial the County Court Judge entered judgment for the agent and against the principal:—*Held*, that the plaintiff by signing judgment against the agent had conclusively elected to proceed against him, and there was no power to set aside that judgment so as to revive the right of the plaintiff to proceed against the principal. *Cross v. Matthews*, 91 L. T. 500; 20 T. L. R. 608—D.

Undisclosed Principal—Baptist Minister—Appointed to Pastorate by Deacons of Chapel—Fund Insufficient to Pay Salary—Claim against Deacons.—The deacons of a chapel were held not to be personally liable as agents for an undisclosed principal to make up arrears of salary due to the pastor of the chapel, although they had invited him to become pastor of the Baptist Chapel of which they were the deacons and had signed the document under which he became pastor, because there was evidence on the face of the document that the salary of the pastor was to be payable out of the chapel fund, of which fund the plaintiff

himself was treasurer, and from which he had paid himself salary as it became due, so long as the fund was sufficient to meet it. *Morley v. Makin*, 54 W. R. 395; 22 T. L. R. 7—D.

11. PARTICULAR AGENTS.

(a) Auctioneer.

Indemnity—Sale of Goods by Direction of True Owner—Claim by Person not True Owner—Mistake as to Ownership—Damages.—The true owner of goods who instructs an auctioneer to sell them is not bound to indemnify the auctioneer, who, while acting on the instructions, is sued and cast in damages on a claim by a third person of which the true owner has no notice. *Halbroun v. International Horse Agency and Exchange*, 72 L. J. K.B. 90; [1903] 1 K.B. 270; 88 L. T. 232; 51 W. R. 622—Bruce, J. And see AUCTIONEER and SALE OF GOODS.

(b) Contractor.

Negligence—Dangerous Work—Liability.—Where a public body takes upon itself the making-up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road. That duty cannot be evaded by employing a contractor to carry out the work. *Hill v. Tottenham Urban Council*, 79 L. T. 495—Bruce, J.

A person who, acting under an authority conferred by statute, does an act likely to cause danger to the public, is bound to see that the work is properly carried out, and that reasonable means are taken to guard against the danger, and does not discharge this duty by delegating it to a contractor who neglects its fulfilment; but such duty does not extend to guarding against casual or collateral acts of negligence on the part of the contractor or those employed by him. *Penny v. Wimbledon Urban Council*, 68 L. J. Q.B. 704; [1899] 2 Q.B. 72; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406—C.A.

A local authority, acting under the powers of section 150 of the Public Health Act, 1875, employed a contractor to make up a road in their district. The contractor in doing the work left obstructions upon the road unguarded. The plaintiff was thereby injured:—*Held*, that the local authority were liable for the negligence of the contractor. *Ib.*

—Dangerous Work on Highway—Liability of Person Executing by Contractor—Joint Execution of Work with Contractor for Part—Independent Contractor—Casual and Collateral Negligence.—A telephone company were lawfully engaged in laying telephone wires in a public highway with the consent of the local authority. The work was carried out by digging a trench, laying down tubes, threading the wires through them, soldering the joints of the tubes, and filling up the trench. The company did all the work themselves except the soldering of the joints, as to which they contracted with a

plumber that he should do the work to the satisfaction of the company's foreman at 12s. per joint. In carrying out the work the plumber, in order to get a flare from a benzoline lamp, plunged it into an iron pot containing melted solder; but the safety-valve being out of order, the lamp exploded, and the molten solder flew up and injured the plaintiff, who was passing by on the highway. It was necessary for the work to obtain the flare from the lamp, and to dip the lamp into the solder was a proper and usual mode of obtaining it if the lamp had been in order, but it was an act of negligence on the part of the plumber to use the lamp in the condition in which it was:—*Held*, in an action by the plaintiff against the company to recover damages for personal injury, that the company were liable for the negligence of the plumber—first, upon the ground that the work was being done not by the plumber alone as an independent contractor, but jointly by the company and the plumber in such circumstances that the company were responsible for negligence in the joint operation such as that which caused the injury; and secondly, upon the ground that, even assuming that the plumber was an independent contractor, as the company were carrying out a dangerous work upon a highway, whether they carried it out by themselves or by a contractor, it was their duty to take care that the works were not negligently carried out so as cause injury to persons using the highway. *Holliday v. National Telephone Co.*, 68 L. J. Q.B. 1016; [1899] 2 Q.B. 392; 81 L. T. 252; 47 W. R. 658—C.A.

Independent Contractor—Abandonment of Possession, Management, and Control.—An owner does not abandon or properly transfer the possession, management, and control of a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck. *The Snark*, 68 L. J. P. 22; [1899] P. 74; 80 L. T. 25; 47 W. R. 398; 8 Asp. M.C. 488—Gorell Barnes, J.

(c) Driver.

Negligence—Watering Streets—Employment of Contractor for Horses and Drivers—Negligence of Driver.—In an action for damages for negligence against a Metropolitan borough council, and against the person who had contracted to supply horses and drivers to work the council's water vans employed in watering streets, the jury, in giving their verdict for the plaintiff, found that there had been negligence on the part of the driver of a water van, who, they found as a fact, was the contractor's servant, but who, at the time of the accident, was acting under the control of the council in his work. The Court, upon this verdict, gave judgment against the council, upon the authority of *Penny v. Wimbledon Urban Council* (68 L. J. Q.B. 704; [1899] 2 Q.B. 72); and gave judgment against the contractor as master of the driver because, upon the construction the Court placed on the contract between the defendants, the contractor had not parted with the control of his servant: following *Jones v. Liverpool Corporation* (54 L. J. Q.B. 345; 14 Q.B. D. 890). *Mileham v. St. Marylebone Borough Council*, 1 L. G. R. 412—Channell, J. And see MASTER AND SERVANT, cols. 1459–1462.

(d) *Factor.*

Agreement for Sale of Goods—Hire-Purchase Agreement.—“Person having agreed to buy goods.”—By an agreement one W. agreed with the defendant to hire goods of the value of — £., “and to pay her the sum of 11. on signing this agreement and the balance in instalments of 11. per month until the full amount of the aforesaid value be paid,” when the goods were to become the property of W. The agreement contained a clause: “But in default being made in payment of such sums of 11. per month,” W. agreed “to give up all claims to the said goods, and to deliver the same free from damage or injury beyond fair wear and tear” to the defendant or to her agents on demand:—*Held*, that W. was a person who had “agreed to buy goods” under section 9 of the Factors Act, 1889. *Wylde v. Legge*, 84 L. T. 121—D.

Factors Act—Indorsement of Delivery Orders to Pledgee—Arrestment by Creditor—Rights of Pledgee and Creditor.—The Factors (Scotland) Act, 1890, makes no alteration in the general law of contracts of pledge in Scotland, and does not in all cases make a pledge of the documents of title equivalent to a completed pledge of the goods themselves. By the common law the indorsement and hypothecation of delivery orders, although they may give the pledgee a right to retain the documents, do not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery orders to the custodian by whom they were granted, and obtaining delivery of the goods from him, or by making such intimation of his right to the custodian as will make it the legal duty of the latter to hold the goods for him. *Inglis v. Robertson*, 67 L. J. P.C. 108; [1898] A.C. 616; 79 L. T. 224—H.L. (Sc.)

— **Mercantile Agent.**—Section 3 of the Factors Act, 1889, which enacts that a pledge of documents of title is to be deemed a pledge of the goods, only applies to “mercantile agents” within the meaning of that Act, which by the Act of 1890 is made applicable to Scotland. The pledgor of goods within the meaning of section 9 must be a person who has obtained the documents of title either from his seller or with the consent of his seller. *Ib.*

Goods of a debtor were stored in a bonded warehouse. The debtor indorsed the delivery orders to the appellant in consideration of a loan, with a letter purporting to hypothecate part of the goods. The appellant gave no intimation of his rights to the warehouse keeper. The seller of the goods arrested them in the hands of the warehouse keeper, and brought an action against the debtor. By arrangement the goods were sold and the proceeds placed in a bank. In an action of multiplepoinding, in which the appellant claimed as pledgee and the respondents as personal creditors of the debtor,—*Held*, that the property of the goods was not effectually vested in the appellant as against the creditors, inasmuch as the warehouse keeper was not a “mercantile agent” in the statutory sense. *Ib.*

— **Possession of Goods by Mercantile Agent**

—**Consent of Owner—Larceny by a Trick—Disposition by Mercantile Agent to Several Joint Purchasers—Want of Good Faith in One Joint Purchaser—Invalidity of Disposition as regards all the Joint Purchasers.**—The plaintiff, a diamond merchant, entrusted certain diamonds to a broker who stated that he had customers for them, and mentioned the names of two firms. The broker did not offer the diamonds to either firm, but gave them to B., asking him to sell them. B. took the diamonds to F. & W., explained that he came from the broker, and asked them to purchase them on joint account with himself. F. & W. agreed, and paid the price required by the broker, debiting B. in their books with one-half thereof, and afterwards disposed of the diamonds, crediting B. with half the profits realised. In an action for conversion by the plaintiff against B. and F. & W., the jury found that the broker obtained the diamonds from the plaintiff by larceny by a trick; that F. & W. had acted in good faith, but that B. had not:—*Held*, that for the particular purpose of purchasing the diamonds B. and F. & W. were partners; and that though F. & W. personally had acted in good faith, B.’s want of good faith deprived them, as well as himself, of the protection of section 2, sub-section 1 of the Factors Act, 1889, and consequently that they were all jointly liable to the plaintiff for the conversion of the diamonds. *Oppenheimer v. Fraser*, 76 L. J. K.B. 806; [1907] 2 K.B. 50; 97 L. T. 8; 12 Com. Cas. 289; 23 T. L. R. 410—C.A.

Semble, that a mercantile agent who obtains possession of goods from the owner by means of larceny by a trick is not in possession of them with the “consent” of the owner within the meaning of section 2, sub-section 1 of the Factors Act, 1889. *Ib.*

— **Transfer of Title—Re-sale—Possession of Document of Title—Consent of Seller—Bill of Lading sent to Buyer with Draft—Draft not Accepted—Stoppage in Transitu.**—English merchants contracted to sell to a merchant abroad ten tons of copper to be delivered at Rotterdam, payment to be made by the buyer’s acceptance at thirty days from date of bill of lading. The sellers forwarded to the buyer the bill of lading indorsed in blank for ten tons of copper shipped on board the defendants’ vessel, to be carried to Rotterdam, together with a draft for the price for his acceptance. The buyer retained the bill of lading, and indorsed it to the plaintiffs in fulfilment of a prior sale by him to them of ten tons of copper. The buyer never accepted the draft, but the plaintiffs received the bill of lading in good faith for valuable consideration and without notice of any right of the original sellers in respect of the goods. The buyer having become insolvent, the sellers stopped the copper *in transitu*. In an action by the plaintiffs, as indorsees of the bill of lading, against the shipowners for non-delivery of the copper,—*Held*, that the buyer was in possession of the bill of lading with the consent of the sellers within the meaning of section 25, sub-section 2 of the Sale of Goods Act, 1893, so that the transfer by him of the bill of lading to the plaintiffs gave them a good title to the copper, and that the sellers had no right to stop it *in transitu*. *Cahn v. Pockett’s Bristol Channel Steam Packet Co.*,

68 L. J. Q.B. 515; [1899] 1 Q.B. 648; 80 L. T. 269; 47 W. R. 422; 8 Asp. M.C. 516—C.A.

— **Mercantile Agent—Pledge.**—The plaintiff, a dealer in diamonds at Amsterdam, sent some diamonds to a diamond broker in London for sale. The broker, without the authority in fact of the plaintiff, asked a friend of his to pledge the diamonds for him. The friend pledged them with the defendants, who were pawnbrokers. The defendants acted in good faith and without notice that the diamonds were pledged without the authority of the owner. In an action to recover the diamonds, —*Held*, that, though the broker was a mercantile agent within the meaning of the Factors Act, 1889, it was not the ordinary course of business of a mercantile agent to ask a friend to pledge goods entrusted to him, but to pledge them himself, and that therefore the defendants were not protected by section 2, sub-section 1 of the Act. *De Gorter v. Attenborough*, 21 T. L. R. 19—Channell, J.

— **Pledge of Diamonds by Agent—Custom in Diamond Trade.**—“Pledge . . . made . . . in the ordinary course of business of a mercantile agent.”—The expression in section 2, sub-section 1 of the Factors Act, 1889, “pledge . . . made . . . in the ordinary course of business of a mercantile agent,” means “of a mercantile agent,” and not “of the mercantile agent” which the particular agent happens to be; and therefore a custom in the diamond trade, that it is not usual for agents employed to sell diamonds to pledge them, cannot be set up to prevent the application of the Factors Act to a pledge by such an agent. *Oppenheimer v. Attenborough*, 76 L. J. K.B. 177; [1907] 1 K.B. 510; 96 L. T. 501; 12 Com. Cas. 88; 28 T. L. R. 182—Channell, J.

The pledging of packets of diamonds by an agent employed to sell diamonds in order to raise money for his principal is not out of the ordinary course of business of such agent. *Hastings, Llm. v. Pearson* (62 L. J. Q.B. 75; [1893] 1 Q.B. 62) distinguished. *Ib.*

Quære, whether, when goods have been obtained by larceny by a trick, and afterwards have been pledged by the person so obtaining them, the mode of obtaining them by a trick has any effect to take the subsequent pledging out of the protection of the Factors Act, 1889. *Ib.* Affirmed O.A., 77 L. J. K.B. 209; [1908] 1 K.B. 221; 98 L. T. 94; 24 T. L. R. 115.

— **“Sale, pledge, or other disposition” of Property—“Ordinary course of business.”**—Goods were consigned by the plaintiffs to H., a mercantile agent, for sale by him on their behalf for cash or on the hire system. H. sent the goods to the defendants, a firm of auctioneers, for sale by auction, and obtained from them an advance upon the goods in contemplation of their sale. In an action by the plaintiffs against the defendants for conversion of the goods, —*Held*, that the transaction was not “a sale, pledge, or other disposition of the goods made by a mercantile agent when acting in the ordinary course of business of a mercantile agent” within the meaning of section 2 of the Factors Act, 1889, and that consequently the defendants were not protected by the

provisions of the Act. *Waddington v. Neale*, 96 L. T. 786; 23 T. L. R. 464—D.

(e) *Insurance Agent.*

Collecting Premiums.—An insurance agent was instructed to effect an insurance on goods against fire. He forwarded the particulars to brokers in London, who effected the insurance with underwriters at Lloyd's. The agent collected the premiums from the assured, and, after deducting therefrom the amount of his commission, forwarded the balance to the brokers:—*Held*, that the insurance agent was the agent of the assured and not of the underwriters. *Bancroft v. Heath*, 5 Com. Cas. 110—Mathew, J.

Insurance Broker and Insurance Agent—Money Received by Broker—Settlement in Account with Agent.—The plaintiff employed an insurance agent to effect an insurance of his mare and unborn foal. The agent sent a proposal form to the defendants, insurance brokers, who effected an insurance with underwriters at Lloyd's. A loss having occurred, the plaintiff informed the agent of the fact, and the agent obtained the policy from the plaintiff and sent it to the defendants. They collected the amount due from the underwriters, and paid to the agent the balance after deducting from the amount a sum due to the defendants from the agent in respect of other transactions. The agent did not pay to the plaintiff the sum received by him:—*Held*, that the plaintiff was entitled to recover from the defendants the whole amount received by them from the underwriters, less 1*l.* per cent. commission for collecting. *Legge v. Byas, Mosley & Co.*, 7 Com. Cas. 16—Walton, J.

Insurance Broker—Dealings between Managing Owner and Broker.—M. & Co., who acted as managing owners of the *Gordon Castle* and other ships belonging to different owners, instructed insurance brokers to insure the *Gordon Castle* and other ships managed by them. The course of dealing between M. & Co. and the insurance brokers was for the brokers to pay the premiums to the underwriters and for M. & Co. to accept bills drawn by the insurance brokers for sums representing the whole premiums disbursed by the insurance brokers on the policies on the various ships insured by them. In the course of dealing it was agreed between M. & Co. and the insurance brokers that if any acceptance was not met by M. & Co. the insurance brokers would be entitled to cancel any of the policies in whole or in part, and apply the return premiums due in respect of such cancellation in liquidation of any debt due to them by M. & Co. On the bankruptcy of M. & Co. certain premiums disbursed by the insurance brokers on policies on the *Gordon Castle* had not been paid to them by M. & Co. In an action by the insurance brokers against the owners of the *Gordon Castle* for payment of these premiums, —*Held*, that the defendants were not liable, as the pursuers had elected to take M. & Co. as their sole debtors. *Xenos v. Wickham* (86 L. J. C.P. 313; L. R. 2 H.L. 296) commented on. *Lamont, Nisbett & Co. v. Hamilton*, [1907] S.C. 628—Ct. of Sess.

Agent of Insurance Company and Insurer—

Fraud.—See *Biggar v. Rock Life Assurance Co.*, 71 L. J. K.B. 79.

Misrepresentations by Agent—Invalidity of Policy—Return of Premiums.—See *INSURANCE*, col. 1029.

(f) *Printers.*

Fine Arts Copyright—Pictures—Penalties—Damages.—Under section 6 of the Fine Arts Copyright Act, 1862, the printers, although merely innocent agents, are liable for penalties for an infringement as well as the publishers; and a penalty must be assessed in respect of each copy of the infringement which has been sold. *Baschet v. London Illustrated Standard Co.*, 69 L. J. Ch. 35; [1900] 1 Ch. 73; 81 L. T. 509; 48 W. R. 56—Kekewich, J.

(g) *Receiver for Debenture-holders.*

Winding-up—Business Carried on by Receiver—Liability of Trustees for Goods Ordered by Receiver.—By a deed made between a limited company and trustees for debenture-holders, the property of the company was transferred to the trustees, upon trust to permit the company to carry on the business until the happening of one or other of events specified. On the happening of such event, the trustees were empowered to appoint a receiver; but it was an express condition of the exercise of that power that “any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults.” One of the events happened, and the trustees appointed a receiver, who took possession of the mortgaged premises and carried on the business of the company. An order was made for the winding-up of the company and a liquidator appointed, who permitted the receiver to carry on the business as before. The respondents sued the trustees for goods supplied to the receiver after the winding-up order:—*Held*, that the trustees were not principals of the receiver, and were therefore not liable for the price of the goods supplied. *Gosling v. Gaskell*, 66 L. J. Q.B. 843; [1897] A.C. 575; 77 L. T. 314; 46 W. R. 208—H.L. (E.) *And see COMPANY*, col. 437.

(h) *Shipbroker.*

Commission on “Hire earned”—Time Charterparty—Cancellation.—The plaintiff, acting as broker for the defendants, obtained a time charterparty for their ship upon terms of being paid a commission on all hire earned. During the currency of the charterparty litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charterparty, there being no wilful act or default on the part of the defendants in bringing about this result:—*Held*, that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charterparty. *White v. Turnbull*, 78 L. T. 726; 8 Asp. M.C. 406—C.A.

(i) *Stockbroker.*

Liability of Broker to Client—Sold Note not Disclosing Jobber's Name.—There is no proved rule or custom of the London Stock Exchange that where a stockbroker who is employed by a client to sell shares sends a contract note to the client in which the name of the jobber or purchaser is not disclosed, the stockbroker becomes a principal and liable to the client for the purchase price of the shares. *Gill v. Shepherd*, 8 Com. Cas. 48—Kennedy, J.

Tender of Shares by Broker to Client—Right of Broker to Indemnity—Delay by Broker—Tender of Portion of Shares—Jurisdiction of Stock Exchange Committee.—Where a client who is not a member of the Stock Exchange instructs a broker who is a member of the Stock Exchange to purchase shares for him, and the broker accordingly purchases them and receives them from the seller within the time allowed by the rules of the Stock Exchange and pays for them, although it is the broker's duty to tender the shares to the client within a reasonable time, it is no answer to his claim for an indemnity for the client to say that the shares were not delivered in time, although that might be a good ground for a counterclaim. Where, under such circumstances, the broker tenders to the client a portion only of the total number of shares comprised in the contract note, the client is bound to accept delivery of the portion so tendered or to indemnify the broker against the price he has paid for them, although there is no valid tender by the broker of the remainder of the shares. *Benjamin v. Barnett*, 8 Com. Cas. 244—Kennedy, J.

But where the seller does not tender the shares to the broker within the time allowed by the rules of the Stock Exchange, and the client gives notice to the broker that he will not accept delivery after such time has elapsed; if the broker does not then accept them and pays the seller he will not be entitled to be indemnified by the client in respect of the sum he has paid for the shares. Nor will a resolution of the Stock Exchange that the broker is to pay the jobber for the shares when delivered be binding on the client, or, *semble*, on the broker, inasmuch as the committee cannot by passing a resolution make valid a contract which has been broken. *Union Corporation v. Charrington* (col. 1981) followed. *Id.*

Statement of Account by Clerk—Receipt.—B, a clerk employed by a firm of stockbrokers, sent a fortnightly statement of account to A, a client of the firm. The statement contained an entry of a sum of money as paid by A to the firm as the price of certain shares. The statement was written by B, and was initialled by him as on behalf of the firm. In an action by A against the firm for delivery of the shares, the defence was that the defenders had not received the price. It being admitted that the defenders had not received the money,—*Held*, that they were not barred by the entry in respect—first, that it was not in itself a receipt, and, secondly, that even if it were, it had not been proved that B had authority to grant it so as to bind the defenders. *Robb v. Gow*, 8 F. 90—Ct. of Sess.

Liability for Loss by Fraud of Clerk.—A, whose brother-in-law B was a trusted clerk in the office of a firm of stockbrokers, carried on a series of transactions with the stockbrokers, in the course of which he instructed them to buy for him certain shares. The shares were bought and paid for, and, transfers having been duly executed, A became the registered owner of the shares. The share certificates, which had been duly forwarded by the various companies to the stockbrokers, were not handed over to A, but were allowed by him to remain in the stockbrokers' office for periods varying from one to two years, when it was found that B had, by taking possession of the certificates and by executing forged transfers, sold the shares on his own behalf and had absconded with the proceeds. Throughout the course of dealing between A and the stockbrokers, B was recognised both by A and the stockbrokers as the person in the stockbrokers' office who attended to A's business. In an action by A against the stockbrokers for delivery of the share certificates or for damages,—*Held*, that the stockbrokers were not liable in respect that either—first, A, in the knowledge that he might have got delivery of the certificates, had chosen to leave them in the stockbrokers' office for his own purposes and under the general management of B, so that B had received delivery of the certificates as A's agent for the time; secondly, if B was not A's agent for the time, B had got hold of the certificates fraudulently; in which case, under the rule of *Barwick v. English Joint-Stock Bank* (86 L. J. Ex. 147; L. R. 2 Ex. 259), the stockbrokers, as innocent principals, were not liable for B's fraud, the fraud not having been committed in the course of his service and for their benefit. *Robb v. Gow*, 8 F. 90—Ct. of Sess.

Authority to Carry over Specified Number of Shares—Purchase by Stockbroker of Larger Number—Failure of Stockbroker—Liability of Undisclosed Principal—Privity of Contract.—Appeal by the plaintiffs from the judgment of Kennedy, J., reported 69 L. J. Q.B. 413, dismissed on the facts. *Beckhussen v. Hamblet*, 70 L. J. K.B. 600; [1901] 2 K.B. 73; 84 L. T. 617; 40 W. R. 481; 6 Com. Cas. 141—C.A.

Broker Instructed by Several Clients—Orders Lumped Together by Broker in One Transaction with Jobbers—Privity of Contract between Jobbers and Client.—The defendant instructed a broker on the London Stock Exchange to "carry over" to the next account 225 shares in a company. The broker, who had been instructed by other clients to carry over to that account shares in the company, employed the plaintiffs, who were jobbers on the Exchange, to carry over to the next account 925 shares in the company, and appropriated in his own books 225 of those shares to the defendant. Before the next settling day the broker was declared a defaulter. The plaintiffs then ascertained from him who his principals were. The defendant wrote to a clerk of the broker claiming that the broker's failure had closed his account, and the letter was shown by the clerk to the plaintiffs, who thereupon sold the 225 shares in the market, and eventually brought an action against the defendant for the difference between the price at which they had carried over these shares and the price at which they had sold them. The

jury found that there was a custom of the Exchange by which a broker lumped together the orders of his clients and executed them by means of one contract with the jobber; that the defendant gave his order on the terms that it might be executed in accordance with that custom; and that there was a further custom by which the jobber and each client of the broker became bound to each other to carry out the part of the contract applicable to the client's order:—*Held*, that there was a contract between the plaintiffs and the defendant in respect of the 225 shares; that it had been repudiated by the defendant; and that the plaintiffs were entitled to recover. *Scott v. Godfrey*, 70 L. J. K.B. 954; [1901] 2 K.B. 726; 85 L. T. 415; 50 W. R. 61; 6 Com. Cas. 226—Bigham, J.

Shares Bought and Carried Over on Stock Exchange—Defaulting Broker—Customer's Liability to Stockjobber—Carrying-over Price—"Hammer" Price.—Where a person buys shares on the Stock Exchange through his broker from a jobber and has them carried over to a future settling day, and in the meantime his broker has been declared a defaulter on the Stock Exchange, a relationship of buyer and seller is established between him and the jobber; and where such a buyer, on his broker's default, refuses the shares at "hammer" price and repudiates the transaction, the jobbers are entitled to sell out the shares and recover from him the whole difference between the price realised and the price at which they were carried over, and are not restricted to the difference between that price and the "hammer" price. *Anderson v. Beard*, 69 L. J. Q.B. 610; [1900] 2 Q.B. 260; 82 L. T. 714; 5 Com. Cas. 261—Mathew, J.

Death of Client—Continuation—Carrying over to Next Settling Day—Continuation Contract.—A stockbroker on the death of his client has no authority, express or implied, to carry over shares purchased for his client to the next settling day, but should close the account. *Phillips v. Jones* (4 Times L. R. 401) followed. *Overweg, In re*; *Haas v. Durant*, 69 L. J. Ch. 255; [1900] 1 Ch. 209; 81 L. T. 776—Byrne, J.

A carrying over or a continuation on the Stock Exchange is in form and in law both a sale and re-purchase, or a purchase and re-sale, as the case may be (*Bongiovanni v. Société Générale*, 54 L. T. 320), and therefore if a broker, when under an obligation to close an account by selling his client's shares, prefers to carry over, he does so at his own risk, and is not entitled as against his client to treat the continuation as one transaction, but is responsible to his client as if there had been an immediate sale at the price named. *Id.*

Sale of Shares for Client—Deposit of Shares by Client with his Bank—Obligation of Broker to Pay Bank against Delivery of Shares—Payment of Bank by Purchasing Jobber.—Where a stockbroker who is a member of the London Stock Exchange has sold shares for a client and the shares are in the possession of the client's bank, there is no duty upon the broker to himself pay the bank the price at which the shares have been sold against delivery by the bank of the shares; nor is he under any obligation to ask the jobber who has bought the shares to make the payment for them direct to the bank. *Hawkins v. Pearce*, 9 Com. Cas. 87—Walton, J.

— Custom of Stock Exchange—Refusal of Company to Register Transfer—Action by Vendor for Specific Performance or Rescission of Contract.]

—A contract for the sale of shares in a registered company with unlimited liability was made through stockbrokers subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him by the vendor of a duly executed transfer, together with the certificate of the shares. One of the regulations of the company provided that it should be lawful for the directors to decline to register the transfer of shares to any person not approved of by the directors as transferee, and that thereupon such transfer should be void. An application for registration of the transfer being subsequently made to the company by the purchaser, they refused to register him as the transferee of the shares. The vendors issued an equity civil bill, claiming specific performance of the contract and asking that the purchaser should be ordered to procure the shares to be registered in his own name, or in that of some other person. The claim was subsequently amended by adding a prayer for an indemnity and for rescission of the contract; and the Judge made a decree declaring the plaintiff a trustee of the shares of the defendant, and that the defendant was bound to indemnify the plaintiff against calls:—*Held* (FITZGIBBON, L.J., *dissentiente*), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transfer, and that the equity civil bill should have been dismissed. *Casey v. Bentley*, [1902] 1 Ir. R. 376—C.A.

Closing Account on Stock Exchange—Breach of Contract—Measure of Damages.]—A stockbroker on the London Stock Exchange who, in breach of his agreement to keep his customer's account open till the settlement at the end of the month, wrongfully closes it, is liable to his customer in damages; and the measure of such damages is the highest price the stocks and shares would have realised between the date he so wrongfully closed the account and the date to which he agreed to carry it over. *Michael v. Hart*, 70 L. J. K.B. 1000; [1901] 2 K.B. 867; 85 L. T. 548; 50 W. R. 154—Wills, J. See s.c. in C.A., 71 L. J. K.B. 265; [1902] 1 K.B. 482.

— Sale of Shares Purchased for Client—Repurchase by Broker for Himself at Time of Sale—Validity of Sale.]—Stockbrokers, who had upon the instructions of a client made a contract on the Stock Exchange for the purchase of shares for him, claiming to be entitled by the terms of their agreement with him to close his account, went for that purpose to a jobber and asked him to make a cash price for the shares. The jobber fixed a price, and a bargain was then made for the sale of the shares by the brokers to the jobber at the price fixed, and for the repurchase of them by the defendants from the jobber for the next account. In an action by the client against the brokers for damages for wrongfully selling the shares, the brokers counterclaimed for the balance of their account, in which they debited the client with the amount for which they originally purchased the shares, and credited him with the amount for which they sold the shares to the jobber.

At the trial the plaintiff failed to show that the brokers were not entitled to sell and made no imputation of want of good faith on the part of the brokers, and the Judge's judgment was given for the brokers upon their counterclaim. On an application by the client for judgment or a new trial, upon the ground that, the brokers being agents acting in a fiduciary capacity, the sale of the shares by them to a person from whom they at the same time repurchased the shares for themselves did not constitute a valid closing of the account with respect to those shares,—*Held*, per VAUGHAN WILLIAMS, L.J., and ROMER, L.J., that, having regard to the course which matters took at the trial, the point was not open upon the application to the Court of Appeal; per A. L. SMITH, M.R., and ROMER, L.J., that in the circumstances there was a sale of the shares which constituted a valid closing of the account with respect to them. *Macoun v. Erskine, Oxenford & Co.*, 70 L. J. K.B. 973; [1901] 2 K.B. 493; 85 L. T. 372—C.A.

— Sale and Repurchase of Client's Shares by Broker—Profit made by Broker—Liability of Broker to Account.]—Brokers on the London Stock Exchange, who had entered into contracts on behalf of clients for the purchase of certain shares, which the clients failed to take up, in order to close the account in accordance with the rules and usage of the Exchange, went into the market and sold to jobbers shares to a like amount. At the same time, and as part of the transaction between themselves and the jobbers, the brokers repurchased the shares for themselves, but the price at which the brokers sold the shares was the proper market price for them. In consequence of the sale and repurchase of the shares having been effected at the same time, the brokers obtained the shares at a less price than they would have had to pay for them in the ordinary course, and thereby made a profit:—*Held*, that the brokers, having in the sale of the shares acted in a fiduciary relation to their clients as their agents, and having in consequence of the sale made a profit on the repurchase of the shares, must account to the clients for the profit so made. *Macoun v. Erskine, Oxenford & Co.* (70 L. J. K.B. 973) and *Walter v. King* (18 Times L. R. 270) considered. *Erskine, Oxenford & Co v. Sachs*, 70 L. J. K.B. 978; [1901] 2 K.B. 504; 85 L. T. 385—C.A.

Transfer of India Stock—Request to Transfer by Stockbroker—Identification of Transferor—Innocent Misrepresentation—Forged Signature—Implied Warranty of Identity—Liability of Stockbroker—Third Party—Indemnity.]—A stockbroker, believing his client to be the holder of India Stock, requested the Bank of England to make a transfer of the stock, and subsequently attended at the Bank and identified the client as the stockholder. In fact, the signature to the transfer was forged by the client and the stockbroker had been himself deceived as to the identity of the client. The stock was subsequently, but before discovery of the fraud, transferred *bona fide* to third parties. Upon discovery of the fraud the real stockholder called upon the Bank to replace the stock. The Bank, being advised that they were liable, bought stock on the market, which was transferred into the name of the stockholder:—*Held*, that, as the Bank had been compelled, by reason of the

subsequent transferees having a good title by estoppel against the Bank, to replace, by purchase, the stock which had been transferred, the stockbroker was liable to indemnify the Bank upon the ground that he had impliedly warranted the identity of the person signing the transfer, and had, by requesting the Bank to make the transfer, brought himself within the doctrine established in *Sheffield Corporation v. Barclay* (74 L. J. K.B. 747; [1905] A.C. 392). *Bank of England v. Cutler*, 76 L. J. K.B. 504; [1907] 1 K.B. 889; 96 L. T. 636; 23 T. L. R. 374—A. T. Lawrence, J.

Lien—Securities in Stockbroker's Hands—Specific Loan.]—A stockbroker has, in the absence of special agreement to the contrary, a general lien on a customer's securities which are in his hands in the course of his business. *Jones v. Peppercorne* (28 L. J. Ch. 158; Johns. 430) followed. *London and Globe Finance Corporation, In re*, 71 L. J. Ch. 693; [1902] 2 Ch. 416; 87 L. T. 49—Buckley, J.

A customer deposited shares with his broker as security for a particular loan, which was paid off shortly after it was made, and for successive advances from time to time made. At a Stock Exchange account all that was payable between customer and broker was paid, but some speculative transactions were carried over, which, when the next account arrived, had resulted in a loss. The shares had remained in the broker's custody:—*Held*, that the broker had a general lien on the shares for the sum due to him from the customer. *Wylde v. Radford* (33 L. J. Ch. 51) and *Bowes, In re; Strathmore (Earl) v. Vane* (56 L. J. Ch. 143; 33 Ch. D. 586), distinguished. *Id.*

Broker Making Default—Client of Broker and Jobber—Privity of Contract.]—A broker on the London Stock Exchange, upon the instructions of the defendant, who was not a member thereof, purchased for him 330 shares from the plaintiffs, who were jobbers on the Exchange. Subsequently, the broker, being instructed by the defendant to carry over these shares and others of the same kind which the defendant had bought, to the next account, carried over 300 of the shares with the plaintiffs, and appropriated the shares so carried over to the defendant, carrying over the other shares with other jobbers. Before the next settlement the broker was declared a defaulter upon the Stock Exchange, and the plaintiffs under rule 177 of the Stock Exchange Rules closed the transaction as to the 300 shares by buying them back from the broker at the price fixed by the official assignee. The plaintiffs having discovered that the defendant was the broker's principal, gave him notice that they should look to him to complete the transaction, but the defendant claimed that the transaction was closed under rule 177. At the next settlement the plaintiffs tendered the shares to the defendant, and on his refusing to accept them sold them at their market price at a loss, and sued the defendant for the difference between the price they obtained and the price at which the shares were carried over:—*Held*, that there was privity of contract between the plaintiffs and the defendant upon the transaction for carrying over the 300 shares; that rule 177 of the Stock Exchange Rules was applicable to members of the Stock

Exchange only as between themselves, and did not close the transaction as regards the defendant; that there is no established usage of the Stock Exchange of which the Courts will take judicial notice that upon the default of a broker his client has the option of closing a transaction entered into by the broker for him with a jobber at the price fixed by the official assignee under rule 177; and that, as no such usage was proved upon the facts of the case, the plaintiffs were entitled to recover from the defendant the amount claimed. *Levett v. Hamblet*, 70 L. J. K.B. 520; [1901] 2 K.B. 53; 84 L. T. 638; 6 Com. Cas. 79—C.A.

—Jobber and Customer—Privity of Contract—Difference between Contract Price and Hammer Price received by Jobber out of Broker's Estate—Failure of Customer to Complete—Liability to Jobber.]—Where a broker on the Stock Exchange has entered into a contract with a jobber on behalf of a customer in such circumstances as to create privity of contract between the jobber and the customer, and the broker is before completion declared a defaulter, and the jobber claims in the liquidation of the estate of the broker for the difference between the contract price and hammer price, and is paid such difference in full, the jobber is nevertheless entitled, in the event of the customer failing to complete with him, to recover damages from the customer; but, in the event of the damages exceeding the sum received by the jobber from the broker's estate, the jobber is bound to account to the broker's estate for that sum. *Stoneham v. Wyman*, 6 Com. Cas. 174—Mathew, J.

—Refusal of Jobber to Complete with Nominee of Broker's Client.]—Where a broker on the Stock Exchange has sold shares on behalf of a client to a jobber, and is, before completion, declared a defaulter, the client, if he elects to complete the transaction on his own account, is not entitled to require the jobber to pass a name to a person nominated by the client as an incident to "making down" the shares with the nominee, inasmuch as the effect of so making down the shares would be to release the client and to substitute his nominee as principal. *Currie v. Booth*, 7 Com. Cas. 77—C.A.

—Several Accounts—Fraudulent Deposit of Securities—General Indebtedness—Debit to Loan Account—Credit to Current Account—Equities between Persons Claiming under Customer.]—A firm of brokers kept two accounts with their bankers, a current account and a loan account. The brokers wrongfully deposited bonds of their clients to secure their general indebtedness to the bank, and also paid to the credit of their current account moneys of other clients which they had received to pay for investments. The brokers having been declared defaulters, the bank opened a new liquidation account, to which they transferred 1,362*l.* then standing to the credit of the current account and the amount standing to the debit of the loan account, which largely exceeded the 1,362*l.* The bank never, in fact, appropriated the 1,362*l.* to meet the debit, but satisfied it by sale of a sufficient part of the deposited bonds:—*Held*, that, as against the clients entitled to follow the 1,362*l.*, the owners of the deposited bonds,

in calculating the amount for which the bonds were a security, were entitled to have the 1,862*l.* first applied in reduction of the debit. *Mutton v. Peat*, 69 L. J. Ch. 484; [1900] 2 Ch. 79; 82 L. T. 440; 48 W. R. 486—C.A. •

— **Jurisdiction of Stock Exchange Committee** — **Default in Delivery of Shares—Suspension of "Buying in"**—**Release of Intermediaries.**—The committee of the London Stock Exchange has jurisdiction under rule 19 of the rules and regulations of the Stock Exchange to pass a resolution that the buying in of shares in a security shall be suspended, inasmuch as the rule contemplates that the committee have it in their power to alter the dates when a particular thing may be done. But the committee has no jurisdiction to pass a resolution "that when the buying in of any security is suspended by order of the Committee the clause in the rules relating to the release of intermediaries shall remain inoperative until such suspension is removed," inasmuch as such a resolution amounts to the entire alteration of the contract by placing upon the buyer of shares the obligation of waiting, possibly for ever, leaving to the vendors the right to come with their shares when they please. Where there is a sale of shares, speedy, prompt, and proper delivery is essential. *Union Corporation v. Charrington*, 8 Com. Cas. 99—Bigham, J.

— **Liquidation by Official Assignee of Stock Exchange—Receipt of Dividend by Creditor** — **Right of Creditor to Present Petition for Balance of Debt.**—Where the assets of a defaulting member of the Stock Exchange are distributed by the official assignee of the Stock Exchange, a member being a creditor who has received a dividend in such distribution is not thereby precluded from suing the defaulter for the balance of his debt or from presenting a petition in bankruptcy against him in respect of such balance. *Mendelssohn v. Ratcliff*, 73 L. J. K.B. 1027; [1904] A.C. 456; 91 L. T. 204; 53 W. R. 240; 10 Com. Cas. 14; 20 T. L. R. 670—H.L. (E.)

Liability of Stockbroker for Conversion of Bearer Bonds.—See NEGOTIABLE INSTRUMENT.

PRINCIPAL AND SURETY.

1. *Guarantee*, 1981.
2. *Surety: Rights and Liabilities*, 1982.
3. *Co-Sureties*, 1984.
4. *Discharge of Surety*, 1986.

1. GUARANTEE.

"Continuing" **Guarantee—Advances More than Six Years Before Action Brought—Liability of Guarantor for Interest Accrued Within Six Years.**—By a guarantee to secure the account of a bank with their customer the guarantor guaranteed the due payment of all advances made or to be made by the bank to the customer "with interest," and it was provided that the guarantee should be "a continuing guarantee," but that the amount ultimately recoverable thereunder should not exceed 1,000*l.* Advances were made by the bank

to the customer up to December, 1890, after which no further advances were made; but the customer continued to make payments on account down to March, 1897. In an action upon the guarantee commenced in September, 1897, by the bank against the guarantor in respect of the balance for advances and interest then owing by the customer,—*Held*, that the bank's cause of action against the guarantor in respect of the advances to the customer accrued as and when the advances were made, and consequently the claim of the bank, so far as it related to the advances, was barred by the Statute of Limitations; but *held*, that, upon the true construction of the guarantee, interest was intended to be guaranteed on the same footing as principal, and inasmuch as the customer, by reason of the payments by him on account, remained liable to the bank in respect of the advances so that interest thereon continued to accrue as against him, the bank were entitled to recover against the guarantor the interest accrued within six years before action brought. *Parr's Banking Co. v. Yates*, 67 L. J. Q.B. 851; [1898] 2 Q.B. 460; 79 L. T. 321; 47 W. R. 42—C.A.

— **Fidelity Bond—Death of Guarantor—Notice—Determination of Liability.**—A continuing guaranty under seal, where the consideration is given once for all, is not determined by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guaranty is given. Such a guaranty cannot be determined by the guarantor or his executors upon notice, unless there be an express stipulation to that effect. *Crace, In re; Balfour v. Crace*, 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144—Joyce, J.

Guarantee for Employee—Criminal Conduct of Employee—Intimation to Guarantor.—By bond of guaranty S. became surety to an insurance company for J., one of the company's agents. On August 11, J. embezzled 25*l.* which had been entrusted to him by the company to be given to a policy-holder. On September 25, J. confessed his crime to the company's manager, and was suspended. On October 8 he absconded. On October 11 the company gave information to the police and also to S.:—*Held*, that the company had failed to give intimation within proper time to S. of the criminal conduct of J., and were barred from claiming against S. under the bond of guaranty. *Snaddon v. London, Edinburgh, and Glasgow Assurance Co.*, 5 F. 182—Ct. of Sess.

2. SURETY: RIGHTS AND LIABILITIES.

Covenant by Surety to Pay Interest "so long as any principal money remains due"—**Covenant to Pay Premiums on Policy of Insurance on Principal's Life—Proof in Bankruptcy of Principal—Valuation of Security.**—H. covenanted jointly and severally with a debtor, M., to whom he had himself made advances, to pay the interest on a loan made to M. by C. "so long as any principal money should remain due," and he also covenanted to pay the premiums on a policy of insurance on M.'s life. On M.'s bankruptcy H. tendered a proof in respect of his liability to continue the payment of both interest and premiums notwithstanding the bankruptcy. C. also proved in respect of

the amount due to him, and valued the policy at a certain sum:—*Held*, that on the debtor's bankruptcy the principal sum was no longer due within the meaning of the covenant, and that, the policy having been valued, the liability to pay the premiums ceased, and H.'s proof had therefore been rightly rejected. *Moss, In re; Hallett, ex parte*, 74 L. J. K.B. 764; [1905] 2 K.B. 307; 92 L. T. 777; 53 W. R. 558; 12 Manson, 227—D.

Alteration of the Duties and Office of Principal Debtor.—B. was in 1896 duly appointed to "the office of clerk and storekeeper" of an asylum at a salary of 80*l.* a year, with allowances valued at 50*l.* On the passing of the Local Government (Ireland) Act, 1898, the committee of management separated the office of clerk and storekeeper, and appointed another person to be storekeeper. B. was continued as clerk at a salary of 100*l.*, without apartments or other allowances, and was compensated (under the Act) for the loss of his emoluments as storekeeper. He was dismissed in 1900, and accounts shewed that he was in default in respect of a sum of 52*l.* received by him during that year. The defendants, in 1897, had executed, as B.'s sureties, a bond to the Crown, conditional on the due discharge by B. of his duties in "the office of clerk and storekeeper." They had no notice of the changes made in 1899-1900. In proceedings against them as sureties,—*Held*, that, even assuming that the old office had not been in fact abolished, still it had been subjected to such material alterations that the bond could not be held to apply to it, and that the defendants were not liable. *Held*, further, following *Holme v. Brunskill* (47 L. J. Q.B. 610; 3 Q.B. D. 495), that, even assuming the bond to apply to the office in its altered form, the defendants should have been given an opportunity of considering whether they would adhere to the bond or not. *Rees v. Herron*, [1908] 2 Ir. R. 474—K.B. D.

Right of Surety to Security given by Principal Debtor—Mortgage.—The right of a surety against the security given to the creditor by the principal debtor arises at the time of his becoming surety, and does not arise merely if, and when, he discharges the obligation of the principal debtor. *Dicta* of PAGE-WOOD, V.C., in *South v. Bloxham* (34 L. J. Ch. 369; 2 H. & M. 457), considered and explained. *Dixon v. Steel*, 70 L. J. Ch. 794; [1901] 2 Ch. 602; 85 L. T. 404; 50 W. R. 132—Cozens-Hardy, J.

Building Contract—Sub-contractor for Part of Work—Accident Indemnity—Claims under Workmen's Compensation Act, 1897—Indemnity not Signed by Sub-contractor.—A contractor for the erection of a building agreed to employ sub-contractors selected by the architect to do certain parts of the work. The architect selected the defendant to do the carving work, and the contractor sent him a written order to execute the whole of the carving, the order concluding as follows: "You agree in accepting this order to sign and send per return of post the enclosed accident indemnity." The indemnity was to hold the contractor and any insurance company with whom he might be insured harmless against all claims under the Workmen's Compensation Act, 1897, by any person in the defendant's employment upon such work in

respect of any accident. The defendant not return any answer to the order, nor did sign the indemnity form, but he went on with the work. An accident happened to a workman employed by him upon the work, which the contractor had to pay compensation under the Workmen's Compensation Act, 1897. The contractor claimed indemnity from the defendant:—*Held*, that the defendant executed the work upon the footing of the order given to him by the contractor and of indemnity inclosed with it, and that he was liable to indemnify the contractor. *Greenwood v. Hawkings*, 23 T. L. R. 72—Bigham, J.

Covenant by Surety for Payment of Rent Limited Company—Winding-up.—See *LAW LORD AND TENANT*, col. 1193.

Relation of Principal and Surety—Construction of Deed.—See *Nicholas v. Ridley*, 73 L. Ch. 145, *ante*, MORTGAGE.

3. CO-SURETIES.

Contribution—Joint and Several Bond by Sureties, by which Sureties as against Creditor to be Treated as Principals—Payment by Surety Transfer of Bond to Surety—Liability of Surety.—Upon the execution of a mortgage its property by a limited company, three of the directors agreed to guarantee the repayment of the mortgage money and executed a joint and several bond to the mortgagees, by which it was stipulated that as between the mortgagees and the obligors, the three sureties, the obligor should be taken to be principal debtors, and should not, nor should either of them, be released from their or his liability under the bond by reason of time being given to the company by the mortgagees or by reason of any forbearance, or omission of the mortgagees or their assignees. Two of the sureties paid off the mortgage and took an assignment of the mortgage and of the bond, and agreed with a new company, who had purchased the goodwill, stock-in-trade, and premises of the original company, not to enforce the mortgage for six months. In an action for contribution by the two sureties against the co-surety, the latter set up the defence that he was released from liability to contribution by reason of the agreement not to enforce the mortgage for six months:—*Held*, that the two sureties, as assignees of the bond, were entitled to stand in the place of the original mortgagees and that, inasmuch as, by reason of the provisions of the bond, this defence could not have been set up against the mortgagees, it could not be set up against the sureties, who had by the assignment become principals, and that the co-surety was liable to contribution subject to any claim he might have for injury done him by reason of the wrongful action, if any, of the two sureties. *Greenwood v. Francis*, 1 L. J. Q.B. 228; [1899] 1 Q.B. 312; 79 L. T. 624; 47 W. R. 230—C.A.

Signature of Three out of Four Sureties—Liability of Three Signatories.—A guarantee by a bank for an overdraft was, on its face, intended to be a joint and several guarantee by four guarantors. Three out of the four signed the guarantee, but the fourth did not sign, though willing to do so, and then died:—*Held*, that

the three who signed were not liable to the bank on the guarantee. *National Provincial Bank of England v. Brackenbury*, 22 T. L. R. 797—Walton, J.

Non-execution of Deed of Suretyship by one of Several Co-Sureties.]—Where several persons sign a memorandum by which they agree to execute a deed of covenant binding themselves jointly and severally for the payment of a certain debt in a certain amount, and where, on the faith that the deed will be executed by all the signatories of the memorandum, several execute it, they are entitled to repudiate liability if all do not in fact sign the deed. The known insolvency of one of those who should sign the deed does not render its execution by him immaterial. *Evans v. Bremridge* (8 De G. M. & G. 102; 2 K. & J. 174) followed. *Fitzgerald v. McCowan*, [1893] 2 Ir. R. 1—Q.B. D.

Duty of Obtaining Execution by All Co-Sureties.]—In the absence of other arrangements, it is the person by whom a security is to be taken or to whom it is to be made—for example, a mortgagee, an obligee, a grantee, or covenantee, or creditor, or the like—and by whom the draft security instrument is prepared and engrossed, who should see that the instrument is duly executed by all the necessary parties. *Ib.*

Mortgage—Insurance—Joint Liability.]—A mortgage deed contained a covenant by a surety for repayment of the mortgage debt of 4,000*l.*, subject to a proviso that the surety should in no case be liable for more than 1,000*l.* It also contained a covenant by the mortgagor for the insurance of the mortgage debt with a mortgage insurance corporation. The mortgage debt was accordingly insured by a policy of insurance which provided that the insurance corporation would, subject to certain conditions, repay the mortgage debt within six months of the power of sale contained in the mortgage deed becoming exercisable by the mortgagees. By one of the conditions of the policy it was agreed that, on the insurance corporation paying in accordance with the policy, the mortgagees should assign or transfer to the corporation the mortgage debt and interest and all securities held by the mortgagees for the same. The insurance corporation were aware at the time of their granting their policy of the covenant made by the surety:—*Held* (VAUGHAN WILLIAMS, L.J., *dubitante*), that the insurance corporation were not co-sureties with the surety, but collateral guarantors against the default both of the principal debtor and the surety, and that, a loss having occurred by the mortgagor's default, the insurance corporation were subrogated to the mortgagees' rights against the surety, without any right on the part of the surety to require them to contribute to the loss. *Craythorne v. Swinburne* (14 Ves. 160) applied. *Denton, In re*; *Licences Insurance Corporation v. Denton*, 73 L. J. Ch. 465; [1904] 2 Ch. 178; 90 L. T. 698; 52 W. R. 484—C.A.

Joint Cautioners—Relief—Measure of Cautioners' Liability inter se—Insolvency.]—Five persons jointly and severally guaranteed to a bank payment of all sums for which a company might become liable to the bank. The company having gone into liquidation, the bank called on two of the cautioners to pay the balance due

under the guarantee. They did so, and then brought an action against another of the guarantors for relief to the extent of one-third of the sum they had paid. The pursuers averred, and gave evidence to prove, that the two remaining guarantors were insolvent. The defender denied that the insolvency of either of the remaining guarantors had been proved, and pleaded that he was liable in relief to the extent of a fifth only of the sum paid by the pursuers:—*Held*, that, whether the two remaining guarantors were insolvent or not, the pursuers were not bound to bear the whole risk of their insolvency, and therefore that the defender was liable in relief to the extent of one-third of the sum paid by the pursuers. *Buchanan v. Main*, 3 F. 215—Ct. of Sess.

4. DISCHARGE OF SURETY.

Rate Collector's Bond—Defalcation of Collector in Another Employment—Obligees Unable to Dismiss Collector—Neglect of Obligees to Inform Sureties of Defalcation—Relationship of Collector to Sureties.]—Sureties in a bond for the due performance of his office by a collector of poor rates are not released by his non-dismissal on the obligees becoming aware of his having been in arrear with public money, where such money has not been collected by him in an office held under the obligees; or where the obligees have not power to dismiss him and have done all in their power to procure his dismissal; nor by the neglect of the obligees, on becoming aware of his having been so in arrear, to inform the sureties of the fact, where, from the relationship and transactions between the collector and the sureties, it cannot be supposed that the sureties were ignorant of it. *Phillips v. Foxhall* (41 L. J. Q.B. 298; L. R. 7 Q.B. 666) distinguished. *Byrne v. Muir* (8 L. R. Ir. 396) approved. *Caxton and Arrington Union v. Dew*, 68 L. J. Q.B. 380; 80 L. T. 325—Bruce, J.

Joint and Several Guarantee—Judgment against Guarantors Jointly and Severally—Release of One Co-Debtor—Accord and Satisfaction—Extinguishment of Debt.]—The rule that the release of one of two joint or joint and several debtors is the release of the other applies equally whether the obligation arises upon a judgment or upon any other security. *E. W. A. (a debtor), In re*, 70 L. J. K.B. 810; [1901] 2 K.B. 642; 85 L. T. 31; 49 W. R. 642; 8 Manson, 250—C.A.

The debtor A. and B. entered into a joint and several guarantee to the extent of 6,000*l.* to a bank in respect of money owing to the bank by the P. Co. The bank recovered judgment against the debtor and B. jointly and severally for 6,000*l.* They presented a petition in bankruptcy against B., but arranged terms with him which were embodied in a document of March 7, 1901. The document was a receipt on behalf of the bank for 2,500*l.* and five bills for 100*l.* each "in full discharge of all claims by the bank against B. in connection with the P. Co., and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank," and the bank undertook to consent to the petition against B. being withdrawn on the terms of B. paying the costs. The bank now presented a petition in bank-

ruptcy against A. in respect of 3,000*l.*, the balance of the judgment debt, and the interest thereon, the consideration for the judgment debt being alleged to be the amount due under the joint and several guarantee. A. contended that he was no longer indebted to the bank, on the ground that his co-debtor had by the document of March 7, 1901, been discharged from all liability under the judgment:—*Held* (*dubitante* ROMER, L.J.), that under the document of March 7, 1901, B. had been released from his liability by way of accord and satisfaction without any reservation of the rights of the bank against A., and consequently the liability of A. under the judgment had been discharged. *Good, Ex parte; Armitage, in re* (46 L. J. Bk. 65; 5 Ch. D. 46), distinguished. *Ib.*

ROMER, L.J., but for the opinion of the rest of the Court, would have construed the document of March 7, 1901, not as a release of the debt, but only as an agreement by the bank with B. not to sue him personally. *Ib.*

PRISON.

STATUTES.

Prisons.—61 & 62 Vict. c. 41 is the *Prison Act*, 1898.

Prison Officers.—2 Edw. 7 c. 9 is the *Prison Officers (Pensions) Act*, 1902.

Governor of Prison—Legal Custody of Prisoners during Trial in Court—Illegal Detention of Prisoner by Warder after Acquittal—Liability of Governor.—The legal custody of prisoners when at the place of trial and during actual trial in Court is in the governor of the gaol from which they have come, or from which, if bailed, they would have come if they had not been bailed, as the effect of the Prison Act, 1865, and the subsequent legislation, has been to transfer such custody from the sheriff to the gaoler; and consequently, if, after a prisoner, whether he has come from the prison or having been admitted to bail has surrendered in Court to take his trial, has been tried, acquitted, and ordered to be discharged, the warders unlawfully detain him, the governor of the prison is responsible for the illegal act of the warders, although he may not have been present in Court or have ordered or directed it. The plaintiff was committed to quarter sessions on a charge of felony; he was admitted to bail, he surrendered, took his trial, and was acquitted, and was ordered by the chairman of the Court to be discharged; whereupon the warders who were in charge of the prisoners for trial, instead of allowing the plaintiff to go, took him to the cells below the Court and detained him for a considerable time, and questioned him as to his age, parentage, and other particulars, and noted down his answers in a book, and afterwards allowed him to go. The governor of the prison from which the plaintiff would have come if he had not been bailed was not present in Court, and the unlawful detention by the warders was not by his orders or directions. In an action for false imprisonment against the governor,—*Held*, that the legal custody of the plaintiff after he had surrendered and during his trial was in the governor of the prison, and that the

governor, whose duty it was to see that the plaintiff was properly discharged after acquittal, was responsible for the illegal acts of the warders in so detaining the plaintiff. *Mee v. Cruikshank*, 86 L. T. 708; 66 J. P. 89; 20 Cox C.C. 210—Wills, J.

— **Clerk of the Peace—Action against Governor and Clerk of the Peace—Governor Receiving Prisoner without Proper Warrant of Commitment—Warrant by Magistrate—Sentence Altered on Appeal by Quarter Sessions—No Fresh Warrant by Quarter Sessions—Liability of Governor and Clerk of the Peace.**—The plaintiff was convicted by a Court of summary jurisdiction and sentenced to a term of imprisonment with hard labour. He was taken to prison under a warrant of commitment made out by the magistrate, but released pending an appeal to quarter sessions. The conviction was affirmed, but the sentence was altered. No fresh warrant of commitment was made out by the Recorder at quarter sessions, but the original conviction by the magistrate was altered by the Recorder in accordance with his sentence. The plaintiff was then taken to prison, and the only documents handed to the governor of the prison were a copy of the original conviction by the magistrate as altered by the Recorder and the original warrant of commitment by the magistrate. He was detained in prison for some days, when the conviction was quashed upon other grounds, and he was released. In an action for false imprisonment against the clerk of the peace of the borough and the governor of the prison for unlawfully imprisoning the plaintiff,—*Held*, that the action could not be maintained against the clerk of the peace, as he was merely a ministerial officer and his act was a ministerial act; but that the action was maintainable against the governor, as he was not justified in receiving the plaintiff into custody and detaining him without a fresh warrant of commitment by the Recorder, and that the documents which the governor received were not equivalent to such warrant of commitment, and that the governor was liable in damages to the plaintiff. *Demer v. Cook*, 88 L. T. 629; 67 J. P. 206; 20 Cox C.C. 444—Lord Alverstone, C.J.

PRIVILEGE.

See DEFAMATION; DISCOVERY.

PRIVY COUNCIL.

See COLONY.

PROBATE.

Duty.—*See* REVENUE.

Wills, of.—*See* WILL.

PROHIBITION.

See COURT and ECCLESIASTICAL LAW.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROMOTER.

See COMPANY, col. 325.

PROXY.

See COMPANY, cols. 406, 407.

PUBLIC AUTHORITIES PROTECTION.

1. *When Act Applicable*, 1899.
2. *When Act not Applicable*, 1992.
3. *Costs*, 1994.

1. WHEN ACT APPLICABLE.

Effect of Act.]—Operation of the Public Authorities Protection Act, 1893, discussed. *Pearson v. Dublin Corporation*, 77 L. J. P.C. 1; [1907] A.C. 351—H.L. (Ir.)

"Public authority."]—The meaning of "public authorities" in the Public Authorities Protection Act, 1893, is not confined to municipal corporations. *The Johannesburg*, 76 L. J. P. 67; [1907] P. 65; 96 L. T. 464; 11 Asp. M.O. 402—Gorell Barnes, P.

Judgment Obtained by Consent.]—Whether section 1 (b) of the Public Authorities Protection Act, 1893, applies when the judgment is for the defendants by consent, *quære*. *Aird v. Tarbert School Board*, [1907] S.O. 22—Ct. of Sess.

Action against Colonel of Volunteers.]—An action against a colonel of Volunteers for an alleged neglect by him in the execution of his public duty as commander of Volunteers must be brought within six months of the act complained of. *Wilson v. Mackay*, 7 F. 168—Ct. of Sess.

Statutory Notification of Infectious Disease—Public Authorities Protection.]—*Semble*, a medical practitioner in giving in respect of a private patient the statutory notification to the local medical officer of health that such patient is suffering from an infectious disease is acting in the execution of a statutory or public duty, and is therefore entitled to the benefit of the provisions of section 1 (a) of the Public Authorities Protection Act, 1893. *Salisbury v. Gould*, 68 J. P. 153—Grantham, J.

Trading Municipalities.]—Section 1 of the Public Authorities Protection Act, 1893, applies to and protects municipal authorities who carry on under a statute such profit-earning undertakings as a tramway. The continuance of the injurious effects or damage caused by an accident is not "a continuance of injury or damage" within the meaning of the section. *Spittal v. Glasgow Corporation*, 6 F. 828—Ct. of Sess.

Negligent Working of Tramway—Neglect or Default in Execution of "public duty or authority"—Action for Injuries—Limitation of Action.]—Where a county council acquire and work a tramway under statutory powers, negligence on the part of their servants in driving the tramcars is a neglect or default in the execution of a "public duty or authority" within the meaning of section 1 (a) of the Public Authorities Protection Act, 1893, and consequently an action against the council in respect of such negligence must be commenced within six months after the occurrence of the negligence. *The Ydun* (68 L. J. P. 101; [1899] P. 236) followed. *Parker v. London County Council*, 73 L. J. K.B. 561; [1904] 2 K.B. 501; 90 L. T. 415; 52 W. R. 476; 68 J. P. 239; 2 L. G. R. 662; 20 T. L. R. 271—Channell, J.

Neglect in Execution "of public duty or authority"—Action for Injuries—Limitation of Time.]—A municipal corporation were working an electric tramway under the provisions of an order made under the Light Railways Act, 1896, which imposed on the corporation the duty of carrying passengers on this tramway constructed by them. An accident occurred to a passenger travelling on the tramway, for which he claimed damages. The action was not commenced within six months of the accident:—*Held*, that the plaintiff's cause of action did not depend upon contract, but arose out of an alleged breach of duty by the defendant corporation to carry him safely, and that such breach of duty was a "neglect or default in the execution of a public duty or authority" within the meaning of section 1 of the Public Authorities Protection Act, 1893, and the action not having been brought within six months failed. *Lyles v. Southend-on-Sea Corporation*, 74 L. J. K.B. 484; [1905] 2 K.B. 1; 92 L. T. 586; 69 J. P. 193; 3 L. G. R. 691; 21 T. L. R. 389—C.A.

Per VAUGHAN WILLIAMS, L.J.—It was not the intention of the Legislature that every act done by the corporation which was within the powers conferred by the order should be subject to the protection conferred by the Public Authorities Protection Act, 1893. An act done not only in pursuance, execution, or intended execution of the Light Railway Order, but also of some obligation incurred by the public authority voluntarily beyond the obligation cast upon them by the order, would not be an act done in pursuance or execution or intended execution of the order. *Ib*.

Semble, the word "person" in section 1 of the Public Authorities Protection Act, 1893, ought to receive a limited construction, and to be construed as excluding bodies or persons who are mere traders, and in no sense public authorities. The Act only applies to duties and acts which the "person" was under statutory duty to perform or do. *Ib*.

Alleged "act, neglect, or default" of High Bailiff of County Court—Non-service of Judgment Summons—Committal.]—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the County Court for not having served him, the debtor, with the judgment summons upon which the order is made. Any

such action against the high bailiff, by virtue of the Public Authorities Protection Act, 1893, must be brought within six months of the "act, neglect, or default" complained of, and therefore it must be brought within six months of the time when the bailiff made the return of the service of the judgment summons and the County Court Judge acted upon it. The date of the arrest on the committal order is not the date of the "act, neglect, or default." *Turley v. Daw*, 94 L. T. 216; 22 T. L. R. 231—Bray, J.

Time for Commencement of Proceedings—Continuance of injury or damage.—By the Public Authorities Protection Act, 1893, an action against a person for an act done in pursuance of an Act of Parliament or in respect of an alleged neglect or default in the execution of any such Act must be commenced "in case of a continuance of injury or damage within six months next after the ceasing thereof":—*Held*, that the words "in case of a continuance of injury or damage" do not refer to a damage inflicted once and for all which continues unrepaired, but to a new damage recurring day by day in respect of an act done, it may be, once for all at some prior time, or repeated, it may be, from day to day:—*Held*, therefore, that where there was such a continuing injury an action would lie, when instituted within six months after the ceasing of the continuing injury, for damages up to the period of six years limited by the Statute of Limitations. *Harrington (Earl) v. Derby Corporation*, 74 L. J. Ch. 219; [1905] 1 Ch. 205; 92 L. T. 153; 69 J. P. 62; 3 L. G. R. 321; 21 T. L. R. 98—Buckley, J.

Action for Declaration.—Where a public authority, by way of asserting its right to a piece of land, pulled down a fence, and an action for a declaration that the land belonged to the plaintiff and for an injunction to restrain the local authority from trespassing on it was commenced against them more than six months after the date of the trespass, —*Held*, that the action was barred by the limitation imposed by the Public Authorities Protection Act, 1893, s. 1, and that the plaintiff was not entitled to a declaration of right under Order XXV. rule 5. *Offin v. Rochford Rural Council*, 75 L. J. Ch. 348; [1906] 1 Ch. 342; 94 L. T. 669; 54 W. R. 244; 70 J. P. 97; 4 L. G. R. 595—Warrington, J.

Magistrate—Improper Conviction—Distress.—A magistrate, having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress was put in on the plaintiff's premises accordingly. Subsequently the conviction of the plaintiff was quashed for want of jurisdiction. In an action by the plaintiff against the magistrate for illegal distress:—*Held*, that the period limited by section 1 of the Public Authorities Protection Act, 1893, began to run from the entry on the plaintiff's premises, and not from the date of the conviction. *Polley v. Fordham* (No. 1), 73 L. J. K.B. 637; [1904] 2 K.B. 345; 90 L. T. 755; 53 W. R. 48, 188; 63 J. P. 321; 20 T. L. R. 435—D.

Damages for Negligence Causing Personal Injury.—*Gawley v. Belfast Corporation*, [1908] 2 Ir. R. 34—C.A.

2. WHEN ACT NOT APPLICABLE.

Payment of Debt—Public Duty—Damages.—Where a contractor brought an action under a building contract against a public authority for payment for work done and damages after the expiration of the time limited by the Public Authorities Protection Act, 1893, for the suing of a public authority in respect of acts done in the performance of a public duty,—*Held*, that the public authority was not entitled to the protection given by the said Act, and that the plaintiff could recover. *West Ham Guardians v. Churchwardens of St. Matthew's, Bethnal Green* (65 L. J. M.C. 201; [1896] A.C. 477), followed. *Sharpington v. Fulham Guardians*, 73 L. J. Ch. 777; [1904] 2 Ch. 449; 91 L. T. 739; 52 W. R. 617; 68 J. P. 510; 2 L. G. R. 1229; 20 T. L. R. 648—Farwell, J.

Action of Deceit—Contract.—The Public Authorities Protection Act, 1893, limiting the time within which an action may be commenced against a public body, does not apply to an action against such a body where the cause of action alleged is a fraud which induced the contract entered into between him and the public body. *Pearson v. Dublin Corporation*, [1907] 2 Ir. R. 537; [1907] A.C. 351; 97 L. T. 645; 77 L. J. P.C. 1—H.L. (Ir.)

Independent Contractor.—The provisions of the Public Authorities Protection Act, 1893, do not apply to the case of an independent contractor, who under a contract with a public authority, and for his own profit, carries out works which that authority are by statute authorised to execute. *Tilling, Lim. v. Dick, Kerr & Co.*, 74 L. J. K.B. 359; [1905] 1 K.B. 562; 92 L. T. 731; 53 W. R. 380; 69 J. P. 172; 3 L. G. R. 369; 21 T. L. R. 281—Warrington, J.

Collision—Action in Rem—Limitation of Action—"Action commenced against any person."—The Public Authorities Protection Act, 1893, s. 1 (a), which provides that an action "commenced against any person" (for—so far as material—any alleged neglect in the execution of any act done in intended execution of an Act of Parliament) shall not lie unless commenced within six months next after the neglect complained of, has no application to an action *in rem*. *The Burns*, 76 L. J. P. 41; [1907] P. 137; 96 L. T. 634; 5 L. G. R. 676; 71 J. P. 193; 23 T. L. R. 323; 10 Asp. M.C. 424—C.A.

Rule for Writ of Quo Warranto Discharged—Costs.—A rule *nisi* for a writ of *quo warranto* calling upon a person to shew by what authority the clerk to the guardians claimed to act as returning officer at an election of guardians was discharged with costs:—*Held*, that the Public Authorities Protection Act, 1893, did not apply to such a proceeding, and that the clerk was not therefore entitled to costs as between solicitor and client. *Rex v. Carter*, 68 J. P. 466—D.

Action against Corporation on Breach of Contract to Let Town Hall.—The magistrates of a burgh let the town hall to A, a public entertainments manager, for the purpose of giving a public entertainment therein on September 7, 1903. On that day the magistrates refused to allow A the use of the hall unless

he omitted a wrestling competition from the programme, and A having refused to do this the entertainment did not take place. On April 8, 1904, A brought an action for breach of contract against the magistrates, who pleaded section 1 of the Public Authorities Protection Act, 1893:—*Held*, that the Act did not apply. *McPhie v. Greenock Magistrates*, 7 F. 246—Ct. of Sess.

Public Body taking over Liabilities of Water Company.]—A water company's undertaking was transferred by Act of Parliament to public water trustees, who undertook liability for the whole debts of the water company. In an action against the water trustees,—*Held*, that they were not in a position to maintain any defence which would not have been competent to the water company, and that the provisions of the Public Authorities Protection Act were inapplicable to that company, inasmuch as, though incorporated by statute, it was in fact a commercial company exercising its statutory powers for its own profit. *Lanarkshire Upper Ward District Committee v. Airdrie, Coatbridge, and District Water Trustees*, 8 F. 777—Ct. of Sess.

Action to Recover Expenses Occasioned by Extraordinary Traffic—Limitation of Time—Action against Public Authority.]—The Public Authorities Protection Act, 1893, s. 1, limiting to six months the period within which an action must be brought, does not apply to an action against a public authority to recover the expenses of extraordinary traffic for which the public authority is liable under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as amended by section 12, sub-section 1 (c) of the Locomotives Act, 1893, where the damage has been done not by the public authority or their servants, but by contractors under a contract to deliver stone to the public authority within their borough in connection with an improvement scheme which is in course of execution by the public authority. *Kent County Council v. Folkestone Corporation*, 74 L. J. K.B. 352; [1905] 1 K.B. 620; 92 L. T. 309; 53 W. R. 871; 69 J. P. 125; 3 L. G. R. 438; 21 T. L. R. 269—C.A.

Pollution of Stream—Limitation of Time—Transfer of Metropolitan Water Undertakings to Metropolitan Water Board—Saving for Pending Causes of Action—Action against Metropolitan Water Board in respect of Acts of Metropolitan Water Company and Acts of Board Themselves.]—The saving for pending causes of action against the Metropolitan water companies contained in section 45 of the Metropolis Water Act, 1902, prevents the limitation of time contained in section 1 (a) of the Public Authorities Protection Act, 1893, from applying to an action brought against the Metropolitan Water Board in respect of acts done by a Metropolitan water company before the transfer of their property and liabilities to the Board. *English v. Metropolitan Water Board*, 5 L. G. R. 384; 71 J. P. 313; 23 T. L. R. 313—Lord Alverstone, C.J.

That limitation of time, however, applies to an action in respect of the pollution of a stream caused by the discharge of oil from pumping engines of the board, and has the effect of

preventing damages from being recovered in respect of pollution so caused more than six months before action brought, notwithstanding that the discharge of oil and consequent pollution continued up to the issue of the writ. *Ib.*

Erection of Public Library—Damage Done to Adjoining Premises.]—*Walsh v. Southwark Borough Council*, 72 J. P. 71.—Sutton, J.

3. COSTS.

Discretion of Court as to.]—*Semble*, per the LORD PRESIDENT and LORD KINNEAR: The Public Authorities Protection Act, 1893, only fixes the scale on which costs are to be taxed; it does not affect the power of the Court to award them or not according to the justice of the case. *Aird v. Tarbert School Board*, [1907] S.C. 305—Ct. of Sess.

Failure on some Issues—Costs.]—Section 1 (b) of the Public Authorities Protection Act, 1893, does not operate to affect—in the case of an action against a public authority—the ordinary form of order for costs in the Chancery Division where the plaintiff has substantially succeeded, although failing on several minor issues. In such an action the defendant's are not entitled by virtue of that sub-section to costs as between solicitor and client on the issues on which they have succeeded, as if the decisions on those issues were equivalent to so many separate judgments in their favour, but the plaintiff will be *prima facie* entitled to the general costs of the action except so far as they have been increased by the issues upon which he has failed, and the defendants will be entitled to their costs as between solicitor and client of the issues upon which the plaintiff has failed, there being a set-off. *Leckhampton Quarries Co. v. Ballinger*, 93 L. T. 93; 3 L. G. R. 72; 69 J. P. 54—Swinfen Eady, J. See s.c. in C.A., ante, Costs, col. 539.

Costs as Between Solicitor and Client—"Act done in intended execution of any Act of Parliament."]—The Tyne Improvement Commissioners, incorporated by Act of Parliament, who are the Conservators of the River Tyne, who have constructed and maintain certain railways, staiths, and shipping places under their private Acts and receive rates in respect thereof, who borrow money on interest, and who render their services without any idea of profit or private gain, are a "public authority" within the Public Authorities Protection Act, 1893. *Ib.*

In an action against the Tyne Improvement Commissioners for negligence in the management of a certain staith and railway, the plaintiffs failed to prove negligence, and judgment was given for the defendants with costs. The defendants applied for costs as between solicitor and client under the Public Authorities Protection Act, 1893, s. 1, sub-s. (b). The plaintiffs opposed the application, among other reasons, on the ground that the staith and railway were not constructed in certain respects in accordance with a deposited plan referred to in the Tyne Improvement Act, 1867, and thereby contravened the Railways Clauses Consolidation Act, 1845, and that the defendants could have no statutory duty in respect

of works which were thus unauthorised:—*Held*, that the staith and railway as constructed were authorised by the Tyne Improvement Acts; and that, even if this were not so, the provisions of the Railways Clauses Consolidation Act, 1845, with regard to such works, could only be taken advantage of by persons aggrieved by the improper construction, and not by the plaintiffs, who had availed themselves of the works in fact constructed. *Ib.*

Quære, whether the terms of section 1 of the Public Authorities Protection Act, 1893, "any act done in . . . intended execution of any Act of Parliament," should be construed to protect a public authority with regard to works the construction of which has been specified by Act of Parliament, but which have not been constructed in certain respects in accordance with such specification. *Jolliffe v. Wallasey Local Board* (43 L. J. C.P. 41; L. R. 9 C.P. 62) considered. *The Johannesburg*, 76 L. J. P. 67; [1907] P. 65; 96 L. T. 464.—Gorell Barnes, J.

— An unsuccessful action brought against a rural council by an urban council to set aside a compromise of a claim for adjustment under section 62 of the Local Government Act, 1888—put forward *bona fide*, but not well founded in law—as being *ultra vires* is not an action brought for any act done by the defendants which will entitle the successful defendants to costs as between solicitor and client under the Public Authorities Protection Act, 1893, *Holsworthy Urban Council v. Holsworthy Rural Council*, 76 L. J. Ch. 889; [1907] 2 Ch. 62; 71 J. P. 330; 5 L. G. R. 791; 97 L. T. 634; 23 T. L. R. 452—Warrington, J. *And see* cols. 595–598.

Fatal Accident—Liability—Statute of Limitations.—See *Williams v. Mersey Docks and Harbour Board*, ante, NEGLIGENCE, col. 1786.

PUBLIC HEALTH.

See LOCAL GOVERNMENT; METROPOLIS.

PUBLIC OFFICER.

Tort by Government Officials—Trespass against Crown or Executive.—An action for trespass committed or intended is not maintainable against officials of the Crown or Government sued in their official capacity or as an official body. *Raleigh v. Goschen*, 67 L. J. Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90—Romer, J.

Such an action will, however, lie against such officials in respect of acts actually done or directed by them if sued in their individual capacity, even although such acts be done by the authority of the Government. *Ib.*

Superannuation.—Crown prosecutors in Victoria, who are paid by salary and are referred to in the Appropriation Acts of the colony as a distinct class from prosecuting barristers who are paid by fees, are entitled under the Public Service Act, 1890, s. 107, to superannuation, and

are not excluded by section 3 of that Act, which provides that nothing therein shall apply to any prosecuting barrister. The fact that a Crown prosecutor holds his office during pleasure does not affect the claim for superannuation for the term during which he has held office. *Smyth v. Reg.*, 67 L. J. P.C. 129; [1898] A.C. 782; 79 L. T. 199—P.C.

Civil Servant—Right to Dismiss—Right to Abolish Office.—See *Young v. Adams* and *Young v. Waller*, ante CROWN, cols. 669–670.

PUBLIC RECORDS.

Statute.—61 & 62 Vict. c. 12 is the *Public Record Office Act*, 1893.

PUBLIC WORKS AND BUILDINGS.

Land Registry.—63 & 64 Vict. c. 19 is the *Land Registry (New Buildings) Act*, 1900.

Public Buildings.—61 & 62 Vict. c. 5 is the *Public Buildings Expenses Act*, 1898.

— 3 Edw. 7 c. 41 is the *Public Buildings Expenses Act*, 1903.

Public Works.—3 Edw. 7 c. 28 is the *Public Works Loans Act*, 1903.

— 5 Edw. 7 c. 22 is the *Public Works Loans Act*, 1905.

— 6 Edw. 7 c. 29 is the *Public Works Loans Act*, 1906.

PUBLIC WORSHIP.

See ECCLESIASTICAL LAW.

QUARTER SESSIONS.

See JUSTICE OF THE PEACE.

RAILWAY.

1. *Statutes*, 1997.
2. *Principal Office*, 1997.
3. *Construction*, 1997.
4. *Taking Lands*, 1999.
5. *Minerals*, 2000.
6. *Bridges*, 2002.
7. *Level Crossings*, 2004.
8. *Stations*, 2005.
9. *Sidings*, 2005.
10. *Accommodation Works*, 2011.
11. *Facilities for Traffic*, 2012.
12. *Running Powers*, 2015.
13. *Agreements*, 2016.
14. *Carriage of Goods*, 2018.

15. *Carriage of Mails*, 2023.
16. *Carriage of Passengers*, 2024.
17. *Rates*, 2027.
 - (a) *Generally*, 2027.
 - (b) *Through Rates*, 2044.
 - (c) *Subscription Tickets*, 2047.
 - (d) *Traders' Tickets*, 2048.
18. *Working Expenses*, 2048.
19. *Negligence*, 2049.
20. *Nuisance*, 2050.
21. *Breach of Statutory Duty*, 2050.
22. *Abandonment of Undertaking*, 2050.
23. *Receiver and Manager*, 2052.
24. *Ultra Vires*, 2053.
25. *Railway Commissioners*, 2053.
26. *Other Matters*, 2054.

1. STATUTES.

Accidents—Prevention of.]—63 & 64 Vict. c. 27 is the *Railway Employment (Prevention of Accidents) Act*, 1900.

Electrical Power.]—3 Edw. 7 c. 30 is the *Railways (Electrical Power) Act*, 1903.

Fires.]—5 Edw. 7 c. 11 is the *Railway Fires Act*, 1905.

Light Railways.]—1 Edw. 7 c. 36 is the *Light Railway Commissioners (Salaries) Act*, 1901.

Private Sidings.]—4 Edw. 7 c. 19 is the *Railways (Private Sidings) Act*, 1904.

2. PRINCIPAL OFFICE.

Principal Office of Company.]—The principal office of a railway company within section 135 of the Railways Clauses Consolidation Act, 1845, is the head office where the government of the railway is carried on. *Clokey v. London and North-Western Railway*, [1905] 2 Ir. R. 251—K.B. D.

3. CONSTRUCTION.

Temporary Interference with Occupation Road—No Substituted Road Provided—Penalty—Owner of Road usque ad Medium Filum.]—Where a railway company in the construction of their railway cut through a private road without substituting a sufficient road for the road interfered with, as required by section 53 of the Railways Clauses Act, 1845, the owner of the soil *usque ad medium filum* of the road cut through may maintain an action under section 54 of the Act for the penalty of 20*l.* for every day during which the substituted road shall not be made, imposed by that section. *Llewellyn v. Glamorgan Vale Railway*, 67 L. J. Q.B. 305; [1898] 1 Q.B. 473; 78 L. T. 70; 46 W. R. 290—C.A.

Semble, the company are liable to one penalty only for each day. *Ib.*

Construction of Railway across Highway—Inclined Plane Raising Highway to Level of

Railway—Liability to Repair.]—Where a railway company constructs a railway across a highway at a higher level than that of the highway, and in order to carry the highway across the railway raises the level of the highway by constructing upon each side of the railway where the railway crosses it a permanent inclined plane whereby the highway is raised to the level at which the railway is constructed across it, the railway company is not liable under the Railways Clauses Consolidation Act, 1845, to repair the portions of the highway so raised. *West Lancashire Rural Council v. Lancashire and Yorkshire Railway*, 72 L. J. K.B. 675; [1903] 2 K.B. 394; 89 L. T. 139; 51 W. R. 694; 67 J. P. 410; 1 L. G. R. 788—Wright, J.

Road Made by Railway on Land Acquired—Private Street Works.]—See *Stretford Urban Council v. Manchester, South Junction, and Altrincham Railway*, *ante*, LOCAL GOVERNMENT.

— **Diversion not Necessary—Made by Railway Company—Liability for Repairs—Bridge and Approaches.]**—Section 46 of the Railways Clauses Consolidation Act, 1845, applies only to such works as the railway company are authorised to make under their statutory powers, including works made within the limits of deviation allowed by section 16 of the Act; and, accordingly, if a railway company, who are authorised to cross certain highways on the level, for their own convenience make a diversion of the highway, which is not necessary for the construction of the works or authorised by their statutory powers, and build a bridge and approaches over the line at a place where there was no highway before and divert the traffic along such bridge, section 46 does not apply, and the company are not bound thereunder to maintain or keep in repair the road over the bridge or the approaches thereto. *London and North-Western Railway v. Ogwen District Council*, 79 L. T. 208; 62 J. P. 691—D.

Obligation to Preserve Drainage of Lands—Limit of Time.]—The appellant company acquired lands for the purposes of their undertaking from the respondent's predecessor in title under a conveyance reciting a decree arbitral following on a statutory reference. The conveyance contained a declaration that "the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works"—*Held*, that this obligation was not of unlimited duration, but was subject to the limit of time prescribed by section 65 of the Railways Clauses (Scotland) Act, 1845, which was incorporated in the private Act of the company. *Great North of Scotland Railway v. Fife (Duke)*, 82 L. T. 425—H.L. (Sc.)

Deposited Plan—Proposed Junction with Existing Line—Limits of Deviation.]—Section 15 of the Railways Clauses Consolidation Act, 1845, which permits deviation by a railway company to a limited extent from the line delineated on the Parliamentary plans, and the decisions under that section to the effect that the *medium filum* *via* of the line of railway actually laid down may be shifted as far as the limits of deviation shewn on the deposited plan, do not

apply to the junction of a proposed with an existing line. *Finck v. London and South-Western Railway* (59 L. J. Ch. 458; 44 Ch. D. 330) applied. *Cardiff Railway v. Taff Vale Railway*, 74 L. J. Ch. 490; [1905] 2 Ch. 239; 93 L. T. 239; 53 W. R. 633—Farwell, J.

Creation of Nuisance during Construction.]—See STATUTE.

4. TAKING LANDS.

Arbitration—Costs—Taxation by Master of Supreme Court—Persona Designata—Jurisdiction to Review Taxation.]—Notice to treat having been given with a view to the compulsory purchase of certain land under a provisional order which incorporated the Lands Clauses Acts (including the Lands Clauses (Taxation of Costs) Act, 1895), and was made under the Light Railways Act, 1896, the amount of compensation to be paid for the land was referred to arbitration under section 13 of the latter Act:—*Held*, that either party might require the costs of the arbitration to be taxed by a Master of the Supreme Court under section 1 of the Lands Clauses (Taxation of Costs) Act, 1895, in which case the Master would tax as a *persona designata*, and not in his official capacity, and there would be no jurisdiction in the Court to review the taxation. *Cannings and Middlessex County Council, In re*, 76 L. J. K.B. 44; [1907] 1 K.B. 51; 95 L. T. 766; 71 J. P. 46; 5 L. G. R. 442; 23 T. L. R. 43—C.A.

Semble, also, that the costs might, if both parties to the arbitration agreed, be taxed by the arbitrator in pursuance of Schedule I. (i) of the Arbitration Act, 1889, which, by section 13 of the Light Railways Act, 1896, is made applicable to an arbitration under that section. *Id.*

Conveyance Subject to Restrictive Covenant—Sale of Superfluous Land—Validity of Covenant—Ultra Vires.]—A railway company which is empowered by statute to buy land for certain purposes, and acquires the land by voluntary purchase, cannot validly enter into a covenant limiting the purposes for which the land may be used so as to preclude themselves and their successors from the exercise in respect of the land of all their statutory powers. *Ayr Harbour Trustees v. Oswald* (8 App. Cas. 623) followed. *South-Eastern Railway and Wiffen's Contract, In re*, 76 L. J. Ch. 481; [1907] 2 Ch. 366; 97 L. T. 576—Neville, J.

Tunnel—Superfluous Land—Discontinuance of Possession—Possession of Surface by Stranger—Telegraph-wires over Tunnel—Title to Surface and Space Above.]—A stranger may by exclusive possession for the statutory period acquire a title to the surface of land situate vertically over a tunnel forming part of a railway company's undertaking, even although not superfluous land, together with so much of what is beneath the surface as is necessary to the enjoyment of such surface, subject to the right of the railway company to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its proper enjoyment as a railway tunnel. *Midland Railway v. Wright*, 70 L. J. Ch. 411; [1901] 1 Ch. 738; 84 L. T. 225; 49 W. R. 474—Byrne, J.

He may also acquire a title to the space above the surface by the exercise of rights of ownership in such space, such as leasing the right to the railway company to carry their telegraph-wires over the land, where it is not shewn that the occupation of the surface is necessary, although it may be convenient, for the purpose of carrying such wires. *Id.*

Lands Acquired for Specified Purpose—Right to Support.]—Where a grant of lands is made for a specified purpose, such as the construction and use of a railway, the grant, in the absence of any contrary intention appearing *ex facie* of it, carries with it by implication a right to reasonable and necessary support for the works to be made upon the lands by the subjacent strata or adjacent lands of the grantor, whether these strata or lands continue to belong to the grantor or are conveyed by him, subject to the date of the grant, to another person. *North British Railway v. Turners, Lim.*, 6 F. 900—Ct. of Sess.

Mines and Minerals—Clay.]—The provisions of section 70 of the Railway Clauses Consolidated (Scotland) Act, 1845, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals under any lands purchased," do not apply to clay forming the subsoil of the lands purchased. *Id.* See MINERALS, *infra*.

Land Acquired for Statutory Purpose—Dedication to Public.]—See STATUTE.

5. MINERALS.

"Minerals"—Clay.]—Clay is not a "mineral" within the meaning of section 77 of the Railways Clauses Act, 1845, if it is, substantially, "the land" itself. Whether it is or not depends on the circumstances of each particular case. *Great Western Railway v. Blades*, 70 L. J. Ch. 847; [1901] 2 Ch. 624; 85 L. T. 308; 65 J. P. 791—Buckley, J.

Land was taken by a railway company under statutory powers. The strata were a thin top layer of a few inches only of ordinary surface soil, and merchantable clay, to a depth of several hundred feet, below:—*Held*, that the clay was not a "mineral" excepted out of the conveyance to the railway company under section 77 of the Railways Clauses Act, 1845. *Glasgow Corporation v. Farie* (58 L. J. P.C. 33; 13 App. Cas. 657) followed. *Id.*

— Clay, forming the surface or subsoil of land, is not a "mineral" within the meaning of sections 77, 78, or 79 of the Railways Clauses Act, 1845. *Glasgow (Lord Provost) v. Farie* (58 L. J. P.C. 33; 13 App. Cas. 657) followed. *Todd and North-Eastern Railway, In re*, 72 L. J. K.B. 337; [1903] 1 K.B. 603; 88 L. T. 366; 67 J. P. 105—C.A.

Minerals under Railway—Owner desiring to Work—Act under which Land Purchased Repealed by Later Act—Purchase of and Compensation for Minerals under Later Act—Mandamus

to Company to take up Award.]—In 1839 the predecessors in title of the prosecutors conveyed to the L. and B. Railway Co. the fee-simple of land, upon which a railway was afterwards made, to hold the same according to the true intent or meaning of the company's Act (3 & 4 Will. 4, c. xxxvi.). By section 1 of 9 & 10 Vict. c. cciv., by which the London and North-Western Railway Co. was incorporated and the L. and B. Railway vested in it, the L. and B. and other railway companies were dissolved, and 3 & 4 Will. 4, c. xxxvi. was, together with other Acts, repealed, provided that the repealing of the Acts should not annul or in any way prejudice or affect any purchase, sale, conveyance, grant, contract, security, act, matter, or thing theretofore made, done, or executed under the Act; and by section 2 the Railways Clauses Act, 1845, was, so far as the same was applicable and not modified by the Act or inconsistent with the provisions thereof, to be held to apply to the company thereby incorporated, and to be read and construed as forming part of the Act to all intents and purposes as if the railway made under the powers and provisions of the repealed Act had been expressly or by reference authorised to be made, and made under the powers of the Railways Clauses Act, 1845. In 1894 the prosecutors gave notice to the company that they desired to work the minerals of the land conveyed in 1839 lying under or within forty yards of the railway, and proceeded to get the amount of compensation assessed by arbitration in accordance with the Railways Clauses Act, 1845, but the company after taking part in the arbitration under protest, and contending that the compensation should be assessed under the repealed 3 & 4 Will. 4, c. xxxvi., refused to take up the award as provided by section 35 of the Lands Clauses Act, 1845:—*Held* (COLLINS, L.J., *dissentiente*), that, on the true construction of 9 & 10 Vict. c. cciv., the provisions of 3 & 4 Will. 4, c. xxxvi., as to the assessment of compensation for the minerals, were superseded by the provisions of the Railways Clauses Act, 1845, for that purpose, and that a *mandamus* must issue directing the company to take up the award. *Reg. v. London and North-Western Railway*, 63 L. J. Q.B. 685; [1899] 1 Q.B. 921; 80 L. T. 782—C.A. Overruled. *See* next case.

Per A. L. SMITH, L.J.—After an award has been made in such an arbitration the Court will not, upon the argument of a rule for a *mandamus* to compel the company to take it up, go into the question whether the award is well made or not. *Ib.*

North-Eastern Railway v. Crosland (32 L. J. Ch. 353) distinguished. *Ib.*

— **Saving by Later Act of Rights Accrued under Earlier Act.**—When the surface of land has been sold under the provisions of a special Act which lays down certain terms with respect to the minerals and the purchase thereof, and that Act is repealed by a later statute which enacts a different set of conditions less favourable to the surface-owner in respect of the minerals, but also provides that the repeal is not to annul or prejudice any purchase, sale, conveyance, or the like made or executed under the earlier statute, the rights

and obligations of the parties with respect to the sale of the minerals or compensation for the same are regulated by the earlier and not by the later legislation. *Reg. v. London and North-Western Railway* (63 L. J. Q.B. 685; [1899] 1 Q.B. 921) overruled. *London and North-Western Railway v. Walker*, 72 L. J. K.B. 578; [1903] A.C. 280; 88 L. T. 705—H.L. (E.)

Costs of Arbitration.—Where an award has been made assessing the compensation to be paid in such a case by a railway company, and the company has protested against the arbitration as wrongly constituted and established the justice of the protest, the company is entitled to the costs of the arbitration and award. *Ib.*

Notice not to Work.—"Compensation for such mines."—Where a railway company, under section 78 of the Railways Clauses Act, 1845, require the owner of minerals lying under or adjacent to the railway to leave the minerals unworked, the railway company must pay to the mineral owner, as "compensation for such mines," the value of the minerals which the owner is precluded from working, and not merely damages caused by reason of the interference with his working of the mine. *Joicey v. North-Eastern Railway*, 75 L. J. K.B. 57; [1906] 1 K.B. 195; 94 L. T. 143; 54 W. R. 332; 70 J. P. 75; 22 T. L. R. 105—Bigham, J. Reversed, 23 T. L. R. 163—C.A.

Compensation for not Working Mines.—*See* MINES AND MINERALS, cols. 1686–1688.

G. BRIDGES.

Bridge and Approaches—Liability of Company to Repair—Diversion.—A railway company empowered by their private Act to carry a certain old road across their line on a level, built a bridge across their line at a spot where no highway had previously been, and 347 yards distant from the place where the line crossed the old road. Upon land given by the owners the company made approaches to the bridge, connecting it with the roads lying on either side of the line. The old road was at the same time thrown into the adjoining fields, and the traffic which formerly had passed along the old road thenceforth passed over the bridge and its approaches. The company repaired the bridge from time to time, but did not repair the approaches. On one occasion an adjoining landowner repaired the approaches under an agreement with the highway authority. The highway authority applied to Justices under the Railways Clauses Consolidation Act, 1845, for an order under section 46 directing the railway company to maintain the bridge and its approaches:—*Held*, that there being no evidence of any constructional necessity which alone would justify a diversion of the old road under section 16 of the Railways Clauses Consolidation Act, 1845, the bridge and its approaches had not been made under section 46, and therefore the railway company were not bound to maintain them under that section. *London and North-Western Railway v. Ogwen District Council*, 80 L. T. 401; 63 J. P. 295—C.A.

Approaches—Liability to Widen.]—The special Act of a railway company, passed subsequently to the Railways Clauses Act, 1845, contained no provisions as to the width of the road on a bridge crossing the railway, although a former Act of the same company passed prior to the Railways Clauses Act had done so:—*Held*, that the railway company were bound under section 51 of the Railways Clauses Act, 1845, to increase the width of the road over the bridge to the width required by section 50 of that Act, as there was no special Act qualifying the provisions of that section; but that the railway company were not bound to widen the approaches to the bridge, as the company had not compulsory powers to acquire the land necessary for such purpose, and that under the Railways Clauses Act, 1845, the liability of the railway company was limited to the widening of the bridge proper. *Rhondda Urban Council v. Taff Vale Railway*, 76 L. J. K.B. 486; [1907] 1 K.B. 739; 96 L. T. 633; 71 J. P. 189; 5 L. G. R. 395.—*Phillimore, J.* Affirmed in C.A., 77 L. J. K.B. 424; [1908] 1 K.B. 239; 6 L. G. R. 201; 24 T. L. R. 165.

“Accommodation bridge”—Obligation to Form Approaches.]—A railway company acquired a piece of land under the burden that they should construct at their own expense “an accommodation bridge over or under the branch railway intended to be formed” on the land acquired, the “plans and sections of the bridge . . . and of the approaches to said bridge” to be submitted to the vendor’s engineers before the construction should be commenced:—*Held*, that the obligation on the company to construct the bridge included an obligation to form the approaches to the bridge. *Addie’s Trustees v. Caledonian Railway*, 8 F. 1047—Ct. of Sess.

Bridge over Canal—Obligation to Maintain at Specified Height—Subsidence.]—By the Rhymney Railway Act, 1882, s. 10, it was provided: “For the protection of the . . . canal company, the following provisions shall have effect: (a) The railways and works by this Act authorised shall not when completed interfere with the locks, waterway, or towing-path of the canal except by the bridge carrying the railway across the canal and towing-path, which bridge shall have a clear height of eight feet from the present level of the towing-path to the underside of the arch. (b) Neither during the construction of the bridge nor at any time shall the free passage of traffic along the canal or towing-path be impeded.” The bridge was duly constructed in accordance with the Act, but afterwards the ground subsided from causes beyond the control either of the railway company or the canal company, so that the bridge was at a much lower elevation above the towing-path and was an obstruction to the traffic:—*Held*, that the railway company were bound to maintain the bridge at the height above the towing-path prescribed by the Act. *Rhymney Railway Co. v. Glamorganshire Canal Co.*, 91 L. T. 113; 20 T. L. R. 593—H.L. (E.)

Bridge Carrying Public Highway Over Railway—Maintenance—Conversion of County Roads into Public Streets.]—The words “public highway” in section 39 of the Railways Clauses Consolidation (Scotland) Act, 1845 [corresponding

to section 46 of the Railways Clauses Act, 1845], include public streets in a burgh as well as county roads. A railway company is not relieved of the obligation to maintain the roadways on the bridges and approaches by means of which such roads are carried over a railway, on the transfer of the roads from the county to the burgh authorities; the company is under the same obligation to maintain such portions of the substituted roads as if they had been the original roads. *Glasgow Corporation v. Caledonian Railway*, 8 F. 755—Ct. of Sess. And see *Rhondda Urban Council v. Taff Vale Railway* (No. 1), 77 L. J. K.B. 424; [1908] 1 K.B. 239; 72 J. P. 25; 6 L. G. R. 201; 24 T. L. R. 165—C.A.

7. LEVEL CROSSINGS.

Trespass—Right of Way.]—A railway company when it is empowered to make a line for traffic must at all places where roads cross the line provide bridges or level crossings according to its undertaking under its application to Parliament. On the other hand, it is vested with a power to have trespassers on its line dealt with penally by fine in a way not open to the ordinary owner of property. This power is given in view of the public safety. If persons claim a right to cross at places where such provision is not made, they must take civil steps to have a crossing provided, which they can only do by proving their right; and if they trespass on the line by climbing over fences they cannot claim immunity from the statutory penalties; they are trespassers if they are not crossing at a place provided for that purpose. *Caledonian Railway v. Walmsley*, [1907] S.C. 1047—Ct. of Sess.

Public Footpath—Obligation to Build Bridge.]—Section 46 of the Railways Clauses Act, 1845, imposes no obligation on a railway company to carry a public footpath over the railway, or the railway over a footpath, by means of a bridge. *Dartford Rural Council v. Beasley Heath Railway*, 67 L. J. Q.B. 231; [1898] A.C. 210; 77 L. T. 601; 46 W. R. 235; 62 J. P. 227—H.L. (E.)

Breach of Statutory Provision—Injunction—Discretion—Application by Attorney-General—No Injury to Public Proved.]—In an action by the Attorney-General, on the relation of the road authority, for an injunction to restrain a railway company from infringing the provisions of section 48 of the Railways Clauses Consolidation Act, 1845, which enacts that “Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour,” it is no answer by the railway company that it is less inconvenient to the public that the trains should cross the road at a greater rate of speed than four miles an hour. *Att.-Gen. v. London and North-Western Railway*, 69 L. J. Q.B. 26; [1900] 1 Q.B. 78; 63 J. P. 772—C.A. Affirming, 79 L. T. 412—Bruce, J.

Closing of Road—Substitution of New Road.]—A railway company, in the exercise of statutory powers, permanently interfered with a turnpike

road and provided a substituted road, under the Railway Clauses Act. The operations resulted in part of the old road becoming a *cul-de-sac*, in which no one had an interest except the adjoining proprietors, the owners of the *solum*:—*Held*, that the provisions of the General Roads Acts as to the closing of a highway had no application, and that the road authority could not prevent the adjoining proprietors building on the disused road. *Lanark County Council v. Caledonian Railway*, 8 F. 1213—Ct. of Sess.

8. STATIONS.

Platform—"Railway"—Trespass.]—A railway station platform is not part of a railway in the sense of section 23 of the Regulation of Railways Act, 1868 (which prohibits trespassing on railways), and proceedings under that section in respect of trespass on the platform of a station are incompetent. *Thomson v. Great North of Scotland Railway*, 2 F. (Just. Cas.) 22—Ct. of Justy.

Right of Railway Servants to Remove Trespasser by Force.]—When a cabman in a railway station has concluded the business which brought him there and refuses to leave, and persists in refusing to leave, he becomes a trespasser, and the railway servants are at common law entitled to remove him by force if necessary. *Wood v. North British Railway*, 2 F. 1—Ct. of Sess.

9. SIDINGS.

Obligation to Make Communication between Railway and Private Siding—"Where the communication can be made with safety to the public and without injury to the railway and without inconvenience to the traffic thereon."—The right given by section 76 of the Railways Clauses Consolidation Act, 1845, to the owner of lands adjoining a railway to lay down collateral branches of railway and to require the railway company to connect such collateral branches with their railway is not an absolute right apart from any question as to the mode of dealing with the connection, but only a right to require a connection to be made for the purpose of the use of the railway by the adjoining owner with his own locomotives and carriages, and therefore cannot be enforced unless such user can be effected, as provided by the section, "with safety to the public and without injury to the railway and without inconvenience to the traffic thereon." *Lancashire Brick and Terra-Cotta Co. v. Lancashire and Yorkshire Railway*, 71 L. J. K.B. 431; [1902] 1 K.B. 651; 86 L. T. 176; 11 Ry. & Can. Traff. Cas. 138—C.A.

Siding Accommodation—Charge for—Coal Waggon Remaining on Sidings.]—The defendants, who were coal merchants, consigned coal from certain collieries by the plaintiffs' railway to the plaintiffs' sidings at Willesden Junction, there to await further orders as to the ultimate destination of the coal to the purchasers, and when the coal was sent on to the ultimate destination the plaintiffs charged a through rate from the colliery station to the station of the purchaser. The plaintiffs had previously given the defendants notice that

they would charge siding rent at the rate of 6d. per waggon per day or part of a day on the "wait order" waggons after the first two clear days. In an action to recover the siding rent, the Judge found as a fact that two clear days afforded sufficient time to enable the defendants to furnish instructions as to the ultimate destination of the coal:—*Held*, that the plaintiffs were entitled to recover the siding rent, either—first, upon a common-law contract to pay, keeping the coal at Willesden after two days not being an incident of the contract to carry; or secondly, under the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, schedule, Part IV., as accommodation provided at the desire of the defendants for which no provision was made elsewhere in the schedule. *London and North-Western Railway v. Crooke*, 20 T. L. R. 506—D.

Branch Railway—Right to Communicate with Sidings of Railway Company—Specific Appropriation by Railway Company as Refuge Sidings.]

—The applicant's sidings had communicated with sidings on the respondents' railway for many years under a terminable agreement, which the railway company terminated; and he now applied under section 76 of the Railways Clauses Consolidation Act, 1845, for an order enjoining the respondents to make, or permit to be made, such lines of rails as might be necessary for effecting a communication between the sidings of the applicant and of the respondents. The railway company refused to make such communication on the ground that their sidings were now set apart for a specific purpose, with which such communication would interfere. At the hearing of the case witnesses on behalf of the railway company proved that the alteration in the contemplated use of the siding was due to an alteration recently made in an adjoining tunnel. This had fallen in, and it had been found necessary to have only a single line of railway for a portion of its length. The consequent alteration in the working of traffic through the tunnel necessitated the exclusive appropriation of the sidings over which the applicant's traffic had formerly been worked to the purpose of providing refuge sidings for trains which met at the tunnel: *Held*, that the railway company had shewn to the satisfaction of the Court that their sidings had been *bona fide* appropriated for the specific purpose of use as refuge sidings, and that the use of them for the applicant's traffic would interfere with such use. *Richard v. Great Western Railway*, 11 Ry. & Can. Traff. Cas. 133—Ry. Com.

Agreement to Maintain in Full Efficiency.]—

By an agreement between a railway company and a landowner, the railway company undertook, *inter alia*, "to maintain and uphold in full efficiency in all time coming" a siding of their railway for the accommodation of the landowner and his tenants:—*Held*, that, under the agreement, the obligation of the railway company was merely to maintain the structural efficiency of the siding and its necessary appurtenances, and not to provide things which were of the nature of mere conveniences or facilities in the use of the siding. *Kennedy v. Glasgow and South-Western Railway*, 8 F. 13—Ct. of Sess.

Semble, that the question whether proper facilities were provided at the siding—such facilities not being matter of contract—was a question for the determination of the Railway Commissioners. *Ib.*

Agreement—Effect of Subsequent Legislation—Services at Trader's Siding.]—In 1891 a trading company entered into an agreement with a railway company for the construction of a siding. Clause 10 of the agreement was as follows: "The railway company will make to the limited company an allowance of not less than 3*d.* per ton for loading and unloading waggons and sheeting the same, in respect of cotton and yarns and other goods usually handled by the company, received at or forwarded from the proposed sidings. And the railway company will not charge any terminal in respect of coal traffic from the same." Subsequently to the agreement the Railway Rates and Charges Order Confirmation Act, 1892, and the Railway and Canal Traffic Act, 1894, were passed. Upon an application by the trading company for a rebate under the Railway and Canal Traffic Act, 1894, and a cross-application by the railway company for an allowance under the Railway Rates and Charges Order Confirmation Act, 1892,—*Held*, that by the agreement the sidings in question were treated as a station, and the railway company were to charge as at a station less the special allowances. *Held*, also, that there was nothing in the subsequent legislation incompatible with the agreement, into which the parties had entered with the knowledge of impending legislation, and for perfectly good consideration, and by which they were bound. *Crompton v. Lancashire and Yorkshire Railway*, 11 Ry. & Can. Traff. Cas. 285—C.A.

Siding of Railway Company not Constructed under Statutory Powers—Reasonable Rate.]—Coal consigned to Vickers, Sons & Maxim is conveyed to Barrow-in-Furness station, and on arrival, after being shunted into various sidings in the Barrow goods yard, goes on by rail, hauled by one of the railway company's engines, over a branch line belonging to the company, but not constructed under statutory powers, with which, at a distance of fifty-four chains from its commencement, Vickers, Sons & Maxim have connected their works by private sidings. For these services, partly in the goods yard and partly on the branch line, the railway company made a charge of 6*d.* per ton:—*Held*, that this was a reasonable sum, which the railway company was entitled to charge under section 5, sub-section 1 of the Railway Rates and Charges, No. 7 (Furness Railway &c.) Order Confirmation Act, 1892. *Furness Railway v. Vickers, Sons & Maxim*, 12 Ry. & Can. Traff. Cas. 81; 20 T. L. R. 326—Ry. Com.

Siding "not belonging to the company."]—An ancient siding was situated on a railway company's land, and ran parallel to their main line upon the same embankment, and had been constructed by the railway company. The railway company conveyed land for building maltings to the applicants upon the terms (*inter alia*) that they should have "full and free right and liberty at all reasonable times and in all reasonable ways to use without charge the railway siding for the purpose of con-

veniently forwarding and receiving and conveying all goods and commodities," and undertook to place in a convenient part of the said siding all trucks destined for the applicants, and also on request to remove and forward them with all reasonable expedition; the railway company further undertook to maintain the siding in good repair:—*Held*, that the siding was a siding "belonging to the railway company." *Girardot v. Great Eastern Railway*, 11 Ry. & Can. Traff. Cas. 244—Ry. Com.

Allowance—Date from which Recoverable.]—Where an allowance is granted by the Court under section 4 of the Railway and Canal Traffic Act, 1894, the allowance *prima facie* should begin from the date of the "application," and not from the date of the judgment, nor from a time anterior to the application. Where a siding owner does not require station accommodation, it does not necessarily follow that he ought to have an allowance in respect of not requiring it, since sidings may be a great burden to a railway company, and each case must stand on its merits. Where a railway company has no power to charge a station terminal, and yet the rate is shewn to include something for a station terminal, the Court is not necessarily bound to allow a rebate, since section 4 of the Railway and Canal Traffic Act, 1894, gives it a wide jurisdiction to do justice free from technicalities. In ascertaining the component parts of a rate the system, adopted in the case of *Pidcock v. Manchester, Sheffield, and Lincolnshire Railway* (9 Ry. & Can. Traff. Cas. 45), whereby the service charges were deemed to be in the same proportion to the rates actually charged as the maxima service charges would be to the sum of the maxima rates chargeable, cannot be taken as an absolute measure; since, in a case like the present, where it is proved that no charge is made for loading or unloading, too little would be attributed to the cost of conveyance and to the station terminal. *Gilstrap, Earp & Co. v. Great Northern Railway*, 11 Ry. & Can. Traff. Cas. 265—Ry. Com.

Rate for Siding Services—Arbitrator—Jurisdiction of Railway and Canal Commissioners.]—In an application to the Railway and Canal Commissioners, under section 4 of the Railway and Canal Traffic Act, 1894, by a firm of traders for a rebate from the rates charged by a railway company for the conveyance of coal to a private siding belonging to the traders, on the ground that the rates exceeded the maximum charge for conveyance, and that the extra charge was for station accommodation, and that no station accommodation was provided, the Commissioners found that the extra charge complained of was made for services rendered at the traders' private siding, and that the charge was reasonable, and refused the application. The traders appealed, and maintained, *inter alia*, that the Commissioners had exceeded their jurisdiction in holding that the charge made by the railway company for their services at the siding was reasonable, in respect that that was a question which, under the schedule, section 5 of the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act, 1892, fell to be determined exclusively by an arbitrator either antecedently to the rate being

levied or, in any event, after a difference as to the rate had arisen between the traders and the company, and that such a difference had arisen here:—*Held*, first, that it is not a condition precedent to a railway company making a charge for services rendered at a siding not belonging to them that an arbitrator shall first have determined that the charge so proposed to be made is reasonable; and secondly, that the jurisdiction conferred upon the Commissioners by section 4 of the Railway and Canal Traffic Act to settle a dispute as to what were just rebates to be allowed from a rate charged to traders necessarily included power to determine whether the charge made for siding services was reasonable or not. *Cowan v. North British Railway*, 4 F. 334—Ct. of Sess.

Station Accommodation—Comparable Rate—Appeal.—Traders had coal delivered to them by a railway company at a private siding belonging to the traders. The rates charged for the carriage of the coal were the same as the rates charged for the conveyance of coal from the same point of departure to a station at a short distance beyond the siding. The rates both to the siding and to the station were admittedly in excess of the maximum conveyance rate, and the excess was the same in both cases. The traders applied to the Railway Commissioners under section 4 of the Railway and Canal Traffic Act, 1894, to determine what were the reasonable or just rebates to be made by the railway company from the rates charged by them on the coal traffic to the traders' siding in respect that the railway company did not require to provide station accommodation or to perform terminal services. They alleged that the rates charged to them included a charge for station terminals. The Commissioners found that while the charges in excess of the maximum conveyance rates to the siding and station were identical, the siding rate did not include any charge for station accommodation, but only for services rendered to the trader at the siding, and that the charge so made was reasonable, and refused a rebate. The traders appealed. At the hearing the railway company maintained, *inter alia*, that as soon as they had proved that the charge complained of was not made in respect of station accommodation the application fell to be refused, and that the Commissioners had exceeded their jurisdiction in entertaining it further:—*Held*, that the company having undertaken to shew that the charge was not only made for station accommodation, but that it was made for siding services, it was open to the traders to challenge the new ground of charge and to shew that it was not reasonable. *Ib.*

— **Special Services at Traders' Siding—Jurisdiction.**—A trader is not prevented from complaining under the Traffic Acts of a rate for carriage of coal from a colliery to his siding by the fact that the rate is paid by the colliery owners, the trader himself having no account with the railway company, since the rate is included in the price paid for the coal by the trader, and the colliery owners, for the purpose of paying the rate, are the agents of the trader. In order to make a station coal rate comparable with a siding coal rate, the coal traffic at the station must bear some reasonable proportion to that at the siding, so that where 97 per cent. of

the whole coal traffic went to the siding, and only 3 per cent. to the station, the explanation of the railway company that the station rate was merely a "paper" rate was accepted. A trader who received coal at a private siding applied to the Commissioners for a rebate from a siding-to-siding rate, upon the ground that the siding-to-siding rate exceeded the maximum rate for conveyance, and was the same in amount as the siding-to-station rate charged to a neighbouring station. The railway company stated in their answer that the siding-to-siding rate, in so far as it was in excess of the conveyance maximum, was not charged for station terminal services, but was a reasonable charge made for services rendered at both ends of the journey:—*Held*, first, that it was not a condition precedent to the railway company lawfully making such a charge at a private siding that its reasonableness should have been determined by an arbitrator in an application under the Railway Rates and Charges Order Confirmation Act; secondly, that the Commissioners had jurisdiction under the Traffic Act of 1894, for the purpose of determining whether the rebate claimed should be allowed, to determine whether the charge made by the railway company for services at the sidings was reasonable; and thirdly, that the determinations of the Commissioners upon the questions raised by the answer of the railway company were determinations upon questions of fact, and consequently not the subject of an appeal. *Cowan v. North British Railway* (No. 3), 11 Ry. & Can. Traff. Cas. 271—Ct. of Sess.

Rebate on Sidings Rate—Sidings "not belonging to the company."—A siding was constructed by a railway company upon a plot of land adjacent to their railway, leased to them by a trader for a term of 996 years at a yearly rental of 1*l.* The trader himself was a lessee of the plot of land at a yearly rental of 7*l.* odd. The sublease contained covenants that the railway company would erect a warehouse and construct a siding upon the plot demised, with proper connections connecting their main line with the warehouse; keep the siding and warehouse in repair; haul from the neighbouring station (a distance of three-quarters of a mile) into the siding, free of charge, wagons consigned to the owners or occupiers of the said trader's mills; take away at their own expense all covering used for such traffic, and check the goods; and afford the owners or occupiers of the mills free use and enjoyment of the warehouse provided that, if they (the owners or occupiers) did not require the use of the whole warehouse, the railway company were to be entitled to use such parts as might not be from time to time required. The owners or occupiers of the mills were to move the wagons from the point on the siding where left by the railway company to the warehouse, and also to load and unload, and perform all necessary labour, at their own cost and risk:—*Held*, that the siding was a siding "belonging to the railway company," not only in the sense that they were lessees entitled to the possession of it, but also in the sense that they were entitled to the user of it, subject to the easement granted to the trader. *Held*, that the words "belonging to the company" in section 4 of the Railway and Canal Traffic Act, 1894, do not mean belonging, in a legal sense, as being owners of real

property; and that it would be possible for a siding to be on the freehold of a railway company and yet not to belong to the company within the meaning of the section. *Huntington v. Lancashire and Yorkshire Railway*, 11 Ry. & Can. Traff. Cas. 237—C.A.

10. ACCOMMODATION WORKS.

Damages for Failure to Provide "forthwith"—Farm Road—Level Crossing—Doubling of Railway.]—A railway company under their special Act acquired the *solum* of a portion of a farm road which connected the north part of the farm with the south, and laid their rails on the portion so acquired. Compensation was paid on the footing that a level crossing was to be provided at the point where the railway intersected the road, and a level crossing was provided accordingly. The railway as originally constructed was a single line with local traffic only, but under a subsequent Act the line was doubled and extended so as to form part of a main line with a large traffic. Before the doubled and extended line was opened for traffic the proprietor and tenant of the farm applied under section 60 of the Railways Clauses Consolidation (Scotland) Act, 1845 (which corresponds to section 63 of the English Act of 1845), for an accommodation bridge in lieu of the level crossing, on the ground that the increased traffic would make the level crossing useless for the purposes of the farm, and in July, 1897, the railway company were ordered to provide an accommodation bridge. The bridge was not provided till March, 1898, by which time the doubled and extended line had been opened for traffic, and the level crossing in consequence useless, for ten months. The tenant claimed damages against the railway company for the loss sustained by him through the want of means of communication between the two portions of his farm during these ten months:—*Held*, that the pursuer was entitled to damages in respect that the defenders had not fulfilled their statutory duty under section 60 of providing the accommodation bridge "forthwith" on the formation of their line. *Pollock v. North British Railway*, 3 F. 727—Ct. of Sess.

Easement—Level Crossing—Limits of Right of User.]—Where a level crossing for a tramroad has been made by a railway company for the accommodation of a landowner whose land is intersected by the railway, the landowner may make any use of the level crossing which may be taken to have been fairly within the contemplation of the parties when the works were executed, but may not use it so as to increase the burden of the easement to which the company is subject—as, for instance, for conveying goods on the tramroad from places not situate on the landowner's property and not served by the tramroad when the easement was first created. *Great Western Railway v. Talbot*, 71 L. J. Ch. 835; [1902] 2 Ch. 759; 87 L. T. 405; 51 W. R. 312—C.A.

Watercourse—Prescription—Water Flowing in Artificial Channel along Railway Company's Permanent Way.]—Prior to 1849 the plaintiff's predecessors had enjoyed the right to take water from a natural stream flowing near their holding. In 1849, the defendant railway company,

in constructing their line, interfered with or tapped the subterranean courses of this stream, which ceased thenceforward to flow, the water that had supplied it finding its way to the surface at a cutting on the company's line. This water the company conveyed along and away from their line in a new artificial channel. The water of this new stream was not until 1898 used by nor was it of any use to the company. In 1898 the company commenced to make use of this water supply for their own purposes, and the plaintiff, who had been taking the water thereof since 1849 for domestic purposes, brought an action for disturbance of a prescriptive right. The jury found that the new stream was substituted for the old, and that the company had not constructed the new channel until they should require to use the water for their own purposes:—*Held*, that, this new artificial watercourse being made for the benefit of the company on the company's own land, no enjoyment of the water thereof while the water was of no use to the company could create a prescriptive right in the plaintiff; and, further, that the existence of such a right would be inconsistent with the purposes of the incorporation of the company and with the obligations of the company to provide for the security of their permanent way and the safety of the public; and that the new artificial stream not being the same as the stream formerly in existence, no contract in regard thereto, as an "accommodation work" within section 16 of the Railways Clauses Act, 1845, could be presumed. *M'Evoy v. Great Northern Railway*, [1900] 2 Ir. R. 325—C.A.

11. FACILITIES FOR TRAFFIC.

Due and Reasonable Facilities for Traffic—Amalgamation Act—Connecting Trains.]—By the Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866, the Caledonian company are to give to all traffic passing to or from the lines of the North British company from or to the lines of the Scottish North-Eastern company (now Caledonian company), "all such facilities as are usual or useful for the convenient working or development of railway traffic," including, among other things, "conveniently timed and arranged trains," and "to accommodate, manage and forward such traffic, and give such facilities, including ordinary waiting for trains, as effectually, regularly and expeditiously, as if it were their own proper traffic, or traffic which they were desirous of cultivating to the utmost":—*Held*, that the word "ordinary," as applied to waiting for trains, has no definite meaning in railway practice. *North British Railway v. Caledonian Railway*, 12 Ry. & Can. Traff. Cas. 27—Ry. Com.

Held, further, first, that in the case of a local branch Caledonian train with which a North British train was timed to connect at Perth (in the sense that it was timed to arrive half an hour or less before the Caledonian train was timed to leave Perth), it should be detained for five minutes; and if the connecting train were then signalled from the signal box immediately outside Perth station, such further time as would enable passengers travelling by the train so signalled to join the Caledonian train; the North British company being bound to give

notice five minutes before the time the Caledonian train was due to leave, if there were no possibility of such connection; secondly, that, in the case of a Caledonian west coast main line train legitimately competing with the North British company's East Coast service, with which a North British train was timed to connect at Perth, the Court, taking into consideration the relative number of passengers in the two connecting trains, would not order its detention for any definite time; but that the main line train should not be allowed to start from Perth, if the North British train should have been signalled from the signal box immediately outside Perth station, until the passengers had been duly transferred. *Ib.*

Passenger Station Accommodation—Rebuilding Bridge Carrying Street over Railway—Alterations applied for not within Railway Company's own Power.]—Section 16 of the Scotch Railways Clauses Act, 1845 (8 & 9 Vict. c. 83), gives power to a railway company (subject to restrictions in its special Act) to construct bridges over railroads, and from time to time to alter, repair, or discontinue them and substitute others in their stead, and to do all other acts necessary for making, maintaining, altering, or repairing, and using the railway. Upon a complaint by the Town Council of Arbroath of the want of facilities for passenger traffic at the station at Arbroath, it was admitted that the rebuilding of a bridge on which the booking offices were erected and which carried one of the town streets over the railway, was essential to any material alteration and improvement of the station. The bridge was originally constructed by the railway company under their special Act, but the street passing over the bridge was vested in the municipal authorities of Arbroath.—*Held*, that while section 16 of the Railways Clauses Consolidation (Scotland) Act, 1845, gives railway companies power to alter works of their own, it does not apply to works which have been dedicated to a purpose other than railway purposes—for example, a street which is vested in the municipal authorities. *Arbroath Corporation v. Caledonian Railway*, 10 Ry. & Can. Traff. Cas. 252—Ry. Com.

Held, further, that as the accommodation works which the applicants asked for could not be carried out except with the consent or authority of some one other than the railway companies themselves, the works applied for were not within the railway companies' own powers, and that therefore the railway companies had not violated their statutory duty under section 2 of the Railway and Canal Traffic Act, 1854. *Ib.*

Diversion of Traffic—Interim Injunction—Powers Granted under old Acts not Exercised—Circumstances Changed—Jurisdiction.]—Article 12 of an agreement made between the Great Northern Railway Co. and the Manchester, Sheffield, and Lincolnshire Railway Co., and dated January 30, 1892, and confirmed by the Manchester, Sheffield, and Lincolnshire Railway (Extension to London, &c.) Act, 1893, provided as follows: "On and from the passing of the Bill, and whether the running powers provided for by this agreement are exercised or not, there shall be a complete system of through booking and through rates and fares between the systems

of the two companies by all reasonable and convenient routes . . . and each company shall conduct the through traffic of the other company in good faith and by through trains, and shall afford to the other company all such reasonable facilities and accommodation as regards traffic of all kinds as is usual between friendly railway companies for the convenient conduct and exchange of traffic passing or destined to pass between the respective systems of the two companies." The respondents having completed their line to London, certain fish traffic was handed to them at Grimsby for conveyance to London "via Great Northern Railway." This had hitherto been so forwarded, but the respondents now conveyed it by their own route to London and delivered it themselves. On an application for an interim injunction enjoining the Great Central Co. to desist from diverting from the Great Northern Co. the fish traffic from Grimsby to London which is consigned by the Great Northern Railway,—*Held*, that the route being *prima facie* a reasonable one, the Great Northern Railway Co. would have *prima facie* the right of requiring traffic to be carried by it on reasonable terms; there being also *prima facie* a contract to that effect, and as an interim injunction would not harm the respondents (provided accounts were kept), and the absence of it might seriously damage the applicants, an interim injunction should be granted. *Great Northern Railway v. Great Central Railway*, 10 Ry. & Can. Traff. Cas. 266—Ry. Com.

The Great Northern Railway (Communication with the Manchester, Sheffield, and Lincolnshire Railway) Act, 1851, s. 14, enacted: "That the Great Northern Railway Co. shall have the right of access at all reasonable and proper times to, and accommodation at, the tidal basin at Great Grimsby for the fish traffic, and likewise access to and accommodation at the docks for the goods traffic, including the right to rent a piece of land for warehouses thereat, upon such sites and upon such terms and conditions, and subject to such regulations as may be agreed upon by the engineers of the two companies, and in the event of a difference between them as may be settled by arbitration in the manner hereinafter provided." Section 15 of the same Act provided for arbitration under the Companies Clauses Act, 1845. The West Riding and Grimsby Railway (Transfer) Act, 1866, s. 31, enacted that: "It shall be lawful for the Great Northern Railway Co. to run over and use with their engines, carriages, and servants the Sheffield, South Yorkshire, and Trent, Ancholme, and Grimsby Railways situate between Barnby Don and Grimsby, including the docks at Grimsby and the railways leading thereto and the works connected therewith, and to use in common with the said Sheffield and South Yorkshire, and Trent, Ancholme, and Grimsby Railway companies the several sidings, stations, turntables, docks, and other conveniences and appurtenances to the said several lines of railway appertaining or belonging." The applicants applied, under section 9 of the Railway and Canal Traffic Act, 1888, for an order enforcing the performance of the obligations imposed by the above-mentioned sections; also for an order, under section 8 of the Regulation of Railways Act, 1873, for determining the sites, terms, conditions, and regulations

upon which the rights conferred upon the applicants by section 14 of the Act of 1851 are to be exercised in lieu of arbitration. It was proved that the docks had been completely changed under powers given to the Manchester, Sheffield, and Lincolnshire Railway Co. by an Act of 1849, vesting the docks in them, and that the "tidal basin" no longer existed:—*Held*, that the Commissioners had jurisdiction to deal with the above-mentioned matters under section 9, sub-section (a) of the Railway and Canal Traffic Act, 1888; and, with regard to the warehouse site, under sub-section (c) of the same section, where the term "individual" means "any legal person not the general public." *Ib.*

Quære whether, as regards section 14 of the Act of 1851, it is a condition precedent to the Commissioners having jurisdiction that the engineers of the two companies should have considered the matter and disagreed. *Ib.*

Held, further, that it is not the function of the Court to make abstract declarations which they could not enforce in their entirety; and that before making an effective order, or granting an injunction under the Act of 1851, the applicants must put forward a definite scheme to be considered by the respondents. *Ib.*

That the Great Northern Railway Co. cannot now (1899) be considered in the same position as if they had asserted their rights immediately after the passing of the Act of 1851; and that they must now shew that their scheme is reasonable possible. *Ib.*

Held, further, that section 81 of the Act of 1866 gives the applicants the right to run over and use the whole of the railways in the docks and all the appurtenances thereto, as the term "docks" in that section cannot reasonably be considered merely a definition of the *terminus ad quem*, but that the applicants must first shew that the exercise of these powers of user can be so regulated as not to interfere with the convenient conduct of the business of the docks. *Ib.*

12. RUNNING POWERS.

Terms for Exercise of—Allowance for Working Expenses—General Rule.—The ordinary terms granted by the Railway Commissioners on which running powers may be exercised are 75 per cent. of the rate, after the deduction of terminals, to the owning company, and 25 per cent. of the rate to the company exercising the running powers. This now amounts to a rule, which will only be departed from under special circumstances. *Caledonian Railway v. North British Railway*, 10 Ry. & Can. Traff. Cas. 259.

By an Act of Parliament the Caledonian Railway Co. were given running powers over a line of the North British Railway Co. to B., a distance of thirteen miles, on such terms and conditions as should be agreed upon between these railway companies (subject to a provision that the rates charged by the Caledonian Co. to B. should not exceed those charged by them for similar traffic from the same places to G.), or as, failing agreement, an arbiter might determine. Such arbiter was empowered, "in fixing

such terms and conditions, to have regard to the obligations imposed on the Caledonian company with respect to rates." The Caledonian Co. proposed certain fixed tolls for the exercise of their running powers, namely—Passengers 2*d.* each, goods 4*d.* per ton, and minerals, including pig-iron, 3*d.* per ton; this being the arrangement between the two companies (by agreement) on the line to G., where the tolls in force for a distance of under three miles were in each case less by 1*d.* than the above-mentioned proposed tolls:—*Held*, that the proposed tolls were inadequate, and that the running powers should be exercised on the ordinary terms. *Ib.*

— By an agreement entered into between the North-Eastern and North British Railway Companies, scheduled to an Act of Parliament, it was provided that, for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British company shall at all times hereafter permit the North-Eastern company, with their engines, &c., to run over and use the North British company's railway . . . between Berwick and Edinburgh . . . subject to the payment by the company to the North British company for such user of such tolls, rates . . . as have or has been, or shall from time to time be agreed upon by and between the said companies, or, in default of such agreement, as shall be fixed by arbitration." The North-Eastern Co. applied to the Commissioners, under section 8 of the Regulation of Railways Act, 1873, for an order allowing them, in the exercise of their running powers, to run between Edinburgh and Berwick the full number of passenger trains required for the conveyance of passenger traffic between England and Scotland by the East Coast route. The Commissioners decided that the North-Eastern Co. were entitled to run one-half of the through passenger trains (for the conveyance of traffic between England and Scotland) over the railway of the North British Co. between Berwick and Edinburgh on the terms of the North-Eastern Co. paying to the North British Co. 75*l.* per cent. of the gross receipts, and retaining 25*l.* per cent. for working expenses, and that the payment of such 75*l.* per cent. by the North-Eastern Co. should include the payment by way of rent for station accommodation and station services at Edinburgh under the agreement:—*Held*, that the fact that the North British Co. were the owners of the line between Berwick and Edinburgh did not of itself entitle them, as of right, to run some of the through trains in dispute, and did not preclude the Railway Commissioners from granting, if they saw fit, the application of the North-Eastern Co. *North-Eastern Railway v. North British Railway*, 10 Ry. & Can. Traff. Cas. 82—Ct. of Sess.

13. AGREEMENTS.

Light Railway—Purchase by Corporation—Special Agreement—Construction—Basis of Valuation—Going Concern—Rolling Stock.—By an agreement made between a certain company (who were empowered under the Light Railways Act, 1896, to construct and work a certain light railway) and the corporation of

the borough within which the light railway in question was to be made, the corporation were to be at liberty to purchase "the said railway No. 5," on certain conditions, "at a price" to be settled, in case of difference, by the Board of Trade. The agreement did not contain any stipulation or provision as to the principle upon which the price was to be arrived at. The interpretation clause, however, of the order under which the railway had been made gave different meanings to the terms "railway" and "undertaking," as used in that order respectively:—*Held*, on the true construction of the documents in question that the proper basis of valuation was that which regarded the railway as a railway fixed in position and capable of earning a profit, but not that which regarded the railway as an income-earning concern. *Dudley Corporation v. Dudley, Stourbridge, and District Electric Traction Co.*, 97 L. T. 556; 5 L. G. R. 1077; 71 J. P. 481—H.L. (E.)

Joint Line Constructed by Two Companies—Wayleave—Agreement—Construction.—Two colliery companies in terms of an agreement constructed a joint railway, each paying half the cost. The renewal and maintenance of the line were to be paid for by the companies in proportion to the extent of traffic done by either of them. The line was to be open to the use of the public on payment of specified tolls. Power was given by the agreement to construct an extension line in connection with the joint line:—*Held*, that the owners of the extension line were not chargeable with tolls for goods carried from the extension over the joint line, their liability being limited to the proportion which fell to them of the renewal and maintenance of the joint line. *Caledonian Coal Co. v. Seaham Colliery Co.*, 70 L. J. P.C. 105; [1901] A.C. 554; 84 L. T. 785—P.C.

Statutory Bargain for Protection of Private Individual—Subsequent Agreement by Company with Third Party Inconsistent with Statutory Obligation—Impossibility of Performance—Specific Performance—Damages.—A private Act of Parliament authorising the construction of a railway contained a clause whereby "for the protection of" an adjoining owner, his heirs and assigns, it was provided, "unless otherwise agreed" between him and the railway company, that the company should (*inter alia*) construct and maintain a station at a particular point on the proposed line. Some years afterwards the company's successors, through oversight and in good faith, entered into an agreement with the plaintiff, who was the proprietor of a building estate traversed by the line in question, to remove the station which had been built in pursuance of the statutory provision above mentioned to a spot more advantageous for the development of the building estate, but subsequently, on discovering their mistake, they refused to carry out this agreement. In an action by the plaintiff for specific performance or damages,—*Held* (ROMER, L.J., *dissentiente*), that it was *ultra vires* of the defendants to enter into the agreement with the plaintiff while the enactment contained in the Act of Parliament was still effective, that the agreement was therefore void, and no action lay by the plaintiff for breach of such agreement. *Corbett v. South-Eastern and Chatham Railway*,

75 L. J. Ch. 489; [1906] 2 Ch. 12; 94 L. T. 748; 22 T. L. R. 550—C.A.

Statutory Agreement for Determination of Differences by Arbitration—Provision for Reference to Arbitrator Designated by Name or, him failing, to Arbitrator to be Appointed—Death of Named Arbitrator—Subsequent Difference—Jurisdiction of Railway Commissioners to Decide Difference.—Section 8 of the Regulation of Railways Act, 1873, provides that where any difference between railway companies is, under the provisions of any general or special Act required or authorised to be referred to arbitration, such difference shall at the instance of any company party to the difference, and with the consent of the Railway Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration: Provided that the power of compelling a reference to the Commissioners shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name. By a provision in an agreement between two railway companies confirmed by a private Act (and therefore for the purposes of the above section to be deemed a provision of that private Act) it was provided that any question which might arise between the parties as to the construction or carrying into effect of the agreement should be referred to a person designated by name, or, him failing, an engineer to be appointed by the Board of Trade. After the death of the person designated as arbitrator a difference arose between the companies:—*Held*, that the case was one in which an arbitrator had been designated by name within the meaning of the proviso to the above section, and therefore that the difference could not be referred to the Commissioners under the section, but only to an engineer to be appointed by the Board of Trade under the agreement. *Alexandra Docks and Taff Vale Railway, In re*, 76 L. J. K.B. 803; [1907] 1 K.B. 356; 96 L. T. 380—C.A.

14. CARRIAGE OF GOODS.

Conveyance—Trader's Truck—Detention by Railway—Hire of Another Truck—Expense—Claim for "Demurrage"—Determination of Difference—Whether Within Jurisdiction of Arbitrator or Courts.—A claim by a trader for demurrage or damages for the detention of his truck by the Great Western Railway and cost of hire of another truck must be decided by an arbitrator appointed by the Board of Trade, as provided by section 6 of the company's special Act, 1891, and the ordinary Courts have no jurisdiction. *Great Western Railway v. Phillips*, 77 L. J. K.B. 306—H.L. (E.)

Decision of the COURT OF APPEAL, *sub nom. Rex v. Marylebone County Court Judge and Great Western Railway; Phillips, Ex parte* (76 L. J. K.B. 1003; [1907] 2 K.B. 664; 96 L. T. 802; 23 T. L. R. 541), reversed. *Id.*

— **Demurrage—Reasonable Sum—Evidence—Onus of Proof.**—Under section 6 of the London and North-Western Railway (Rates and Charges) Order Confirmation Act, 1891, certain traders claimed "a reasonable sum by way of demurrage for detention of their trucks

beyond a reasonable time" on journeys between their sidings in the Midlands and in London. They proved that during twelve months the average time taken on the journey was two and a-half days; but that in thirty-three cases during the same twelve months trucks belonging to them had taken periods varying from four to seven days:—*Held*, first, that "demurrage" included a reasonable sum for detention in the course, as well as at the end, of the journey; secondly, that, though the applicants must prove their case, there existed a limit of detention after which the onus lay upon the railway company to explain or justify the delay; thirdly, that in the circumstances three days was the limit, and that, if unable to explain or justify delay beyond that limit, the railway company must pay a reasonable sum; and fourthly, that in the circumstances sixpence per ten-ton truck per day was a reasonable sum. *Charrington, Sells, Dale & Co. v. London and North-Western Railway*, 74 L. J. K.B. 835; [1905] 2 K.B. 437; 93 L. T. 215; 12 Ry. & Can. Traff. Cas. 171; 21 T. L. R. 457—Ry. Com.

Dog—Condition Limiting Liability—"Just and reasonable"—**Alternative Rates**.]—The owner of a dog of the value of 300*l.* delivered it by his agent to a railway company for carriage from one station to another. The agent signed a note of a special contract of carriage which contained a condition that the company would not be liable in respect of a dog for a greater amount than 2*l.* unless a higher value were declared at the time of delivery and a percentage of 1½ per cent. paid upon the excess of the value so declared. The agent paid 4*s.* for the carriage of the dog, and did not make any declaration as to its value. By the negligence of the company's servants the dog was burnt to death. In an action by the owner to recover from the company the value of the dog,—*Held*, that the condition in the special contract was "just and reasonable" within the meaning of section 7 of the Railway and Canal Traffic Act, 1854, and that the company were not liable for more than 2*l.* *Williams v. Midland Railway*, 77 L. J. K.B. 157; [1908] 1 K.B. 252; 98 L. T. 81; 24 T. L. R. 170—C.A.

Merchandise—Charge—Account Specifying how Charge is Made Up—Carriage from one Private Siding to Another—"Terminal services"—"Special services".]—Section 33, sub-section 3 of the Railway and Canal Traffic Act, 1888, applies to a charge for the carriage of goods from one private siding to another private siding as well as to a charge for the carriage of goods between station and station. The expression "terminal charges" in the sub-section includes charges for such services as come under the denomination of "special services" in the schedule to the Railway Rates and Charges (Caledonian Railway &c.) Order Confirmation Act, 1892, as well as charges for such services as in that schedule are in the category of proper terminal services. *Caledonian Railway v. Hamilton & Calder*, 8 F. 918—Ct. of Sess.

Timber—Measurement of Timber—Most Accurate Mode.]—By section 18 of the schedule to the Great Western Railway Co. (Rates and Charges) Order Confirmation Act, 1891, it is enacted that "the cubic contents of timber consigned by measurement weight shall be ascer-

tained by the most accurate mode of measurement in use for the time being":—*Held*, that the most accurate mode of measurement in use, of the cubic contents of round timber consigned by measurement weight, is measurement by string under bark, with a divisor of 113, with reasonable allowances for any irregularity or defect in the shape of the timber measured. The Court did not determine the question whether the railway company were entitled to make any charge in respect of the carriage of bark excluded from the measurement of timber as above provided. *Great Western Railway v. Lowe*, 11 Ry. & Can. Traff. Cas. 152—Ry. Com.

Parcel Post—Delivery of Parcels.]—Under the provisions of the Post Office (Parcels) Act, 1882, any railway company named in schedule 1 of the Act is bound to accept from and to deliver to the postal authorities receptacles containing postal packets at any station where such receptacles are tendered or applied for, notwithstanding that such receptacles contain postal packets which are ultimately destined for stations other than that at which such receptacles were first delivered. The same station may be both an "outwards" and an "inwards" station within the meaning of sub-section 2 of section 3 of the Act in relation to a postal parcel received at one station for sorting purposes, and forwarded again from the same station to its ultimate destination. *Reg. v. London and North-Western Railway and Great Western Railway*, 65 L. J. Q.B. 516—D.

Order to Distinguish Charges other than for Conveyance of Goods on Railway—Non-compliance with Order.]—An order made against a railway company by the Railway Commissioners under section 14 of the Regulation of Railways Act, 1873, is not complied with unless the amounts charged in a rate for the conveyance by them of goods as regards each of the services performed by them other than conveyance on the railway are specified in the particulars given by the company. *Colman v. Great Eastern Railway* (4 Ry. & Can. Traff. Cas. 108) and *Pirchgrove Steel Co. v. Midland Railway* (5 Ry. & Can. Traff. Cas. 229) followed. *Pickfords, Lim. v. London and North-Western Railway*, 74 L. J. K.B. 634; [1905] 1 K.B. 752; 92 L. T. 607; 53 W. R. 468; 12 Ry. & Can. Traff. Cas. 154; 21 T. L. R. 381—C.A.

Account in Writing of Goods Carried—Account to be Given "on demand"—False Account—Penalty.]—By section 98 of the Railways Clauses Act, 1845, the owner or person having the care of any carriage or goods passing or being upon a railway is bound on demand to give to the collector of tolls an exact account in writing of the goods conveyed by any such carriage. By section 99, if any such owner or person gives a false account with intent to avoid payment of tolls payable in respect of the goods he is liable to a penalty:—*Held*, first, that these sections apply to the case of a person sending goods for carriage in the railway company's carriages or trucks; secondly, that the goods need not be actually upon the railway at the time when the demand for an account is made or an account is given; thirdly, that there is a sufficient demand if, to the knowledge of the owner of the goods, the goods will not be accepted for carriage by the railway company unless an account of them is

given, and the owner gives an account before any express demand is made; and fourthly, that "tolls" includes rates and charges for goods carried upon the railway. *Moreing v. London and North-Western Railway*, 74 L. J. K.B. 540; [1905] 2 K.B. 113; 92 L. T. 421; 53 W. R. 605; 69 J. P. 233; 21 T. L. R. 412—D.

Short Distance Clause—Where Traffic "Conveyed" on Two Railways, both to be Considered as One Contract for Entire Distance with One Company—Physical Carriage by both Companies.]

—A special Act of the A railway company and of the B railway company each contained a clause enacting that where merchandise was "conveyed" for an entire distance which did not exceed six miles, the railway company might make the charge authorised by the Act as for six miles; provided that where merchandise was "conveyed" by the company partly on its own railway and partly on the railway of another company, both railways should, for the purpose of reckoning such short distance, be considered as one railway. Pursuant to a contract between a colliery association and the A company, that company took consignments of coal from the colliery sidings to a station less than six miles off. The first part of the journey was over the line of the A company, and the remainder over that of the B company. For the first portion of the distance over the line of the A company the traffic was taken by the locomotives of that company, and for the latter portion of that distance, and the entire distance over the line of the B company, the traffic was taken by the locomotives of the B company:—*Held*, that the word "conveyed" in the clause meant actually carried, and not carried under a contract of carriage; and that therefore the traffic in question was not conveyed by the A company on both railways within the proviso, but only on its own railway, and that a separate charge for conveyance as for six miles might be made in respect of the distance for which the traffic was actually taken by each company. *Lancashire and Cheshire Coal Association and London and North-Western Railway, In re*, 75 L. J. K.B. 454; [1906] 1 K.B. 577; 95 L. T. 62—Ry. Com.

Special Contract — Owner's Risk — Common Carrier — Declaration of Value — Customs Declaration.]—Four bales of furs were consigned abroad for carriage to London by the defendants' steamer from Holland to Harwich and thence by their railway to London. The bales were carried at a reduced rate at owners' risk, subject to certain exceptions which were not material, under a special contract signed by the consignors. A declaration as to the nature and description of the goods was made under section 64 of the Customs Consolidation Act, 1876, treating the four bales as one parcel. On arrival at the railway station in London one of the bales was stolen. The learned Judge came to the conclusion upon the facts and documents that the bale was lost before the transit was at an end:—*Held*, that the defendants were protected from liability by the special contract. *Semble*, the fact that the goods were received by a common carrier under a special contract would not deprive him of the protection of section 1 of the Carriers Act, 1830, unless the terms of the contract

were inconsistent with the goods having been received by him as a common carrier. *Semble*, also, the Customs declaration is not a declaration of the value of the goods to the common carrier within the meaning of section 1 of the Carriers Act, 1830. *Hirschel & Meyer v. Great Eastern Railway*, 22 T. L. R. 661—Kennedy, J.

Owner's Risk—Wilful Misconduct—Liability.]

—A railway company undertook to carry certain goods at a reduced rate upon terms that they should be excused from all liability for loss, damage, mis-delivery, delay, or detention, except upon proof that such loss &c. arose from wilful misconduct on the part of the company's servants. In an action brought by a trader to recover damages for injury to goods,—*Held*, upon the facts, that there had been no wilful misconduct. *Held*, further, that wilful misconduct in such a special condition means misconduct to which the will is partly as contra-distinguished from accidents, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be) a particular thing, and yet intentionally does, or fails, or omits to do it, or persists in the act, failure, or omission regardless of consequences. *Dictum* of JOHNSON, J., in *Graham v. Belfast and Northern Counties Railway* ([1901] 2 Ir. R. 13) approved. *Forder v. Great Western Railway*, 74 L. J. K.B. 871; [1905] 2 K.B. 532; 93 L. T. 344; 53 W. R. 574; 21 T. L. R. 625—D.

Classification of Goods—Addition Thereto by Board of Trade — Article not Clearly within Description.—By section 20 of the Great Western Railway Co. (Rates and Charges) Order Confirmation Act, 1891, it is enacted that "In respect of any merchandise or article of any description which is not specified in the classification, the company may, unless or until such merchandise or article is duly added to this classification and schedule pursuant to sub-section 11 of section 24 of the Railway and Canal Traffic Act, 1888, make the charges which are by this schedule authorised in respect of merchandise and things in Class 3." By an order made in pursuance of their powers under section 24, sub-section 11 of the Railway and Canal Traffic Act, 1888, the Board of Trade added to class 5 of the classification the following: "Extracts and essences for human food." The railway company under this order claimed to charge for the carriage of "Virol" under class 5 as being an extract or essence for human food. The ingredients of "Virol" are as follows: Malt extract, lemon syrup, animal fat, eggs, glycerine, salt, and flavourings. Previous to the above order of the Board of Trade the railway company carried "Virol" under class 3 as an article not specified in the classification:—*Held*, that "Virol" was a mixture of different component parts rather than an extract or essence, and that, as it did not come clearly within the expression "Extracts and essences for human food," the railway company must continue to carry it under class 3 as being unclassified. *Bovril, Lim. v. Great Western Railway*, 12 Ry. & Can. Traff. Cas. 151—Ry. Com.

Undue Preference—Shorter Competing Route.]—It is the duty of the Court, when undue preference is complained of, to take into consideration all the circumstances affecting the case. Of the circumstances upon which a railway company is entitled to rely, none is more convincing than the fact that there is a shorter competing route with which the company have to reckon. *Abram Coal Co. v. Great Central Railway*, 21 T. L. R. 264—Ry. Com. **PASSENGERS' LUGGAGE**, see *infra*, cols. 2025 and 192. And see **CARRIER**, col. 194.

15. CARRIAGE OF MAILS.

Measure of Remuneration to the Railway Company for Conveyance of Mails—Special Trains—Trains Timed by the Postmaster-General.]—Upon an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Waterford Railway Company for the conveyance of mails on their railway—first, by certain special or notice trains required to be run by notice from the Postmaster-General; secondly, by certain ordinary or agreed trains timed by agreement with the Postmaster-General.—*Held*, that the remuneration for carrying the mails ought not to include any sum directly representing the capital cost of providing the railway; and, further, that the definite sum to be paid should be of sufficient amount—first, to give the railway companies payment for the mails at their ordinary parcels rate less a rebate of one-third of it, in consideration of the usual terminal services in connection with parcels being done in the case of the mail parcels by the Postmaster-General; secondly, to make up to them, when required, the gross receipts of the notice trains to 5s. per train mile; thirdly, to compensate them for possible decrease of the receipts of agreed trains due to their times of running being partly fixed to meet postal requirements, the allowance under this head to be a “substantial” one (*per* WRIGHT, J.) and (*per* SIR F. FEE) equal to a guarantee of 3s. 6d. gross receipts per train mile, the cost of working either class of train being taken by agreement at 2s. 7d. per train mile. *Held*, also, that those conditions would be provided for by fixing the amount to be paid per annum at 8,000l. *Waterford, Limerick, and Western Railway v. Postmaster-General*, 11 Ry. & Can. Traff. Cas. 77—Ry. Com.

Mails, Conveyance of—Measure of Remuneration to the Railway Company—Deductions from Parcel Rates—Charges for Travelling Sorters at Season Ticket Rates.]—Upon an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Great Western Railway Co. for the conveyance of mails on their railway, and for the services performed and accommodation provided by them in connection therewith.—*Held*, that to arrive at a “reasonable remuneration” to be paid to the railway company for the conveyance of mail bags, the railway company's ordinary scale of rates for parcels should be applied less certain deductions to counterbalance expenses incurred by the railway company in carrying parcels for the public, and not incurred in case of the mails—namely, 25 per cent. for terminal services, and 10 per cent. on account

of the substantial difference between mail bags and parcels in the quantity of the bags, and the regularity with which they are supplied for conveyance. *Great Western Railway v. Postmaster-General*, 12 Ry. & Can. Traff. Cas. 11—Ry. Com.

The railway company claimed to be paid full passenger fares for servants of the Post Office travelling in the sorting carriages. The Postmaster-General objected to make any payment for the space occupied by the sorters in the carriage, on the ground that, as the carriages are paid for, the sorters at work in them should travel free of charge:—*Held*, that the railway company should be paid for the conveyance of sorters and other servants of the Post Office at season ticket rates. *Id.*

The railway company claimed to charge for “rent” for sites of letter boxes at stations, and for conveyance of mails by omnibus:—*Held*, that such matters were outside the question of conveyance of mails by train; but charges were authorised for the use of the company's premises by the Post-Office staff, and for assistance in transferring mails rendered by the servants of the railway company. *Id.* And see **POST OFFICE**.

16. CARRIAGE OF PASSENGERS.

Ticket—Conditions Incorporated—Delay Caused to Passenger by Negligence of Company.]

—D travelled by an early workman's train, which arrived late and he consequently lost a day's wages:—*Held*, that the railway company were not liable to him, notwithstanding their admitted negligence, because the printed notice on the back of the ticket (to the effect that the departure or arrival of the trains at the times specified in the time-table was not guaranteed nor were the company under any circumstances to be held responsible for delay or detention, however occasioned, or any consequences arising therefrom) was a condition incorporated into the contract. *Duckworth v. Lancashire and Yorkshire Railway*, 84 L. T. 774; 49 W. R. 541; 65 J. P. 517—D.

— **Conditions—Passenger—“Passengers' own risk”—Notice.]**—The plaintiff was a passenger on one of the defendants' steamers for an evening cruise. The passengers took their tickets when on board, and on the face of the tickets were the words “at passengers' own risk,” and there were also conditions on the back. The plaintiff's hand was injured on board owing to the negligence of the defendants' servants; and in an action in the County Court to recover damages the Judge found that the plaintiff did not observe or read any notice upon the ticket, and that no reasonably sufficient notice was given to him that the ticket contained conditions. He accordingly gave judgment for the plaintiff:—*Held*, that the County Court Judge had put the proper questions to himself, that there was evidence to support his findings, and that therefore judgment was properly entered for the plaintiff. *Hooper v. Furness Railway*, 23 T. L. R. 451—D.

Continuance of Journey to More Distant Station—Fare for Whole Distance Greater than Sum of Fares to Intermediate Station—Quantum

Meruit—Amount.—The through fare by a railway from H. to M. was greater than the fares from H. to S., an intermediate station, and from S. to M. added together. The defendant, intending to travel from H. to M., took a ticket at H. for S. On arriving at S. he gave up his ticket, tendered the fare from S. to M., which was refused, and travelled on to M. by the same train without a ticket:—*Held*, that he was liable for the through fare for the entire journey, less the amount which he had already paid, and not merely for the fare from S. to M. *London and North-Western Railway v. Hinchcliffe*, 72 L. J. K.B. 530; [1903] 2 K.B. 32; 88 L. T. 800; 51 W. R. 556; 67 J. P. 205—D.

Right of Railway Passenger to Break his Journey—Determination of Contract.—The plaintiff took a return ticket from Chorley to Manchester on the defendants' railway. On her return journey she travelled by a train by which it was necessary for her to change at Bolton. Upon her arrival there she alighted, and was about to leave the station to visit a friend when a ticket-collector demanded her ticket, and she gave it up under protest. On resuming her journey to Chorley by a later train on the same day she was required to pay the fare from Bolton to Chorley, which she did under protest. In an action to recover back the amount so paid,—*Held*, that the contract of the company was to carry the plaintiff from Chorley to Manchester and back by two continuous journeys; that the plaintiff, by leaving the company's premises, released them from all contractual relations; and that she was not, therefore, entitled to recover. *Ashton v. Lancashire and Yorkshire Railway*, 73 L. J. K.B. 701; [1904] 2 K.B. 313; 91 L. T. 349; 52 W. R. 655; 20 T. L. R. 482—D.

By-law—Light Railway—Refusal to Pay Fare—No Intent to Defraud—Validity.—By a by-law made by a light railway company pursuant to a light railway order which incorporated section 109 of the Railways Clauses Consolidation Act, 1845, and to which light railway Parts 2 and 3 of the Tramways Act, 1870, was applied, "Each passenger shall upon demand pay to the conductor or other duly authorized officer of the company the fare legally demandable for the journey":—*Held*, that the by-law was good. *Tuffley v. Tate*, 96 L. T. 24; 21 Cox C.C. 337; 71 J. P. 21; 5 L. G. R. 448—D.

Passengers' Luggage—Commercial Travellers' Samples—Absence of Obligation to Carry by Passenger Train—Condition Exempting Carrier from Loss—No Special Contract Signed by Passenger—Liability of Carrier for Loss.—A notice in a railway company's time tables stated that commercial travellers were allowed to take with them free of charge by passenger train a certain amount of luggage per passenger, not being ordinary passengers' luggage, on the condition that the company were relieved from all liability for loss, damage, misdelivery, or delay. The plaintiffs, who were commercial travellers, and were travelling in the ordinary course of their business, took third-class and saloon ordinary return tickets from Huddersfield to Belfast, and gave into the custody of the company's servants a case containing trade samples. The case was dropped into the sea, and the samples lost, by the admitted negligence

or default of the company's servants. The plaintiffs had not signed any special contract for the carriage of the samples. In an action to recover the value of the samples,—*Held*, that, in the absence of any special contract signed by the plaintiffs, the railway company were not entitled, having regard to the provisions of section 7 of the Railway and Canal Traffic Act, 1854, to rely upon the condition as relieving them from liability for the loss sustained by the plaintiffs. *Wilkinson v. Lancashire and Yorkshire Railway*, 76 L. J. K.B. 801; [1907] 2 K.B. 222; 97 L. T. 35; 23 T. L. R. 509—C.A.

Dangerous Luggage—Fatal Explosion—Negligence—Onus Probandi.—Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers, and are not under obligation to carry safely. *East Indian Railway v. Kalidas Mukerjee*, 70 L. J. P.C. 63; [1901] A.C. 396; 84 L. T. 210—P.C.

The appellant's son was killed by an explosion of bombs brought by passengers into a railway carriage. There was no evidence of the appearance or dimensions of the parcels, or that any servant of the company knew or had reason to suspect the character of the parcels, which were taken into the carriage according to a practice which prevails in India as well as in England:—*Held*, that the company was not liable, and was not under obligation to disprove that the parcels suggested danger, or to search every parcel carried by a passenger. *Collett v. London and North-Western Railway* (20 L. J. Q.B. 411; 16 Q.B. 984) explained. *Id.*

Jewellery and other Articles Exceeding 10*l.* in Value—Free Allowance of Ordinary Personal Luggage—Special Contract—Loss of Luggage—Liability.—The fact that a passenger by railway is, by virtue of a provision published in the railway company's time table, entitled to have a certain amount of personal luggage carried free of charge is not inconsistent with the right of the railway company under sections 1 and 2 of the Carriers Act, 1830, to be paid an increased charge in respect of articles included in such personal luggage which exceed 10*l.* in value and are of the kind enumerated in section 1 of that Act. Where, therefore, no declaration of the value and nature of such articles of the passenger's ordinary personal luggage is made to the railway company and an increased charge paid thereon, the company are, by virtue of section 1 of the Carriers Act, 1830, exempted from liability for their loss. *Dictum in Macrow v. Great Western Railway* (40 L. J. Q.B. 300; L. R. 6 Q.B. 612) followed. *Casswell v. Cheshire Lines Committee*, 76 L. J. K.B. 734; [1907] 2 K.B. 499; 97 L. T. 209; 23 T. L. R. 580—D. *And see* CARRIER.

Negligence, Evidence of—Closing Carriage Door—Personal Injuries.—It is not evidence of negligence on the part of servants of a railway company that they close railway carriage doors, left open by passengers who have quitted the train, without warning other passengers still seated in the carriages that they are about to do so; and a passenger, so left seated, who

places his finger in the hinge of the open door of the carriage as it is being closed by the company's servant cannot recover damages for personal injuries. *Drury v. North-Eastern Railway*, 70 L. J. K.B. 830; [1901] 2 K.B. 322; 84 L. T. 658—D.

—**Train in Motion—Shutting Door without Notice—Injury to Passenger.**—B. being a passenger from D. to U., at L., some people getting into the carriage, he put his hand in the doorway. While the train was moving, the door was banged to by a servant of the defendant company without any notice or warning, and B.'s hand was injured:—*Held*, that there was no evidence of negligence on the part of the company. *Benson v. Furness Railway*, 88 L. T. 268—D. And see col. 2050.

Train Snowed up—Injury to Passenger.—In an action of damages for personal injury against a railway company, the pursuer averred that when she was travelling in one of the defendants' trains it became snowed up between two stations; that the windows of the compartment in which she travelled were covered with snow so that she could not see out; that she was unable to open the windows, which were rendered immovable by the frost; that the company's officials left her unattended during the stoppage, which lasted for more than an hour; that in consequence of the exposure to cold her health was seriously injured; that the exposure was due to the fault of the company; that the other passengers were forwarded to the next station by a special train, but that pursuer was not informed of this arrangement:—*Held*, that the pursuer had averred no relevant case. *Mathieson v. Caledonian Railway*, 5 F. 511—Ct. of Sess.

Accident to Passenger in Station, after Alighting from Train—Accident due to Intoxication.—A railway company is not liable in damages for failing to see an intoxicated passenger safely off the platform at which he arrives. *M'Cormick v. Caledonian Railway*, 6 F. 362—Ct. of Sess.

Carriage by Steamship—Negligent Navigation—Loss of Ship—Passenger Travelling with Free Pass—Loss of Luggage.—Section 31 of the Railways Clauses Act, 1863 (which extends the provisions of the Railway and Canal Traffic Act, 1854, to steam vessels), does not apply to a railway company whose special Acts were passed before the Act of 1863. *The Stella* (No. 2), 69 L. J. P. 70; [1900] P. 162; 82 L. T. 390; 9 Asp. M.C. 66—Gorell Barnes, J.

Section 14 of the Regulation of Railways Act, 1868, does not operate to prevent a railway company making conditions with a passenger travelling with a free pass which exempt the company from liability for the loss of such passenger's luggage, although no notice has been posted in the company's offices as required by that section. *Ib.*

Passenger Rates.—See col. 2032.

17. RATES.

(a) Generally.

Increase of.—*Quære*, whether under section 1 of the Railway and Canal Traffic Act, 1894, a

railway company can be called upon to justify the increase of rates which have been lowered since December 31, 1892, but re-raised to a point not exceeding the level of 1892. *Millom and Askam Hematite Iron Co. v. Furness Railway*, 12 Ry. & Can. Traff. Cas. 1—Ry. Com.

Increased Rates found Unreasonable by Railway Commissioners—Action for Recovery of Increased Rates Paid under Protest.—The Caledonian, North British, and Glasgow and South-Western Railways, in terms of a joint notice, made an increase in the rates charged for the carriage of coal on their systems. A steel company, whose works were connected with the lines of the Caledonian Railway, paid the increased rates under protest, and, as they alleged, upon the understanding that, if it should ultimately be found that the railway companies were not entitled to increase their charges the excess would be refunded to them. Thereafter, upon separate complaints made under the Railway and Canal Traffic Act, 1894, by seven coalmasters, the Railway and Canal Commissioners pronounced in each complaint an order finding that the railway companies had not proved that the increase was reasonable, and ordering them to discontinue the increased rates. The steel company obtained the necessary certificates from the Board of Trade, but did not lodge a complaint with the Railway and Canal Commissioners, relying, as they alleged, upon the representations of the railway companies that if the increase was found to be unreasonable the increased charges would be refunded. In an action by the steel company against the Caledonian Railway for repayment of the extra charges paid under protest,—*Held*—first, that there was no relevant averment of a contract binding the railway company to repay the extra charges in the event of the Commissioners holding that they were not reasonable; secondly, that the action was incompetent, exclusive jurisdiction to deal with the subject-matter of the action having been conferred upon the Railway and Canal Commissioners by the Railway and Canal Traffic Acts, 1888 and 1894; and thirdly, that, as the charges made were not illegal, though they might be unreasonable, there was no ground for the action on the footing that the increased charges had been paid on an illegal demand. *Lanarkshire Steel Co. v. Caledonian Railway*, 6 F. 47—Ct. of Sess.

Increase since December 31, 1892—Complaint as to Unreasonableness.—By section 1, sub-section 1 of the Railway and Canal Traffic Act, 1894, "where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable":—*Held*, by the COURT OF APPEAL (KENNEDY, L.J., dissenting), reversing the decision of the Railway Commissioners, that the sub-section applies to every increase of rates or charges whether the result of such increase is or is not to raise rates or charges above the 1892 standard, and that, therefore, where a rate in existence on that date was, after the passing of the Act of 1894,

lowered, but subsequently raised again to the same amount at which it stood on the last day of December, 1892, it had been "increased" within the meaning of the sub-section. *North Staffordshire Colliery Owners' Association v. North Staffordshire Railway*, 76 L. J. K.B. 602; [1907] 2 K.B. 191; 96 L. T. 893; 23 T. L. R. 418—C.A.

Increase — Reasonableness — Evidence.]—By section 1, sub-section 1 of the Railway and Canal Traffic Act, 1894, it is enacted that where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable. The question whether an increase in a rate is reasonable depends upon the circumstances existing at the time the increase was made, including the charges before and after the increase with reference to the services rendered and to be rendered, the expenses of performance, and every other fact with relation thereto. *North Staffordshire Colliery Owners' Association v. North Staffordshire Railway*, 77 L. J. K.B. 448; [1908] 1 K.B. 771—Ry. Com.

The Act of 1894 does not confer any general jurisdiction upon the Court of the Railway and Canal Commission to investigate the reasonableness of rates. *Ib.*

Justification of Increase — Order of Court against Undue Preference—Bona Fide Obedience Thereto.]—Where a railway company can shew that, in complying with an order of the Court against undue preference, a levelling down of the rates at other similar places, proportionate to the amount of the rate complained of, would involve a great risk of serious loss, a levelling up or increase of such rate or charge complained of is reasonable:—*Quare*, whether section 1 of the Railway and Canal Traffic Act, 1894, applies to an increase made in *bona fide* obedience to an order of the Court against undue preference. *Rishworth v. North-Eastern Railway*, 12 Ry. & Can. Traff. Cas. 34—Ry. Com.

Upon a complaint by millers, at Hull, under section 1 of the Railway and Canal Traffic Act, 1894, that the North-Eastern Railway Co. had, in August, 1901, directly and indirectly increased the rate for carriage of flour from Hull, by refusing to perform the service of cartage in Hull without extra charge, and by refusing to allow traders performing their own cartage the former rebate (which varied from 6d. to 1s. per ton), and that such increases were unreasonable,—*Held*, that the railway company having shewn that the increase was made in *bona fide* obedience to an order of the Court, to avoid a preference found undue, by levelling up the rate at Hull to that at Goole, and also having shewn that the levelling down of rates at other similar places to the Hull standard would risk an annual loss of 10,000l., the increases complained of were reasonable. *Ib.*

— Measure of Reasonableness.]—In justifying an increase of rates under section 1 of the Railway and Canal Traffic Act, 1894, it is not sufficient to shew an increase in the ratio of cost to receipts to an extent equalling or exceeding that of the advance in the rates. If

it be shown, after all elements of cost and economy have been taken into consideration, that the necessary cost per ton carried will, under uniform conditions, be increased by any sum without any compensating circumstances, then it is *prima facie* reasonable to increase the charge by the same sum. In considering under this section whether an increase of rate is reasonable, the Court is not precluded from having regard to any circumstances which may tend either to justify the increase or to prove it unreasonable. Although the rates, as existing before 1893, are presumed by the Railway and Canal Traffic Act, 1894, to be sufficiently high, an advance shewn to be necessary to accommodate them to circumstances may be allowed even though the circumstances are of a date prior to 1893 (for example, circumstances existing since 1888), provided that the date is not too remote. Upon a complaint by Manchester oil refiners under section 1 of the Railway and Canal Traffic Act, 1894, that the London and North-Western and other railway companies had, in March, 1893, directly and unreasonably increased certain rates per ton in force on December 31, 1892, to the extent of some 5 per cent.,—*Held*, that the railway companies having shewn that the cost of goods traffic had grown proportionately between 1888 and 1892, an advance of rates in 1893 to the extent of 3 per cent. was justified, on the assumption that the rates in force down to the end of 1892 ought to be considered to have been not more than reasonable in 1888. *Smith and Forrest v. London and North-Western Railway*, 11 Ry. & Can. Traff. Cas. 156—Ry. Com.

— of Coal Rates—Comparative Tables—Discovery of Documents—Documents to Shew Extent and Profits of Applicants' Business—Damages.]—Upon a complaint, under section 1, sub-section 1 of the Railway and Canal Traffic Act, 1894, by colliery owners, that the respondent railway companies had in December, 1899, increased the rates for the carriage of coal to an extent varying from the sum of 1d. per ton on rates not exceeding 2s. per ton to the sum of 3d. per ton on rates exceeding 5s. per ton, and that such increase was unreasonable, the railway companies alleged that the increase was reasonable on the ground that the cost of working their coal traffic had increased owing to shortening of hours of labour, increase of price of fuel, additional capital expenditure, and other causes:—*Held*, that the evidence given by the railway companies as to the cost of working did not prove that when the coal rates were raised at the end of 1899 the cost of carrying that traffic shewed such an advance upon the cost in previous years as to require or justify the raising of the rates. To justify a permanent increase of rate, changes affecting only temporarily cost of working (such as high price of locomotive coal) are not sufficient. The Commissioners ordered an enquiry to be taken before the Registrar as to the damages sustained by the applicants in consequence of their having been compelled to pay these increased rates since January 1, 1900, and held that on such enquiry it would be open to the railway company to shew, by any competent evidence, that damages had not been sustained by the applicants, and in particular that the increased rates had been, in whole or in part, truly borne by other persons:—*Held*, that the

railway companies were not entitled to discovery of the business books and accounts of the applicants in order that extracts might be taken therefrom to shew the amount of coal sold by the applicants, the cost of working it, and the profits made. *Black v. Caledonian Railway*, 11 Ry. & Can. Traff. Cas. 176—Ct. of Sess.

Special Contract — Owner's Risk — Common Carrier — Declaration of Value — Customs Declaration.—Four bales of furs were consigned abroad for carriage to London by the defendants' steamer from Holland to Harwich and thence by their railway to London. The bales were carried at a reduced rate at owners' risk, subject to certain exceptions which were not material, under a special contract signed by the consignors. A declaration as to the nature and description of the goods was made under section 64 of the Customs Consolidation Act, 1876, treating the four bales as one parcel. On arrival at the railway station in London one of the bales was stolen. The learned Judge came to the conclusion upon the facts and documents that the bale was lost before the transit was at an end.—*Held*, that the defendants were protected from liability by the special contract. *Semble*, the fact that the goods were received by a common carrier under a special contract would not deprive him of the protection of section 1 of the Carriers Act, 1830, unless the terms of the contract were inconsistent with the goods having been received by him as a common carrier. *Semble*, also, the Customs declaration is not a declaration of the value of the goods to the common carrier within the meaning of section 1 of the Carriers Act, 1830. *Hirschel v. Great Eastern Railway*, 96 L. T. 147; 12 Com. Cas. 11; 22 T. L. R. 661—Kennedy, J.

Refusing to Deliver at Private Siding—Undue Preference—Jurisdiction.—A railway company which had for twenty-eight years received and delivered coal and goods at a private siding belonging to a firm of traders informed the latter that, while they were willing to receive and deliver other goods as before, they would no longer deliver coal at the private siding. In an application by the traders, the Commissioners found—First, that the delivery of coal at the siding was a due and reasonable facility which the railway company were bound to afford, and made an order upon them accordingly; and secondly, that by delivering coal at the private sidings of competitive traders and refusing to deliver it at the applicants' siding the railway company were giving an undue preference to the former, and ordered them to desist from so doing. On an appeal by the railway company,—*Held*—first, that the Court of the Railway and Canal Commission had no jurisdiction to order a railway company to deliver traffic at a private siding, such sidings not being part of the "railway" within the meaning of section 2 of the Railway and Canal Traffic Act, 1854, and that the right of the railway company to refuse to deliver traffic at such sidings was not affected by the fact that they had in the past voluntarily received and delivered traffic at the siding in question, or that they were still voluntarily receiving and delivering traffic there in the case of goods other than the particular kind of goods which they had refused

to deliver; and secondly, that the Court of the Railway and Canal Commission had jurisdiction to make the second order appealed against. *Cowan & Sons v. North British Railway* (No. 2). 11 Ry. & Can. Traff. Cas. 96—Ry. Com. and Ct. of Sess.

Benefit of Geographical Position — Group Rates—Cartage.—Upon a complaint by corn millers at Goole that the railway companies did not, in respect of flour traffic in four-ton lots consigned by the applicants from Goole, give the applicants the benefit of the geographical position of Goole as compared with the port of Hull, with regard to various inland towns, there being a saving of about one-fifth of the total distance to them from Hull in respect of Goole, whereas the rates charged were the same,—*Held*, that the railway company had failed to prove that if the same mileage rate per ton were applied to Goole as was applied to Hull any injustice would follow, or that the maintenance of the existing Goole rate was necessary to the maintenance of the Hull traffic; and therefore that the railway companies had given an undue preference to the traders in flour at Hull over the applicants by charging rates of the same amount as the rates at which they carried similar traffic from Goole for the applicants. Where no reason is shown to the contrary, the Court will act on the principle that similar charges should be made for similar services. Upon a further complaint by the applicants that the railway companies collected in Hull, free of charge, flour when consigned by their railways, or allowed rebates off the rates charged for conveyance when the cartage was performed by the consignors, but refused to collect the traffic of the applicants at Goole free of charge, or to allow the applicants when they did the collection a rebate as allowed to their competitors at Hull,—*Held*, that such distinctions, as regards collection or charges for the same between Hull and Goole, were an undue prejudice and disadvantage to the applicants at Goole as compared with their competitors in trade at Hull. *Timm v. North-Eastern Railway*, 11 Ry. & Can. Traff. Cas. 214—Ry. Com.

Passenger Duty — Third-Class "Reserved" Accommodation — Supplementary Ticket.—A railway company, whose third-class fares did not exceed a penny a mile, and were therefore exempt from duty under section 2, sub-section 1 of the Cheap Trains Act, 1883, abolished their second-class fares, and in lieu thereof issued for an extra charge, to persons holding third-class tickets, "supplementary reserved" tickets entitling the holders thereof to reserved accommodation in certain third-class compartments having labels in the windows bearing the words "reserved tickets":—*Held*, that where the total sum received by the company from a person holding a third-class ticket and a supplementary reserved ticket exceeded a penny a mile they were liable to pay duty upon it. *Att.-Gen. v. Furness Railway*, 68 L. J. Q.B. 623; [1899] 2 Q.B. 267; 80 L. T. 710; 36 J. P. 326—D.

Short Distance Clause—Where Traffic "Conveyed" on Two Railways both to be Considered as One—Contract for Entire Distance with One Company — Physical Carriage by both Com-

panies.]—A special Act of the A railway company and a similar Act of the B railway company each contained a clause enacting that where merchandise was “conveyed” for an entire distance which did not exceed six miles the railway company might make the charge authorised by the Act as for six miles; provided that where merchandise was “conveyed” by the company partly on its own railway and partly on the railway of another company both railways should, for the purpose of reckoning such short distance, be considered as one railway. Pursuant to a contract between a colliery association and the A company, that company took consignments of coal from the colliery sidings on their own line to a station on the line of the B company. In the case of two of these sidings the distance to that station was less than six miles; in the case of the third siding the distance to that station, and even to the junction between the lines of the two companies, was more than six miles. For the first portion of the distance over the line of the A company the traffic was taken by the locomotives of that company, and for the latter portion of that distance and the entire distance over the line of the B company the traffic was taken by the locomotives of the B company:—*Held*, by the COURT OF APPEAL (VAUGHAN WILLIAMS, L.J., and FLETCHER Moulton, L.J.; BUCKLEY, L.J., dissenting in part), that the word “conveyed” in the clause meant actually carried, and not carried under a contract of carriage; and that therefore the traffic in question was not “conveyed” by the A company on both railways within the proviso, but only on its own railway, and that a separate charge for conveyance might be made in respect of the distance for which the traffic was actually taken by each company. *Lancashire and Cheshire Coal Association and London and North-Western Railway, In re*, 76 L. J. K.B. 1020; [1907] 2 K.B. 902; 97 L. T. 569; 23 T. L. R. 645—C.A.

Proposed Reduction of Particular Rate — Whether Undue Preference or Justified by a Competitive Route — Benefit of Geographical Position — Jurisdiction.—The Merthyr Vale Colliery was equidistant from the main line of the Taff Vale Railway Co. (the applicants) and that of the Rhymney Railway Co., and was connected with each line by private sidings. The route from the colliery to Cardiff by the Taff Vale was shorter by eighteen chains than that by the Rhymney. The Taff Vale charged a uniform mileage rate of 575*d.* per ton over their system, while the Rhymney charged a similar rate of 551*d.*, with the result that the total rate from the colliery to Cardiff was 24*d.* per ton more by the Taff Vale route than by the Rhymney route, although the distance was shorter. By section 24 of the Taff Vale Railway Act, 1879, section 90 of the Railway Clauses Consolidation Act, 1845, was incorporated, subject to the proviso “that the company (*i.e.* the applicants) shall not, in the exercise of the powers conferred by this section, give any undue advantages to traffic passing from or to any of the valleys traversed by the company’s present system of railways over traffic of the like description passing from or to any other of such valleys under the same circumstances.” Upon an application of the Taff

Vale Railway Co. under section 29, sub-section 3 of the Railway and Canal Traffic Act, 1888, with a proposal to reduce their rates from Merthyr Vale Colliery to Cardiff to the same sum as charged by the Rhymney Railway Co., on the ground that while the geographical position of the colliery entitled the colliery owners to a competitive service by the two routes, and the applicants to a share of the traffic, the other collieries on the applicants’ line would not be thereby affected in any way,—*Held*, that there was not sufficient evidence to break in upon the uniform mileage system established over the applicants’ and neighbouring railways, taking into consideration section 24 of the Taff Vale Company’s Act, 1879, as well as the Railway and Canal Traffic Acts. *Quare*, whether any public advantage would be served by the proposed lowering of rate, as the coal would come to Cardiff in any event; and, *quare*, what public interest would be served by a particular colliery having an improved train service. *Held*, further, that in the exercise of jurisdiction under sub-section 3 of section 29 of the Railway and Canal Traffic Act, 1888, no order should be made unless the Commissioners are of opinion that all the interests are before the Court, and then only on the fullest possible evidence. *Taff Vale Railway, In re*, 11 Ry. & Can. Traff. Cas. 89—Ry. Com.

Inequality of Charge.—The plaintiff contracted with the M. railway company for the carriage of coke breeze from a station on the M. railway to a station on the defendants’ railway at a certain specified through rate per ton. The goods having been delivered, the plaintiff paid for the carriage at the agreed rate to the defendants as the collecting agents of the M. railway company. The plaintiff subsequently discovered that the M. railway company had in their published book of rates a through rate between the same stations charging a less sum per ton for coke breeze if used for fuel purposes. The coke breeze carried for the plaintiff was intended to be used for other than fuel purposes. The plaintiff sought to recover from the defendants the difference between the two rates, upon the ground that differential charges for the carriage of the same article according to the purposes for which it was used were a breach of the provisions of section 90 of the Railways Clauses Act, 1845, which requires “that all such tolls be at all times charged equally to all persons and after the same rate . . . in respect of all . . . goods . . . of the same description conveyed . . . over the same portion of the line of railway under the same circumstances.” There was no evidence that the M. railway company had in fact ever carried coke breeze for fuel purposes at the lower rate for any particular persons, but the lower rate had been in existence as a published rate for several years, including the whole period covered by the transactions with the plaintiff. The payments by the plaintiff to the defendants had been made voluntarily and without compulsion. Before any notice to the defendants of any claim by the plaintiff that he had been overcharged they had settled in account with the M. company in respect of the payments so received by them on the M. company’s behalf:—*Held*—First, that, assuming section 90 to apply to the case of carriage at a through rate over more than one

railway, as to which the Court expressed no opinion, it was necessary, in order to establish an inequality of rates under that section, to shew that some persons had in fact been charged at the lower rate, and that of that the existence of the lower rate upon the rate book was no evidence. *Taylor v. Metropolitan Railway*, 75 L. J. K.B. 785; [1906] 2 K.B. 55; 95 L. T. 149; 22 T. L. R. 479—D.

Money Paid to Agent under Mistake of Fact—When Recoverable Back.—Secondly, that, even if there was a breach of that section, the money could not be recovered back from the defendants, who had received it as innocent agents and settled for it with their principals before any notice of the overcharge; and that this applied equally to that portion of the money received by them, which in the ordinary course, under their traffic arrangement with the M. company, they would be entitled to retain to their own use as representing their share of the through rate for the portion of the transit over their railway, the money having been paid by the plaintiff as a lump payment under a contract to which the defendants were not parties. *Id.*

Undue Preference—Ultra Vires—Action by Shareholder of Railway Company against Company and Third Party.—It is not *ultra vires* for a railway company having a fixed rate of charge for the conveyance of goods of a specified class to allow one of its customers to send goods of that class at a lower rate than the fixed rate. Such an act may entitle other customers to appeal to the Railway Commissioners, on the ground of undue preference, under section 2 of the Railway and Canal Traffic Act, 1854, but it does not enable a shareholder of the company suing on behalf of himself and all other shareholders to maintain an action against the company and the preferred customer to recover from the latter the difference between the rate paid and that which ought to have been paid. *Anderson v. Midland Railway*, 71 L. J. Ch. 89; [1902] 1 Ch. 869; 85 L. T. 408; 50 W. R. 40—Buckley, J.

Canal Tolls—Rebate under Special Agreement—Considerations Affecting the Case.—The applicants, corn millers and merchants at York, in the course of their business brought cargoes of wheat up the river Ouse to York. They complained that the respondents (as trustees for improving the navigation of the river Ouse) charged Messrs. L., flour millers and corn merchants at York (competitors in trade with the applicants), a sum by way of toll for the use of the river Ouse navigation, within the jurisdiction of the respondents, which worked out to a payment of about 1½d. per ton on wheat brought up the river Ouse to Messrs. L.'s works at York, and charged the applicants for similar traffic brought up the river Ouse to the applicants' works at York tolls for the use of such navigation amounting to 6d. per ton. By an agreement dated October 1, 1888, and made between the respondents and Messrs. L., the respondents agreed to accept a maximum annual payment of 600l. from the said firm, in place of the tolls which would otherwise have been payable, for the whole of the wheat brought by them over that part of the river Ouse navigation which is within the respondents' jurisdiction,

irrespective of the amount of the tonnage which might use the said navigation. The respondents sought to justify the agreement on the ground that at the date it was entered into Messrs. L. contemplated transferring their business to Hull, which would have seriously diminished the tolls and would even have imperilled the maintenance of the navigation, and that such a removal would also have caused a serious loss to the ratepayers of the city, and, moreover, that Messrs. L.'s business had increased to a far greater extent than was contemplated when the agreements were entered into:—*Held*, that, after taking into consideration these and other matters, the difference in the amount charged to Messrs. L. and to the applicants for the use of the river Ouse navigation in connection with the conveyance of wheat was an undue preference given to Messrs. L. over the applicants. *Fairweather v. York Corporation*, 11 Ry. & Can. Traff. Cas. 201—Ry. Com.

Working Agreement in Perpetuity—Fair Development of Traffic—Working Company Unduly Preferring own Route—Sunday Trains—Group Rates—Through Rates.—The applicants were the owners of a railway which consisted of a single line about eight miles in length, and formed an alternative route to the main line of the defendants' railway between E. and N. The applicants entered into an agreement with the defendants whereby it was provided that the defendants were to work the said railway in perpetuity and in connection with their system of railways, and employ all the requisite staff, locomotive power, rolling stock, &c., so as "to fairly develop the traffic to be accommodated thereby." Upon a complaint by the applicants that the defendants had unduly preferred their own line to that of the applicants, and had not provided the necessary and proper facilities in working both the goods and passenger traffic in connection with the defendants' system required for the fair development of the applicants' railway and had not carried out the working agreement,—*Held (inter alia)*, that the fact that the defendants' line was longer between two places than the new route owned by the applicants (the same rates being charged by both routes) did not compel the defendants to work the goods traffic along the new route where they could shew (as in this case) that their own route could be worked more cheaply; that the defendant working company was entitled to exercise its discretion as to the running of Sunday trains on the applicants' line. *Exeter Railway v. Great Western Railway*, 12 Ry. & Can. Traff. Cas. 182—Ry. Com.

Upon a specific complaint by the applicants that, although with regard to all goods traffic coming from the applicants' line and from two local lines connected therewith, the defendant working company grouped the terminus station of the applicants at E. with their own station situated in the same town, yet with regard to the goods traffic from their (the defendants') own system they charged from 2d. to 8d. per ton (according to class) more for goods consigned to the applicants' terminus than for goods consigned to their own station, a difference of charge which was not based on any mileage calculation:—*Held*, that the difference in charge complained of fairly represented the additional cost in working traffic into the ap-

plicants' station, and that the defendants could not be compelled to group the two stations for all purposes. *Ib.*

Held, further, that the fact that the additional charge exceeded the statutory mileage rate for the very short distance between the two stations did not make it illegal (the total statutory charge for the transit of the whole distance not being exceeded), inasmuch as the rates for goods going to the defendants' station and those for goods going beyond the defendants' station to that of the applicants were for different journeys and to different termini, and might be fixed independently of each other, and were each a single sum; and where one journey cost as a whole more than the other, and the difference between the rates charged was only such as corresponded to the difference of cost, it was immaterial that the rates did not work out at the same sum per mile over such distances as were common to both journeys. *Ib.*

Under the working agreement between the parties the gross amount of all tolls was to be divided equally between the parties. The applicants contended that, after deducting the terminals, the amount charged in a through rate from a third line which represented the special tolls chargeable on their line ought to be retained by them in such division:—*Held*, that the applicants were only entitled to their terminal and the mileage proportion of the whole through rate, without considering how far the various portions of the route over which the journey was taken had contributed to earn the toll. *Ib.*

The agreement also provided for the division of receipts on interchanged traffic, which was further defined as traffic arising at or destined for places on the applicants' railway, and carried to or from places on the railway of the defendants, but exclusive of any proportion due to lines worked jointly or worked by the defendants:—*Held*, that the words "carried to or from places on the railway of the defendants" are applicable also to traffic which does not terminate or arise at such places, but is there handed to or received from another company. *Ib.*

— **Group Rates**—A railway company carried coke to certain ironworks, and grouped them. Upon complaint by the owners of one of such works that the group rate created an undue prejudice to them, and an undue preference to their competitors in the group, the Railway Commissioners held that the railway company had not created an undue preference. Subsequently the railway company took one of the ironworks out of such group. Upon complaint that the Railway Commissioners having declared the grouping of these various ironworks to be reasonable, the railway company were not justified in taking works out of the grouping in which they had been so included:—*Held*, that section 29 of the Railway and Canal Traffic Act, 1888, did not prevent a railway company from grouping *de novo*, or dissolving a group, or taking one place out of it in the sense of leaving the others in, and not putting that one in. *Millom and Askham Hematite Iron Co. v. Furness Railway*, 12 Ry. & Can. Traff. Cas. 1—Ry. Com.

— **of Carriers—Special Agents—General Orders for Delivery given by Consignees—Special Services.**—A railway company employed Messrs Wordie, a firm of carriers, under a contract, to deliver all goods carried by the railway company to Dublin at cartage rates, and not invoiced to be delivered by any particular firm of carriers. Ninety-five traders in Dublin sent to the railway company general orders to hand over to Messrs. Wallis (another firm of carriers in Dublin) for cartage all inwards traffic consigned to them. Such orders were in the following form:

"Dublin, 190 .

"To the Great Northern Railway Company
(of Ireland).

"All goods and empties arriving at your station for (no matter how consigned or addressed), please hand to agents John Wallis & Sons, for delivery until further orders."

The railway company refused to recognise or act upon such general orders:—*Held*, that in view of the inconvenience which the recognition of such general orders would entail on the public and the railway company, and the small and irregular consignments of traffic carried for the traders giving such orders, the refusal to obey such general orders was not a denial of reasonable facilities for the delivery of traffic, nor an undue preference of Messrs Wordie. *Parkinson v. Great Western Railway* (40 L. J. C.P. 222; L. R. 6 C.P. 544) distinguished. *Wallis v. Great Northern Railway (Ireland)*, 12 Ry. & Can. Traff. Cas. 38—Ry. Com.

The railway company, under their contract with Messrs. Wordie, paid them 1s. 7d. per ton for the cartage of collected and delivered traffic in Dublin, but allowed Messrs. Wallis only 1s. 3d. per ton for similar services. The railway company alleged that the payments were really the same—namely, 1s. 3d. for cartage; and that the 4d. extra which Messrs. Wordie got was paid them for special services, in their capacity as agents, rendered to the railway company:—*Held*, that 4d. per ton was an excessive allowance for the special services, and that the payment thereof constituted an undue preference by the railway company of Messrs. Wordie to the prejudice of Messrs. Wallis. *Ib.*

— **Shipment Rate and Works Rate—Works Rate for same Services Higher than Shipment Rate—Right of Trader to Apply for Reduction of Works Rate—Right to make Application where Trader does not Directly Pay Rate.**—The mere fact that a railway company charge a higher rate for carriage of coal over the same length of line to traders' works—all traders being charged an equal rate—than they do for coal for shipment, is not of itself sufficient to give a trader a right to apply to the Court for reduction of the works rate, and such difference between the works rate and the shipment rate does not necessarily shew an undue preference or an undue prejudice within the meaning of the Railway and Canal Traffic Acts. *Spillers & Bakers v. Taff Vale Railway*, 90 L. T. 713; 12 Ry. & Can. Traff. Cas. 70; 20 T. L. R. 101—Ry. Com.

A railway company carried from certain collieries to C. large quantities of coal, the

greater proportion of which was for shipment from that port to places abroad and to ports in England, and the remaining part was for works in C., including the works of the applicants, who were large flour millers in C., and for home consumption. They carried the shipment coal at a low shipment rate, but all other coal, whether for works (including the applicants' works) or for home consumption, was charged a higher or works rate, the works rate being some 50 per cent. higher than the shipment rate, and being the same for all traders in C. It was proved that the low shipment rate was justified by necessity, and that owing to competition with other ports and to other causes it was practically impossible in the interests of the public for the company to raise the shipment rate; and further, that the works rate was a reasonable rate, and was in fact so low that it could not reasonably be made lower without reducing it to a non-paying rate, and though there was some slight competition, no real or substantial competition was proved between the two classes of coal. Upon a complaint by the applicants that the higher works rate charged for the carriage of their coal as compared with the low shipment rate was an undue preference and an undue prejudice within the meaning of the Railway and Canal Traffic Acts,—*Held*, that the mere difference in the two rates was not in itself sufficient to prove an undue preference or an undue prejudice, or to give the applicants a right to come to the Court for relief; that, under the circumstances, within the meaning of sub-section 2 of section 27 of the Railway and Canal Traffic Act, 1888, not only was the lower charge for the shipment traffic "necessary for securing in the interests of the public the traffic in respect of which it is made," but also "the inequality could not be removed without unduly reducing the rates charged to the complainant," and that therefore the applicants were not entitled to a reduction in the works rate charged to them. *Ib.*

Semble, in such case, the fact that the rates are charged by the railway company to and paid by the colliery company, and not directly charged to or paid by a trader himself in the first instance, does not prevent the trader from applying to the Court under the Railway and Canal Traffic Acts, if in substance the charge is made so as to affect the trader's interest. *Ib.*

— **Competing Wharfowners.**—Any person who is directly prejudiced by the breach of the statutory duty imposed on a railway company to give similar treatment to all similar traffic can apply to the Railway and Canal Commission for an order to remedy the grievance. Hence a wharfinger, who has no interest in the goods carried, can complain of undue preference given to a competing wharfinger. *Forwood v. Great Northern Railway*, 12 Ry. & Can. Traff. Cas. 89; 20 T. L. R. 320—Ry. Com.

Coal Traffic—Guarantee of Quantity.—The applicants, the owners of a colliery on the defendants' railway, consigned coal for shipment over the defendants' railway to the defendants' Alexandra Dock at Hull, a distance of fifty-one miles seven chains, and were charged 2s. 7d. per ton. The D. company also owned collieries on another branch of the defendants'

railway, and competed with the applicants in sending coal for shipment to the Alexandra Dock at Hull, a distance of fifty-six miles twenty-four chains, and were charged—(a) For any quantity up to 200,000 tons a year, 2s. 5d. per ton; (b) from 200,000 to 300,000 tons a year, 2s. 4d. per ton; (c) for any quantity above 300,000 tons a year, 2s. 3d. per ton. These rates were charged to the D. company under a guarantee given to the railway company to send a minimum quantity of 200,000 tons of shipment coal per annum, which in practice came up to about 500,000 tons per annum during twenty-one years from 1891. It was proved that the applicants sent only some 60,000 tons of coal a year, and that in the case of shipment coal it was necessary that there should be a large and constant supply so that the railway company could make their shipment arrangements with certainty and regularity, and, further, that the railway company were willing to carry the applicants' coal at the same rates as the D. company's coal if the applicants would give a like guarantee as to quantity:—*Held*, that under the circumstances the difference of 2d. a ton up to 200,000 and the still greater difference for larger tonnage was justified, such difference being made by the railway company in good faith for the protection of their own interest, and in the belief that the guarantee was worth to them the difference. *Hickleton Main Colliery Co. v. Hull, Barnsley, and West Riding Junction Railway*, 12 Ry. & Can. Traff. Cas. 63—Ry. Com.

Semble, that such difference of charge would not be justified if the applicants sent quantities of coal comparable to those which the D. company sent, and promised from month to month, without any guarantee, a sufficient continuance of supply to enable the railway company to make all necessary arrangements for shipment. *Ib.*

Under section 27 of the Railway and Canal Traffic Act, 1888, the Court will take into consideration any circumstance which makes it better worth the while of the railway company to carry the traffic of one trader rather than the traffic of another. *Ib.*

— **Rebate under Special Agreement—Damages Recoverable for Six Years only.**—A railway company had, since the year 1889, under an agreement, allowed a rebate of from one to one and a-quarter per cent. upon the total annual carriage accounts paid by Messrs. Rickett, Smith in respect of the carriage of coal from collieries situated on the railway company's system of railways to all stations or places in the United Kingdom, other than stations on the Great Eastern Railway outside London. The applicants, who were competitors in trade with Messrs. Rickett, Smith, complained that the railway company had not allowed such rebate in respect of similar traffic carried by the railway company for the applicants and delivered in like manner. The applicants first became aware of the existence of the rebate in October, 1900:—*Held*, that the terms and conditions contained in the agreement with Messrs. Rickett, Smith did not afford a justification for the railway company making a difference between Messrs. Rickett, Smith and the appli-

cants as regards any rebate on their annual carriage accounts of more than a quarter per cent. in favour of Messrs. Rickett, Smith. The Court, therefore, allowed to the applicants on their annual accounts with the railway company for the carriage of coal from collieries on the railway company's system of railways for six years before the termination of the agreement, damages equal to the allowance per cent. made by the railway company during that period to Messrs. Rickett, Smith on their annual carriage account with the railway company for carriage of similar traffic, less one-quarter per cent.; such damage to be in respect of the applicants' coal traffic to places (stations on the Great Eastern Railway outside London excepted) to which comparable and competitive coal contributing to their carriage account with the railway company had also been sent in substantial quantities within twelve months by Messrs. Rickett, Smith. *Held*, further, that the words "Rebates are allowed to coal merchants off their coal traffic accounts in certain cases and upon certain conditions, where the annual tonnage carried exceeds 25,000 tons; particulars of the conditions qualifying merchants to this allowance may be obtained on application to the general manager," inserted in the rate-books, were not sufficient to disclose the existence of the rebate in accordance with section 14 of the Regulation of Railways Act, 1873. *Charrington, Sells, Dale & Co. v. Midland Railway*, 11 Ry. & Can. Traff. Cas. 222—Ry. Com.

— **Lower Charge made for a Longer Distance — Geographical Competitive Position — Public Interest.**—The applicants consigned coal from their collieries by way of the defendants' railway to the private siding at the works of Messrs. Brunner, Mond, at Winnington, a distance of thirty-one miles. Messrs. Evans & Co. also consigned coal from their collieries by way of the defendants' railway for delivery to the private siding at the works of Messrs. Brunner, Mond, a distance of thirty-three miles. The defendant railway company charged the applicants for the conveyance of the coal traffic between the two points 2s. 1d. a ton, and Messrs. Evans 1s. 9d. a ton. The applicants and Messrs. Evans were competitors, and sent precisely the same traffic to the same destination and over substantially the same route. There was an alternative railway route by the line of the London and North-Western Railway between the collieries of the applicants and Messrs. Evans, and the works of Messrs. Brunner, Mond, at Winnington. By such alternative route the distance between Messrs. Evans's collieries and the works of Messrs. Brunner, Mond, was twenty miles, and between the applicants' colliery and such works twenty-seven miles, and the rate of 1s. 9d. per ton was also the rate charged by the London and North-Western Railway to Messrs. Evans by such shorter route, and the defendant railway company contended that the existence of that shorter alternative route gave Messrs. Evans a geographical competitive position which justified the lower rate, and that to apply the mileage principle, where competitive routes exist, would shut up the longer route, which was not in the interests of the public.—*Held*, that the difference of 4d. per ton in favour of Messrs.

Evans in respect of a longer transit of their traffic over substantially the same route as the applicants' traffic was conveyed amounted to an undue preference, there not being sufficient public interest to justify so great a difference. *Abram Coal Co. v. Great Central Railway*, 12 Ry. & Can. Traff. Cas. 125; 20 T. L. R. 264—Ry. Com.

Subsequently the defendant railway company reduced the rate charged to the applicants from 2s. 1d. per ton to 2s. per ton, leaving a difference of 3d. per ton in favour of Messrs. Evans & Co. instead of 4d. The applicants not being satisfied with such reduction, again brought the matter before the Court pursuant to the leave reserved:—*Held*, that the preference of 3d. per ton given to Messrs. Evans is neither undue nor unreasonable. *Ib.*

Seem, the Railway Commission Court would, in a proper case, order the railway company before it to have recourse to grouping, if by so doing they could remove a preference without undue injury to themselves, and without undue injury to third parties—*per* BIGHAM, J. *Ib.*

— **Shipment Coal—Competitive Traffic.**—A railway company carried shipment coal to certain sidings on a ship canal at a lower rate than they carried coal to a trader at the same sidings; such coal (which was in the form of slack) being then manufactured by the trader into patent fuel for shipment. Upon a complaint by the trader that the railway company were unduly preferring the shipment coal to his prejudice,—*Held*, that no competition existed between the coal carried for shipment and that carried for the trader; and that therefore the applicants had no *locus standi*. *Lancashire Patent Fuel Co. v. London and North-Western Railway*, 12 Ry. & Can. Traff. Cas. 77—Ry. Com.

Held, further, that the fact that the trader manufactured the coal carried for him by the railway company into an article which might ultimately compete with the coal carried by the railway company for shipment was not bound to be taken into consideration by the railway company in regulating their charges. *Ib.*

Rebate — Cartage — Undue Preference.—In assessing a rebate off a rate for the carriage of goods in respect of the cartage having been performed by the trader,—*Held*, that the correct basis was to take the cost of the service rendered and the saving to the company when the trader performed his own carting. *Pickfords v. London and North-Western Railway*, 23 T. L. R. 535—Ry. Com. Affirmed, 24 T. L. R. 149—C.A.

Rebate for Station or Service Terminals—Jurisdiction of Commissioners — Sidings Provided by Trader.—The plaintiffs received from and delivered to the defendant company large quantities of merchandise at a siding belonging to the plaintiffs, in respect of which the company did not provide any station accommodation or perform any terminal services at that siding. They were charged the same rates as were charged to other traders for similar traffic, in respect of which the company did provide

station accommodation and perform service terminals; and they claimed an allowance or rebate, under section 4 of the Railway and Canal Traffic Act, 1894. The Railway Commissioners decided that a rebate should be made. *SIR FREDERICK PEEL* decided upon the ground that the rebate could be ordered, whether any charge for station or service terminals was in fact included in the rate or not; and *WRIGHT, J.*, expressed an opinion to the same effect. But *WRIGHT, J.*, and *LORD COBHAM* both decided that a charge for station or service terminals was in fact included in the rate:—*Held*, that, as the majority of the Commissioners had decided that the rebate should be made upon the ground that a charge for station or service terminals was in fact included in the rate, the appeal would not lie. *Vickers, Sons & Maxim v. Midland Railway*, 87 L. T. 665; 11 Ry. & Can. Traff. Cas. 249—C.A.

Rebate Given to Competitive Trader in Consideration of Services Performed for the Railway Company.—The applicants, millers and corn merchants at Limerick, complained that while the rate charged to the public on grain carried from Dublin to Limerick is 9s. a ton, the railway company allow to G., a miller at Kilrush, on grain they carry for him from Dublin to Limerick a rebate of 6s. G. is a shipowner as well as a miller, and a contract entered into with him by the railway company provides that he shall be their agent for the Lower Shannon district, and shall use every effort to develop a goods traffic from and to that district, and to and from London and North-Western stations *via* Dublin and Holyhead, and shall receive from the railway company on all such traffic carried partly by his steamers and partly by their railway a commission of 6s. per ton. The applicants import grain into Limerick for sale there and elsewhere, and for the carriage by rail to Limerick of grain bought in Dublin the railway company's rate of charge is 9s. a ton; but if the grain is carried on G.'s account, and if his steamer is used, the charge to him is reduced by the action of the rebate to a net 3s. a ton:—*Held*, that the differential charge on the railway amounted to an undue preference of G., and the Court ordered and enjoined the railway company not to give G. any rebate or allowance in the nature of a rebate for the carriage by the railway company on their line between Dublin and Limerick of any grain, &c., in excess of any rebate or allowance thereon given to the applicants; and not to make any payment to G. depending in any way upon the amount of grain &c. consigned to G. from Dublin to Limerick, and not to give any undue or unreasonable preference or advantage to G. in the carrying for him of such grain, &c. *Bannatyne v. Great Southern and Western Railway*, 12 Ry. & Can. Traff. Cas. 105—Ry. Com.

Carriage of Non-perishable Goods by Passenger Train—No Statutory Obligation to Carry—Charge Inclusive of Collection—Collection by Consignor—Right of Consignor to Rebate.—Where a railway company which is under no statutory obligation to do so carries non-perishable goods by passenger train, and charges a rate which includes collection and delivery, a consignor is not entitled to any rebate from the rate on the ground that he has himself done

the work of collection, provided the rate is not charged unequally to different consignors. *Stone v. Midland Railway*, 72 L. J. K.B. 377; [1903] 1 K.B. 741; 88 L. T. 92—D.

(b) *Through Rates.*

Application for—Reasonable Facilities for Traffic—Dock Company's Lines—"Railway company."—A dock company applied for a through rate under section 25 of the Railway and Canal Traffic Act, 1888, from the warehouses of one of its docks to certain places on the Great Eastern Railway. The lines of the dock company, in respect of which the application was made, were constructed under statutory powers which authorised the company to make and work a dock and to construct lines of rails and all appliances ancillary to the working of a dock, but did not incorporate the general provisions of the Railway Clauses Acts or contain any provisions purporting to treat the dock company as a railway company in respect of the lines ancillary to the working of the docks. The dock company was the owner of a railway in the United Kingdom constructed and carried on under the powers of an Act of Parliament within the meaning of section 3 of the Regulation of Railways Act, 1873, but this railway was not a part of the through route in respect of which the application was made:—*Held*, that the dock company were not entitled to apply for the through rate, since, having regard to the provisions of the company's Acts, the company did not own, or lease, or work a railway within the meaning of section 3 of the Regulation of Railways Act, 1873, which could be substantially treated as forming part of the through route in respect of which the application was made. *London and India Docks Co. v. Great Eastern Railway*, 71 L. J. K.B. 369; [1902] 1 K.B. 568; 86 L. T. 339; 50 W. R. 461; 11 Ry. & Can. Traff. Cas. 57—C.A.

Under the powers of one of the dock company's Acts, a portion of a railway constructed under the powers of an Act of Parliament, and forming part of the Great Eastern Railway system, was replaced by a substituted line, and vested in the dock company, but the Great Eastern company retained the right to use it in special circumstances, and no charging powers were conferred upon the dock company in respect of it. This portion of railway formed a part of the route in respect of which the application was made:—*Held*, that the dock company were not a railway company owning a railway within the meaning of section 3 of the Regulation of Railways Act, 1873, in respect of the transferred portion, inasmuch as, having regard to the provisions of the Act, the dock company took it upon transfer divested of its special characteristics as a public railway, and held it in the same manner as they held their other dock lines. *Ib.*

Apportionment—Bonus Mileage—Particulars of Rates Necessary.—Upon an application under sections 25 and 26 of the Railway and Canal Traffic Act, 1888, to the Railway and Canal Commissioners to fix the apportionment of "all agreed-on rates chargeable on traffic passing, *via* the Forth Bridge, between stations on the Great North of Scotland railway and on

the Caledonian railway between Aberdeen and Kinnaber Junction, on the one hand, and stations on the south of the Forth Bridge on the other, as between the respondents and the applicants, on the footing that the applicants shall receive in every case from the said rates as the share belonging to the Forth Bridge company, such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge railway were 19 miles more than it actually is,"—*Held*, that such a description of rates is too general and indefinite, and that full particulars are required of rates proposed for apportionment, which should include their amount, the termini for each rate, and the route between those termini, in order that no mistake may occur in the identification of the rates. *Held*, further, that, although by sections 104 and 106 of the Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866, the North British company were empowered to fix the rates and fares for Scottish east-coast traffic over their own and the Caledonian Co.'s lines, and it was further provided that, after the reduction of certain charges, including the proportion of any through rate payable to other companies, the residue of such rates and fares should be divided between the Caledonian Co. and the North British Co. according to the actual distance the traffic travelled over their respective railways, or in such proportions as might be agreed on between them, or in case of difference as should be settled by the arbitrator, yet the jurisdiction of the Court was not ousted by that of the arbitrator, because the application was not to apportion a through rate, or residue of a through rate, between the North British and Caledonian companies, but to apportion a through rate between all forwarding companies engaged in the east-coast traffic. Sub-section 1 of section 25 of the Railway and Canal Traffic Act, 1888, which requires "written notice" of the proposed through rate to be given to each forwarding company, stating both the amount and the route proposed, and the proportion of the rate claimed by the company making the proposal, had been sufficiently complied with in this case, where each forwarding company, including the respondents, had after the opening of the Forth Bridge received the aforementioned particulars at meetings of the railway clearing-house, of which a written record was kept, although written notice had admittedly not been given to each forwarding company (*per* LORD TRAYNER). Since the effect of the application would not be confined to the two respondent companies, but would leave a less sum to be divided among all the other companies interested, rates with which other companies were concerned could not be considered without such companies being joined as respondents (*per* SIR FREDERICK PEEL). *Forth Bridge Railway v. Great North of Scotland Railway* (No. 1), 11 Ry. & Can. Traff. Cas. 1—Ry. Com.

Notice—Jurisdiction—Railway.]—By section 25 of the Railway and Canal Traffic Act, 1888, written notice must be given of a proposed through rate to each forwarding company stating the amount, rate, and apportionment. If no objection be made by any forwarding company within ten days, the rate comes into operation. Where the objection is only to the apportion-

ment of the rate, the rate comes into operation and the decision of the Commissioners is to be retrospective. On January 14, 1890, a printed notice was addressed by the secretary of the clearing-house to the goods managers of the various companies requesting attendance at a meeting of the goods managers' conference, and appending a list of subjects for discussion, among which was the following: "Mr. Macdougall will intimate the probable opening of the Forth Bridge railway in March next, and give notice that, in terms of the Forth Bridge Railway Acts, 1878 and 1882, the North British company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the bridge railway." Certain of the companies interested assented to the claim so made, but others objected, and the sums in dispute were held in suspense in the clearing-house. On October 19, 1898, the Forth Bridge Co. and the North British Co. served a notice upon all the companies interested in the Forth Bridge through route, which purported to be under section 25 of the Railway and Canal Traffic Act, 1888, setting forth that the applicants proposed and required that the through rates and fares then in operation *via* the Forth Bridge, and particularly those set forth in a schedule to each notice, should be continued in operation, and that the apportionment among the applicants and the other companies of the said rates and fares should be made on the footing that the Forth Bridge Railway was nineteen miles longer than it actually is. In the schedule were set forth a selection of through rates then in operation *via* the Forth Bridge between certain stations of the company receiving the notice and certain other stations south of the Forth Bridge. Objections having been lodged to the allowance and apportionment, the Forth Bridge Co. and the North British Co. applied to the Railway Commissioners to apportion the scheduled rates and fares, and also all other agreed-on rates and fares *via* the Forth Bridge on the footing that the applicants should be credited with the said nineteen-mile bonus:—*Held*, first, that the notice of October 19, 1898, was a valid notice within the meaning of section 25, sub-section 1 of the Railway and Canal Traffic Act, 1888, and therefore that the Railway Commissioners had jurisdiction to entertain the application; secondly, that the notice of January 14, 1890, was not a valid notice within the meaning of the said sub-section, and therefore the rates in operation were not agreed-on rates, but must be granted or disallowed in the application before the Commissioners; and, accordingly, as the objections before them were to the allowance as well as to the proposed apportionment, their order should not be retrospective. *Held*, that section 25, sub-section 9 of the Railway and Canal Traffic Act, 1888, applies only to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge for which traffic may be carried from end to end of it. *Forth Bridge Railway v. Great North of Scotland Railway* (No. 2), 11 Ry. & Can. Traff. Cas. 14—Ct. of Sess.

Competing Routes—Diversion of Traffic—Transportation of Goods—Rebates.]—Certain through

rates for traffic passing *via* Strabane, between the railway of the Great Northern Co. and the railway of the Donegal Co. west of Strabane, were in operation under a notice duly served on the Donegal Co. in accordance with the provision of section 25 of the Railway and Canal Traffic Act, 1888. Each of the railway companies owned a railway between Strabane and Londonderry, and were competing for the traffic. Upon a complaint by the Great Northern Co.

—(1) of the unreasonable delay caused by the Donegal Co. to traffic forwarded from Londonderry *via* Strabane, partly on the line of the Great Northern Co. and partly on the line of the Donegal Co., and *vice versa*; (2) of improper diversion of traffic from the line of the Great Northern Co. to the line of the Donegal Co., and obstruction offered at stations on the Donegal Co.'s line west of Strabane to the use by the public of the route to Derry by the line of the Great Northern Co. as a through route; (3) of improper refusal of the Donegal Co. to recognise the through bookings of passengers by the Great Northern Co. from Londonderry *via* Strabane to stations on the Donegal Co.'s line west of Strabane; (4) of detention of the Great Northern Co.'s waggons at Strabane owing to the delays in transhipment of traffic by the Donegal Co.,—*Held*, that the Great Northern Co. were entitled on the facts proved to an order enjoining the Donegal Co. to afford all due and reasonable facilities for carrying out the through system of booking and rates over the Great Northern Co.'s and Donegal Co.'s railways for passengers and goods as required by the notice served by the Great Northern Co. on the Donegal Co., and in particular for transferring to and from the Great Northern Co.'s railway all goods and traffic carried at through rates partly over the railway of the Donegal Co. and partly over the railway of the Great Northern Co. The Donegal Co. applied for an order declaring that the through rates in force under the notice served on the Donegal Co. by the Great Northern Co. were not a reasonable facility or required in the interests of the public, and that the same should no longer be in force :—*Held*, that no case had been made for rescinding the through rates. *Query*, whether the Court has power to rescind through rates, which have become valid by a notice under section 25 of the Railway and Canal Traffic Act, 1888. Upon complaint that the Great Northern Co. granted a rebate of 1s. per ton out of their portion of the through rates it was proved that the Great Northern Co. were not acting *mala fide* nor for the purpose of treating the Donegal Co. unfairly, but to secure a portion of the competitive traffic, and that without such rebate the Great Northern Co. would lose the traffic altogether owing to the delays caused by the Donegal Co. at Strabane :—*Held*, that no case had been made for prohibiting the Great Northern Co. from allowing the rebate. *Great Northern Railway (Ireland) v. Donegal Railway*, 11 Ry. & Can. Traff. Cas. 47—Ry. Com.

(c) Subscription Tickets.

Reasonable Conditions — Carrying Merchandise as Personal Luggage.—A railway company issued monthly subscription tickets on certain conditions, amongst which are the following: No subscriber shall be entitled

to carry free of charge any merchandise or articles of any kind for hire or profit, or for the use of any person or persons other than the subscriber. The directors reserve to themselves the right of declining to renew the subscription ticket of any person who refuses to comply with any of the regulations herein set forth :—*Held*, that such conditions are fair and reasonable, and that the railway company are entitled to decline to renew the subscription ticket of a subscriber who refuses to abide by the former of such conditions. *Morrison v. Belfast and County Down Railway*, 12 Ry. & Can. Traff. Cas. 99—Ry. Com.

(d) Traders' Tickets.

Issue of, at Rates Varying according to Amount of Traffic.—A railway company issued season tickets to traders who sent or received traffic yielding annually 250l. or over at a cheaper rate than to ordinary passengers, the cost of such traders' season tickets being about one-third of the cost of an ordinary season ticket. To traders whose traffic yielded over 1,000l. the railway company gave a still greater reduction on the season-ticket rate. Upon a complaint that the railway company were unduly preferring traders who sent or received large quantities of traffic to those sending or receiving small amounts of traffic,—*Held*, that it was entirely a matter of fact whether the preference given was undue, and that where such a preference was given to all persons alike upon purely business considerations, there was a strong presumption that the preference was not undue; and that, on the facts proved, no undue preference existed. *Inverness Chamber of Commerce v. Highland Railway*, 11 Ry. & Can. Traff. Cas. 218—Ry. Com.

18. WORKING EXPENSES.

Railway Companies Act, 1867, s. 4—"Other proper outgoings"—Costs of Defending Action.—The W., M., and C.'s Q. Railway Co. incurred costs in defending an action brought against it for large sums by the contractor for the line in respect of the balance of the contract price. A receivership order had been made against the company after the action was commenced; and the plaintiff had obtained leave to continue the proceedings in the action. At the same time leave was given to the company to attend the proceedings, but no order was made as to its costs. This was an application by the company that these costs might be paid to them at once by the receiver and manager of the railway out of the moneys received by him, upon the footing that the costs in question were "other proper outgoings" within the meaning of section 4 of the Railway Companies Act, 1867 :—*Held*, that as the line could have been carried on just as well and effectually, although the company had not resisted the claim made in the action, however proper it might have been for them to do so, these costs were not "proper outgoings" within the meaning of section 4, and the application failed. *Wrexham, Mold, and Connah's Quay Railway (No. 2), In re*, 80 L. T. 648—Byrne, J.

19. NEGLIGENCE.

Drunken Man Causing Injuries to Passenger—Liability of Railway Company.]—A drunken man, with a ticket, was admitted to the platform of the defendants' station and passed the barrier where the ticket-checker was stationed. The man was seen outside, obviously drunk, but there was no evidence that there was anything in his conduct to attract the ticket-checker's attention. The man attempted to enter a first-class carriage when the station-master ordered a porter to keep him back, and whilst the porter was leading him along the platform he suddenly swung up his arm and broke the window of the carriage in which a passenger was sitting. The passenger being injured by the broken glass sued the defendants for damages for negligence and want of care, and at the trial judgment was entered for the plaintiff:—*Held* (WALKER, L.J., dissenting), that there must be a new trial, as the case was left to the jury on the erroneous assumption that if the drunken man was "obviously drunk," either the neglect to notice that condition, or the admission of him in that condition as a passenger rendered the defendants absolutely responsible for all that he did. *Adderley v. Great Northern Railway*, [1905] 2 Ir. R. 378—C.A.

Obligation to Make Fence between Highway and Land taken for Purposes of Railway—Liability for Injury to Cattle Straying upon Highway.]—Where a highway adjoins lands taken for the purposes of a railway, a person whose cattle stray upon the highway, by the licence of the owner of the soil over which the highway passes, is not an owner or occupier of adjoining lands within the meaning of section 68 of the Railways Clauses Act, 1845. As between such person and the railway company there is no obligation upon the latter to make sufficient fences to prevent the cattle of the former straying upon the railway. Therefore if, under such circumstances, the cattle stray from the highway on to the railway and are consequently killed, the railway company is not liable to their owner for their loss. *Luscombe v. Great Western Railway*, 68 L. J. Q.B. 711; [1899] 2 Q.B. 313; 81 L. T. 183—D.

Injury to Passenger by Spark from Engine—Exit from Station—Omission to Take Reasonable Precautions to Protect from Sparks.]—The plaintiff, a passenger, while leaving the defendants' station by a path belonging to the defendants which ran alongside the railway and was an authorised means of exit, was injured by a spark from an engine on the railway. There was evidence that the attention of the defendants had been called to the danger of injury from sparks to passengers using the path, and that they had declined to protect the path by a screen or cover on the ground of expense; and that the path could have been protected at a reasonable cost and without interfering with the business of the railway. The engine was properly constructed to prevent the emission of sparks according to the latest and most improved methods, and there was no negligence in working the engine. In an action for damages for negligence, the jury found a verdict for the plaintiff:—*Held*, that there was

evidence upon which the jury could properly find that the defendants were negligent in not taking reasonable precautions to protect passengers using the path from injury by sparks. *Atherton v. London and North-Western Railway*, 93 L. T. 464; 21 T. L. R. 671—C.A. And see col. 2026.

20. NUISANCE.

Locomotive Emitting Black Smoke.]—Certain locomotives belonging to the appellants emitted black smoke for three minutes on various occasions. Evidence was given that the coal used was smoky coal, and that it was unnecessary for a locomotive to emit smoke for longer than one minute, but no evidence was given that the locomotives were not constructed on the principle of consuming their own smoke:—*Held*, that an offence had been committed within section 114 of the Railways Clauses Consolidation Act, 1845, as amended by section 19 of the Regulation of Railways Act, 1868. *South-Eastern and Chatham Railway v. London County Council*, 84 L. T. 632; 65 J. P. 568; 19 Cox C.C. 721—D.

— Engine Constructed to Consume its own Smoke—"As far as practicable."]—A locomotive steam-engine belonging to the respondents emitted smoke while passing through one of their stations. The engine was a properly constructed one, being constructed on the principle of consuming as far as practicable its own smoke. The coal used was a good hard steam coal, but the smoke emitted was of a darker colour and more in quantity than would have been the case if Welsh coal had been used:—*Held*, that the use of the coal that was in fact used upon the engine did not constitute an offence on the part of the respondents under section 114 of the Railways Clauses Consolidation Act, 1845, and section 19 of the Regulation of Railways Act, 1868. *London County Council v. Great Eastern Railway*, 75 L. J. K.B. 490; [1906] 2 K.B. 312; 94 L. T. 586; 54 W. R. 537; 70 J. P. 356; 4 L. G. R. 925; 21 Cox C.C. 171; 22 T. L. R. 513—D.

21. BREACH OF STATUTORY DUTY.

Injunction—Discretion—Application by Attorney-General—No Injury to Public Proved.]—In an action by the Attorney-General, on the relation of the road authority, for an injunction to restrain a railway company from infringing the provisions of section 48 of the Railways Clauses Consolidation Act, 1845, which enacts that "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour," it is no answer by the railway company that it is less inconvenient to the public that the trains should cross the road at a greater rate of speed than four miles an hour. *Att.-Gen. v. London and North-Western Railway*, 69 L. J. Q.B. 26; [1900] 1 Q.B. 78; 81 L. T. 649; 63 J. P. 772—C.A.

22. ABANDONMENT OF UNDERTAKING.

Parliamentary Deposit—Disposal of.]—A railway undertaking having been abandoned, an

action was raised for the determination of the rights of parties to the parliamentary deposit, there being no other assets of the company. By the Act authorising the undertaking it was provided that if the undertaking was abandoned the parliamentary deposit should be "applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and subject to such application, shall be repaid or retransferred to the depositors," and that "all costs charges and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company":—*Held*, first, that solicitors and engineers who had given their professional services in preparing and carrying through Parliament the bill for the creation of the railway company—the scheme being a *bona fide* one—were creditors of the company and entitled to payment out of the deposit fund, although they had given their services solely in the prospect of being remunerated by the company when formed; and secondly, that, in the exercise of its discretion in the distribution of the assets, the Court could give direct effect to the claims of professional persons who had given their services in the promotion of the company on the employment of the professional promoters. *Muir v. Forman's Trustees*, 5 F. 546—Ct. of Sess.

Agreement to Pay Lump Sum for Services in obtaining Special Act—Ultra Vires.—A special Act incorporating a company for the construction of a railway in Dundee connecting two railway systems there, authorised (*inter alia*) payment from the funds of the company of the cost of obtaining the Act. Shortly after its incorporation the company granted an acknowledgment of its indebtedness for 5,000*l.*, being 2 per cent. on its authorised capital, to M., the ex-manager of a railway company and an expert on railway matters, for services rendered by him in pursuance of an agreement which bore to be entered into between him and the promoters of the company, and under which he agreed to give his services in aiding the company to obtain its special Act and in negotiating with the neighbouring railways. He was to receive for these services a fee of fifty guineas if the bill did not pass; if it did pass he was to receive 2 per cent. on the authorised capital. The deed also acknowledged that these services had been rendered, and the special Act scheduled an agreement with the two railway companies. The undertaking having been abandoned, and proceedings raised for distribution of the company's assets among its creditors,—*Held*, that the agreement to pay a lump sum for the services in question, irrespective of their value, and not subject to official taxation or audit, was *ultra vires* of the company, and that M. was not entitled to claim as a creditor upon its funds. *Mason's Trustees v. Poole & Robinson*, 5 F. 789—Ct. of Sess.

"Non-meritorious creditors."—*Semble*, the cases in which professional promoters claiming a gift from a deposit fund forfeited to the Crown were regarded as non-meritorious creditors not entitled to a gift do not apply in a case where the deposit fund is not forfeited but falls to be treated as an asset of the company. *Skegness and St. Leonards Tramways Co.*,

In re (58 L. J. Ch. 737; 41 Ch. D. 215), distinguished. *Ib.*

— Parliamentary Deposit—Costs of Enquiries as to Claimants on Deposit—Priority.—The promoters of a railway undertaking who are entitled to a parliamentary deposit after the claims of creditors are satisfied cannot, in general, be allowed their costs of the prosecution of enquiries as to the persons entitled to the money deposited, until after the creditors establishing a claim on the fund have been paid in full. *Wrexham, Mold, and Connah's Quay Railway* (No. 2), *In re* (69 L. J. Ch. 291; [1900] 1 Ch. 261), distinguished. *Lancashire, Derbyshire, and East Coast Railway Acts, In re*, 72 L. J. Ch. 789; [1903] 2 Ch. 711; 52 W. R. 26—Farwell, J.

Debentures — Unsecured Creditors — Sale of Rolling Stock, &c. — Undertaking — Pro tanto Abandonment — Priorities.—A railway company, which had agreed to work the line of a second railway company on certain terms, became insolvent, and the original agreement between the two companies was cancelled. By a subsequent agreement it was arranged that the second railway company should take over the working of the two lines, and that the insolvent company should hand over to the second company for a certain sum of money the rolling stock belonging to the insolvent company that had hitherto been used for working the second company's line:—*Held*, that the sum thus paid was money coming to the receiver of the insolvent company within the meaning of section 4 of the Railway Companies Act, 1867, and that it was liable under section 23 of the same Act to be first applied in satisfaction of the debentures of the insolvent company in priority to the unsecured creditors. *Liskeard and Caradon Railway, In re*, 72 L. J. Ch. 754; [1903] 2 Ch. 681; 89 L. T. 437—Swinfen Eady, J.

23. RECEIVER AND MANAGER.

Railway not Completed.—Assuming that there is jurisdiction to appoint a receiver under the Railway Companies Act, 1867, s. 4, before the railway is opened for traffic, the Court will not exercise it in a case where the receiver if appointed would have no duties to perform. *Knott End Railway, In re*, 70 L. J. Ch. 463; [1901] 2 Ch. 8; 84 L. T. 433; 49 W. R. 469—C.A.

The Railway Companies Act, 1867, s. 4, discussed by RIGBY, L.J., and VAUGHAN WILLIAMS, L.J., and *Manchester and Milford Railway, In re* (49 L. J. Ch. 865; 14 Ch. D. 645), explained. *Ib.*

Working Expenses and other Proper Outgoings — Costs of Company in Defending Pending Proceedings.—The Court has jurisdiction to provide for the costs of all proceedings directed under the Railway Companies Act, 1867, s. 4, such as the costs of the receiver in resisting a creditor's claim; and where, after an order appointing a receiver and manager under section 4, an order was made in the proceedings that the company should continue to defend a pending action brought against the company

by the contractors for the cost of constructing the line,—*Held*, that costs incurred by the company in defending the action since the date of the order appointing a receiver ought to be allowed in the same way as if they were costs of enquiries directed by the order appointing the receiver, in priority to the claims of debenture-holders, and creditors for whose benefit the action was defended, although such costs were not “proper outgoings in respect of the undertaking” within the meaning of section 4. *Wrexham, Mold, and Connah's Quay Railway, In re* (No. 2), 69 L. J. Ch. 291; [1900] 1 Ch. 261; 82 L. T. 33; 48 W. R. 311—C.A.

“Proper outgoings”—Breach of Implied Contract—Damages.]—Damages recovered for loss sustained through the neglect of a railway company to keep its premises in proper repair are not “other proper outgoings in respect of the undertaking” payable by the receiver and manager in priority to the other creditors of the company, under section 4 of the Railway Companies Act, 1867. *Wrexham, Mold, and Connah's Quay Railway* (No. 3), *In re*, 69 L. J. Ch. 671; [1900] 2 Ch. 436; 83 L. T. 49—Farwell, J.

24. ULTRA VIRES.

Omnibus Service—No Express Power—Undertaking to Modify Service.]—A railway company, in the absence of a special statutory power to that effect, is not entitled to carry on the business of omnibus proprietors except as strictly incidental to and consequential upon their railway undertaking. If special powers for the conduct of such a business are desired, it is for the railway company to apply to Parliament for that purpose. It is not for the Court to impose conditions on the company which shall restrict their business within the limits of their statutory powers. *Att.-Gen. v. Mersey Railway*, 76 L. J. Ch. 568; [1907] A.C. 415; 97 L. T. 524; 71 J. P. 449; 23 T. L. R. 634—H.L. (E.)

Amalgamation of Railway Company and Dock Company—Supply of Water by Railway Company to Dock.]—Where a dock company and a railway company were amalgamated under an Act which incorporated the Railways Clauses Act, 1863, and provided that the two undertakings should form one undertaking and be the undertaking of the railway company, but that no provision of Acts which related exclusively to one of the undertakings should apply to the other undertaking, and the railway company supplied their dock undertaking with water derived from land acquired for their railway undertaking, it was held that the railway company were not carrying on the business of a water company, and that, there being no statutory prohibition, they were not acting *ultra vires* in supplying the dock with water. *Att.-Gen. v. North-Eastern Railway*, 76 L. J. Ch. 5; [1906] 2 Ch. 675; 95 L. T. 512; 70 J. P. 473; 22 T. L. R. 695—C.A. Affirming, 54 W. R. 212—Joyce, J.

25. RAILWAY COMMISSIONERS.

Appeal from.]—Where the Railway Commissioners sit in lieu of arbitrators under the provisions of section 8 of the Regulation of Railways Act, 1873, they exercise a jurisdiction

not depending on the consent of the parties, and an appeal will lie under section 17 of the Railway and Canal Traffic Act, 1888, to a superior Court on a question of law. *North-Eastern Railway v. North British Railway*, 10 Ry. & Can. Traff. Cas. 82—Ct. of Sess.

The Railway and Canal Traffic Act, 1888, s. 17, enacts that “no appeal shall lie from the Commissioners on a question of fact . . . save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior Court of Appeal”—*Held*, that an appeal is competent against an order of the Commissioners, if it appears from the judgment of the Commissioners (although not in the order itself) that in arriving at the result expressed in the order they had first decided a question of law. *Id.*

Quare, whether the appeal from the Commissioners to a superior Court of Appeal allowed by section 17 of the Railway and Canal Traffic Act, 1888, applies to cases arising under the Telegraph Acts. *Postmaster-General v. Glasgow Corporation*, 10 Ry. & Can. Traff. Cas. 238—Ct. of Sess.

Whether the appeal provided by section 17 of the Railway and Canal Traffic Act, 1888, applies to cases under the Telegraph Acts, *quare*. *Glasgow Corporation v. Lord Advocate*, 2 F. 506—Ct. of Sess.

26. OTHER MATTERS.

Carriage of Passengers and Goods.]—*See* CARRIER, col. 190.

Land Adjoining Railway—Conveyance of—Presumption of Ownership.]—*See* BOUNDARIES.

Mails—Conveyance of.]—*See* POST OFFICE.

Mines under Railway—Working.]—*See* MINES AND MINERALS, cols. 1686, 2000.

— Compensation for not Working.]—*See* MINES AND MINERALS, col. 1688.

— Notice not to Work.]—*See* MINES, col. 1686.

Parliamentary Deposit.]—*See* PARLIAMENT, col. 1765.

Rates—Undue Preference.]—*See* col. 2035 and CARRIERS, col. 200.

Rating.]—*See* LOCAL GOVERNMENT; POOR LAW.

Reasonable Facilities—Railway Commission.]—*See* col. 2012 and WATER.

Water—Right of Commissioners to Break Open Road over Tunnel.]—*See* WATER.

RATE.

See LOCAL GOVERNMENT; METROPOLIS; POOR LAW.

RATIFICATION.

See PRINCIPAL AND AGENT.

RECEIVER.

See COMPANY, col. 435; EXECUTION, col. 826; and PRACTICE.

RECOGNISANCES.

See CRIMINAL LAW.

REGISTRATION.

Births and Deaths.]—1 Edw. 7 c. 26 is the *Births and Deaths Registration Act*, 1901.

Bills of Sale, of.]—See BILL OF SALE.

Copyright, of.]—See COPYRIGHT.

Deeds, of, in Middlesex.]—See DEED.

Deeds of Arrangement, of.]—See BANKRUPTCY.

Judgments, of.]—See JUDGMENTS.

Land, of.]—See LAND REGISTRATION, col. 1177.

Ships, of.]—See SHIP AND SHIPPING.

Stocks and Shares, of.]—See COMPANY, cols. 382, 394.

Trade Mark, of.]—See TRADE MARK.

Voters, of.]—See ELECTION LAW.

RELEASE.

See PRINCIPAL AND SURETY, and EXECUTOR.

REMOTENESS.

See PERPETUITIES; WILL.

RENT.

See LANDLORD AND TENANT, col. 1192.

RENTCHARGE.

Improvement of Lands.]—62 & 63 Vict. c. 46 is the *Improvement of Land Act*, 1899.

Limitation under Statute of Uses—Common-Law Reservation—Eviction from Part of Property by Title Paramount—Apportionment—Value.]—Where property is conveyed by feoffment reserving or limiting a rentcharge under the Statute of Uses, if the feoffee or his successors in title are evicted by title paramount from part of the property, the rentcharge will not remain payable, in full, but will be apportionable. Although, as stated in Co. Lit. p. 148b, in the case of a grant of a rentcharge the rent will continue payable in full, notwithstanding a defect in the grantor's title to part of the land, a further witnessing part in a feoffment by which a rentcharge was reserved, purporting to grant the rent already reserved or limited, will have no such operation. *Hartley v. Maddocks*, 68 L. J. Ch. 496; [1899] 2 Ch. 199; 80 L. T. 755; 47 W. R. 573—Cozens-Hardy, J.

The apportionment must be made not on the acreage, but on the respective values of the properties at the date of the eviction. *Ib.*

Term to Secure Amount—Arrears of Rentcharge—Whether Raisable by Sale of Inheritance.]—A legal rentcharge was by deed charged

upon and payable out of land, and besides the usual power of distress and entry, a term was limited by the deed to the use of trustees upon the usual trusts if the rentcharge fell into arrear by mortgage or demise for all or part of the term, or by other reasonable means to raise the arrears:—*Held* (applying *Hall v. Hurt*, 2 Joh. & Hem. 76), that the limiting of the term negatived the right to have the arrears raised by a sale of the inheritance. *Blackburne v. Hope Edwardes*, 83 L. T. 370; 48 W. R. 701—Buckley, J.

Release of Part of Hereditaments Charged—Concurrence of Owner of the other Part—Extinguishment—Apportionment.]—A wife was entitled to certain real property, out of which her husband was entitled to a rentcharge. Subsequently she made a voluntary settlement of a moiety of this property, and she and her husband concurred to "grant release dispose of and confirm" this moiety, "and all the estate right title interest property claim and demand whatsoever of them," the said husband and wife, "or either of them in to and out of the same premises":—*Held*, that this concurrence on the part of the husband operated to release the moiety granted from all liability in respect of the rentcharge, but had not the effect of conveying the whole rentcharge, or any part of it, to the grantees of the settlement. *Drew v. Norbury (Lord)* (9 Ir. Eq. 171) and *Johnston v. Webster* (24 L. J. Ch. 300; 4 De G. M. & G. 474) distinguished. *Price v. John*, 74 L. J. Ch. 469; [1905] 1 Ch. 744; 92 L. T. 768; 53 W. R. 456—Swinfen Eady, J.

Held also, that the unsettled moiety remained liable for the whole of the rentcharge. *Ib.*

REPRESENTATION.

As to Credit—Signature.]—See CONTRACT, col. 509.

RESTRAINT OF TRADE.

See CONTRACT, col. 525.

Restraint on Anticipation.]—See HUSBAND AND WIFE, col. 938.

RETAINER.

See EXECUTOR and SOLICITOR.

REVENUE.

1. *Statutes*, 2057–8.
2. *Corporation Duty*, 2058.
3. *Customs*, 2058.
4. *Death Duties*, 2059.
 - (a) *Probate Duty*, 2059.
 - (b) *Estate Duty*, 2060.
 - (i.) *Exemptions*, 2060.
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 - (iii.) *Incidence*, 2086.
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 - (v.) *Raising Duty*, 2091.
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 - (d) *Succession Duty*, 2095.
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6. *Income Tax*, 2104.
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 - (b) *What Property Liable to*, 2105.
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 - (l) *Receipt*, 2160.
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 - (n) *Settlement*, 2163.
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1. STATUTES.

Finance.—61 & 62 Vict. c. 10 is the *Finance Act*, 1898; and c. 46 is the *Revenue Act*, 1898.

— 62 & 63 Vict. c. 9, Part III., is the *Income Tax Act*, 1899.

— 62 & 63 Vict. c. 9 is the *Finance Act*, 1899; and c. 25 is the *Land Tax Commissioners Act*, 1899.

— 63 & 64 Vict. c. 7 is the *Finance Act*, 1900.

— 1 Edw. 7 c. 7 is the *Finance Act*, 1901.

— 2 Edw. 7 c. 7 is the *Finance Act*, 1902.

— 3 Edw. 7 c. 8 is the *Finance Act*, 1903; and 3 Edw. 7 c. 46 is the *Revenue Act*, 1903.

— 4 Edw. 7 c. 7 is the *Finance Act*, 1904.

— 5 Edw. 7 c. 4 is the *Finance Act*, 1905.

— 6 Edw. 7 c. 8 is the *Finance Act*, 1906.

— 7 Edw. 7 c. 13 is the *Finance Act*, 1907.

Foreign Plate.—4 Edw. 7 c. 6 is the *Hall-marking of Foreign Plate Act*, 1904.

Revenue.—6 Edw. 7 c. 20 is the *Revenue Act*, 1906.

Stamps.—62 & 63 Vict. c. 9, Part II.

Imported Watch Cases.—7 Edw. 7 c. 8. See *infra*, CUSTOMS.

2. CORPORATION DUTY.

Cricket Ground—“Annual value”—**Gate-money.**—The appellant cricket club, an unincorporated body, were lessees of a cricket ground known as Kennington Oval. Parts of the property comprised in the lease were underlet by the club. The rest of the ground was in their possession, and they had also certain investments in stocks from which they derived income. The only other receipts were the subscriptions and entrance-fees paid by members, and gate-moneys and other payments received from the public for viewing the cricket matches played on the ground:—*Held*, that for the purposes of assessment to duty under section 11 of the Customs and Inland Revenue Act, 1885, the “annual value” of the real property of the club must be ascertained on the basis of assessments to income tax under Schedule A of the Income Tax Act, 1842, subject to deductions for ground-rent and repairs; and that the income of the club derived from stocks must be assessed under Schedule C of that Act. *Surrey County Cricket Club, In re*, 70 L. J. K.B. 823; [1901] 2 K.B. 400; 85 L. T. 213; 50 W. R. 173; 65 J. P. 488—D.

Exemption—Property Appropriated and Applied for Promotion of Science—Property Applied for Examination Purposes.—To entitle a corporation to exemption from payment of corporation duty under sub-section 3 of section 11 of the Customs and Inland Revenue Act, 1885, the property, or the income or profit thereof, sought to be exempted must be legally appropriated and in fact applied for the promotion of science. *Royal College of Surgeons, In re*, 68 L. J. Q.B. 613; [1899] 1 Q.B. 871; 80 L. T. 611; 47 W. R. 452—C.A.

The holding of examinations and granting of diplomas in surgery are not the “promotion of science” within the meaning of section 11, sub-section 3 of the Act of 1885. *Ib.*

A corporation whose functions are to promote the science of surgery and who hold examinations for the purpose of granting diplomas is not a body existing solely or mainly for the promotion of science so as to exempt the whole of its property from corporation duty, but only such parts of its property are exempt as are from time to time in fact applied for the promotion of surgery. *Ib.*

The following property of the Royal College of Surgeons—the museum containing the “Hunterian collection,” the conservator’s house, and the various laboratories used in connection with the science of surgery—is exempt from corporate duty under section 11, sub-section 3, but the library, examination hall, and general offices are not so exempt. *Ib.*

3. CUSTOMS.

Watch Cases.—7 Edw. 7 c. 8 is the *Assay of Imported Watch Cases (Existing Stocks Exemption) Act*, 1907.

Carriage—Constructed or Adapted for Use in Trade or Husbandry.—A vehicle to come within the exemption in section 4, sub-section 3 of the Customs and Inland Revenue Act, 1888, from the duty imposed upon carriages must be one that has been constructed or adapted for use for the conveyance of goods or burden in the course of trade or husbandry; it is not enough to shew that the vehicle is capable of being so used. *Hanworth v. Williams*, 67 J. P. 315—D.

Plate—Hall-mark—Imported Gold and Silver Watches—Penalty.—Gold and silver watches imported from abroad as completed articles must be assayed and stamped as gold and silver plate under section 59 of the Customs Act, 1842. *Goldsmiths' Company v. Wyatt*, 76 L. J. K.B. 166; [1907] 1 K.B. 95; 95 L. T. 855; 71 J. P. 79; 23 T. L. R. 107—C.A.

Customs Officer—Search of Ship—Obstructing Officer—Right of Magistrate to Judge of Reasonableness of Search.—Where a person is summoned under section 12, sub-section 5 of the Customs and Inland Revenue Act, 1881, for obstructing a Customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to enquire into the reasonableness or unreasonableness of the search, or to dismiss the information upon the ground that in his opinion the search was under the circumstances unreasonable, unless he finds that the search was a mere pretence for the purpose of justifying an interference or annoyance by the officer. The duty of deciding what search there shall be is by the Act imposed on the Customs officer, and not on the magistrate. *Anderson v. Reid*, 86 L. T. 713; 66 J. P. 564—D.

4. DEATH DUTIES.

(a) Probate Duty.

English or Foreign Asset—Foreign Land Devised upon Trust for Sale—Bequest of Share of Proceeds.—A legacy of a share of the proceeds of sale of real estate in Jamaica, payable to the representative of the legatee, who has died before the sale, is an English asset, and the representative is therefore liable to pay probate duty thereon. *Sudeley (Baron) v. Att.-Gen.* (66 L. J. Q.B. 21; [1897] A.C. 11) followed. *Smyth, In re*; *Leach v. Leach*, 67 L. J. Ch. 10; [1898] 1 Ch. 89; 77 L. T. 514; 46 W. R. 104—Romer, J.

Locality of Assets—Testator Resident in England—Business in Colony.—The share of a deceased partner in a business is situate where the business was carried on at the time of his death, and where the partner was resident in England and the business was in New South Wales probate duty is payable in New South Wales upon the value of his share of the business. *Commissioner of Stamp Duties v. Salting*, 76 L. J. P.O. 87; [1907] A.C. 449; 97 L. T. 225; 23 T. L. R. 723—P.C.

Executor de son Tort—English Company—Foreign Shareholder—Death of Foreign Shareholder—Will Proved Abroad—No Probate or Administration in England—Transfer of Shares and Debentures to Foreign Executors—"Taking possession of and administering" Estate.—An

English company in transferring shares and debentures of a deceased foreigner to foreign executors who decline to take out probate or administration in this country, takes possession thereby, and administers the estate in this country of such foreigner, and becomes an *executor de son tort*, and as such chargeable with probate duty and the statutory penalties. *New York Breweries Co. v. Att.-Gen.*, 68 L. J. Q.B. 135; [1899] A.C. 62; 79 L. T. 568; 48 W. R. 32; 63 J. P. 179—H.L. (E.)

(b) Estate Duty.

(i.) Exemptions.

Exemption from Estate Duty—Settled Personal Property on which Probate Duty has been Paid—Investment in Real Property.—By section 21, sub-section 1 of the Finance Act, 1894, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property" probate duty (amongst other duties) has been paid, unless the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property. A testator by will bequeathed the residue of his personal property to trustees upon trust to invest it in real estate and settle it upon two persons in succession for life, with remainder to a third in tail male. The testator died in 1849, and probate duty was paid in respect of his personalty. The trustees invested the residue of the personalty in real estate, and settled it as directed by the will. In 1900 the second tenant for life, who was not and never had been competent to dispose of the property, died, and the Crown claimed estate duty on his death in respect of the real estate purchased with the residue of the personalty of the testator:—*Held*, that, notwithstanding that the property had been invested in real estate, the exemption in section 21, sub-section 1, applied, and estate duty was not payable upon it. *Att.-Gen. v. Londesborough (Earl)*, 74 L. J. K.B. 81; [1905] 1 K.B. 98; 92 L. T. 39; 53 W. R. 147; 21 T. L. R. 36—C.A.

(ii.) Property Chargeable.

Value of Estate—Incumbrances "created bona fide"—"Full consideration in money or money's worth"—"Wholly for the deceased's own use and benefit."—By section 7, sub-section 1 of the Finance Act, 1894, "In determining the value of an estate for the purpose of estate duty . . . an allowance shall not be made (a) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest"—*Held*, that where a tenant for life of property in Scotland executed deeds barring the entail, under which he acquired the fee-simple and gave a charge on the property to the nearest heir, the deeds came within the above exemption, there being no

secret or covinous arrangement between the parties, notwithstanding that the deeds were made with the object of defeating the claim of the Crown to estate duty upon the death of the tenant for life. *Att.-Gen. v. Richmond (Duke)* (No. 2), 77 L. J. K.B. 38; [1907] 2 K.B. 923; 23 T. L. R. 739; 97 L. T. 802—Bray, J.

In arriving at a conclusion as to whether such deeds are real deeds intended to have a real operation and creating real incumbrances, motive may be an element for consideration; but once it is found that they are real incumbrances, the motive which actuated the person creating them is immaterial. *Ib.*

Property Passing on Death.—A testator by his will devised and bequeathed all his real and personal estate to trustees upon trust for sale and collection and investment of the proceeds and for payment out of the income to arise therefrom of an annuity to his wife for life, and, subject to such annuity, to pay the income in equal shares between his eight children, and upon trust, after the decease of his wife as to 9,600*l.*, part of the trust fund, and if the same exceeded 9,600*l.*, then also as to eight-ninths of such excess, for his eight children in equal shares, and as to the remaining ninth part for the children of a deceased son equally:—*Held*, that the only property which passed under the will upon the death of the testator's widow was the one ninth share of the excess and the benefit which accrued to the children of the testator by the cesser of the annuity to his widow, and that estate duty was only payable upon such property. *Townsend, In re*, 70 L. J. K.B. 764; [1901] 2 K.B. 331; 84 L. T. 714; 49 W. R. 600; 65 J. P. 344—D.

— **Property Deemed to Pass—Consideration in Money or Money's Worth—Mutual Obligations in Marriage Contract.**—A father came under obligation in his own marriage contract and by a subsequent deed to provide 12,000*l.* to his younger children, over which he reserved a power of apportionment. There were six younger children. In 1899 he became a party to the ante-nuptial marriage contract of one of his younger children—a daughter—whereby he bound and obliged himself to pay to her an annuity during his life of 300*l.*, and on his death to provide to her trustees the sum of 15,000*l.*; but he reserved power to make payment of the whole or part of the 15,000*l.* during his lifetime, and in the event of 10,000*l.* being so prepaid the annuity was to cease. The daughter on her part discharged all her legal and conventional claims on her father's estate. In 1900 the father made payment to the daughter's trustees of 10,000*l.*, and died within six weeks thereafter. Estate duty and settlement estate duty being claimed on this 10,000*l.*,—*Held*—first, that the 10,000*l.* was property which must be “deemed” to pass on the father's death in terms of section 2, sub-section 1 (c) of the Finance Act, 1894; secondly, that it was not exempted by section 3 of that Act in whole or in part from the claim for estate duty, as there was no purchase and sale for full consideration in money or money's worth; and thirdly, that estate duty and settlement estate duty were consequently exigible. *Per the LORD PRESIDENT*: The effect of the amendment of section 38 of the Customs and

Inland Revenue Act, 1881, by the omission of the word “voluntary” is that the word “gift” can no longer be taken in the strict sense of *res donata*, but must be held to include *res data*. *Att.-Gen. v. Smyth* ([1905] 2 Ir. R. 553) followed. *Lord Advocate v. Heywood-Lonsdale*, 8 F. 724—Ct. of Sess.

— **Cesser of Annuity—Value of Benefit Accruing.**—In the case of the cesser of an annuity payable out of heritable property, the value of the benefit accruing within the meaning of section 7 of the Finance Act, 1894, is to be determined by capitalising the amount of the annuity on the basis of the number of years' purchase applicable to the class of property out of which it was paid, and without taking into consideration the amount of the bonds by which the heritable property might be effected. *Lord Advocate v. Henderson's Trustees*, 7 F. 963—Ct. of Sess.

Property Passing on Death of Heir of Entail —“Competent to dispose”—**Estate Duty Paid by Deceased Heir of Entail and not Charged on Entailed Estates.**—An heir of entail who had paid estate duty on the death of his predecessor died without having taken any steps to charge the sum so paid on the entailed estate. The Crown having claimed from his executors estate duty on the sum so paid,—*Held*, first, that as the money was not recoverable by his executors it was not an asset in their hands liable to estate duty; and secondly, that it was not property of which the deceased was at the time of his death competent to dispose. *Inland Revenue Commissioners v. Moray (Earl's) Trustees*, 6 F. 347—Ct. of Sess.

Property “deemed” to Pass—Fund to be Invested in Entailed Land.—A testator, who died prior to the passing of the Finance Act, 1894, and on whose estate inventory duty was paid, directed his trustees to hold and accumulate the residue of his estate till the death of O. M., when it was to be invested in land which was to be entailed. O. M. died in 1902:—*Held*, that estate duty and settlement estate duty were payable on the value of the residue of the testator's estate. *Lord Advocate v. Stewart*, 8 F. 579—Ct. of Sess.

Property of which Deceased was at Time of Death Competent to Dispose.—Where a father devises property to a son who dies before his father, leaving issue any of whom survive the father, the son is by section 33 of the Wills Act, 1837, “at the time of his death competent to dispose” of the property within the meaning of section 2, sub-section 1 of the Finance Act, 1894. Such property is therefore “property which passes on the death” of the son within the meaning of section 1 of that Act, and is therefore liable to estate duty. *Scott, In re*, 70 L. J. K.B. 66; [1901] 1 K.B. 228; 83 L. T. 613; 49 W. R. 178; 65 J. P. 84—C.A.

Property Passing to Executor “as such.”—A fund appointed by will under a general power passes to the executor “as such” within the meaning of section 9, sub-section (1) of the Finance Act, 1894, and accordingly, in the absence of any direction to the contrary, the estate duty thereon is payable out of the

appointor's residuary estate. *Treasure, In re; Wild v. Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), on this point considered and not followed. *Moore, In re; Moore v. Moore*, 70 L. J. Ch. 321; [1901] 1 Ch. 691; 49 W. R. 373—Buckley, J.

— **Legal and Equitable Assets.**—Property appointed under a general power of appointment by will does not pass to the executor "as such" within the Finance Act, 1894, s. 9, sub-s. 1, and consequently estate duty is, in the absence of any direction to the contrary, payable out of the appointed property, and not out of the residuary estate of the appointor. *Treasure, In re; Wild v. Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), and *Maddock, In re; Llewellyn v. Washington* (86 L. J. N.C. 307; W. N. (1901) p. 118), followed. *Moore, In re; Moore v. Moore* (*supra*), dissented from. *Hoskin's Trusts, In re* (46 L. J. Ch. 817; 6 Ch. D. 281), discussed. *Power, In re; Stone, In re; Acworth v. Stone*, 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678—Byrne, J.

Foreign Bonds Payable to Bearer—Bonds Situate in England.—Foreign Government bonds payable to bearer and negotiable in this country are, where actually in England at the death of the deceased, liable to estate duty. *Att.-Gen. v. Glendinning* (92 L. T. 87) followed. *Winans v. Reg.*, 23 T. L. R. 705—Bray, J.

Covenant by Testator to Pay Sum "without any deduction"—Settlement by Deed in Testator's Lifetime.]—Where a person covenants with trustees to pay to them a sum of money to be held on certain trusts, and then dies, any settlement estate duty payable on his death must, as a general rule, be borne by the settled fund, and not by his general estate. If, however, the covenant is to pay "without any deduction," the effect of those words is to throw the burden of the settlement estate duty on the general estate in exoneration of the settled fund, and the duty must then be borne by the general estate. *Webber, In re; Gribble v. Webber* (65 L. J. Ch. 544; [1896] 1 Ch. 914) disapproved. *Maryon-Wilson, In re; Wilson v. Maryon-Wilson*, 69 L. J. Ch. 310; [1900] 1 Ch. 565; 82 L. T. 171; 48 W. R. 338—C.A.

"Testamentary expenses"—Duty for Real Estate.]—The estate duty payable in respect of realty is not a "testamentary expense," and must be borne by the real estate and not by the personalty, notwithstanding that the will contains a bequest of the residue of personal estate "after payment thereof of all my just debts, funeral and testamentary expenses." *Sharman, In re; Wright v. Sharman*, 70 L. J. Ch. 671; [1901] 2 Ch. 280; 84 L. T. 859; 49 W. R. 555—Kekewich, J.

— **Direction to Pay.**—Under a direction by a testator to his executors to pay the "testamentary expenses" of his widow out of his residuary estate, which consisted of personalty, the executors are entitled to pay—first, the costs of, and incident to, and in connection with the administration of the estate of the widow, who died intestate; secondly, the costs of a probate action instituted by one of the next-of-kin of the widow, and incurred for the

benefit of her estate; and thirdly, the estate duty payable on the death of the widow. *Clemow, In re; Yeo v. Clemow*, 69 L. J. Ch. 522; [1900] 2 Ch. 182; 82 L. T. 550; 48 W. R. 541—Kekewich, J.

The word "testamentary" is applicable to the administration of an estate, whether there is a testament or not. *Id.*

Direction to Set Apart a Fund—"To produce a clear yearly sum."—A testator directed his trustees to set apart and invest so much of his estate as would produce a clear yearly sum of 400*l.* and pay the income thereof to his wife during her widowhood:—*Held*, that the settlement estate duty must be paid out of residue. *Dyet, In re; Morgan v. Dyet*, 87 L. T. 744—Swinfen Eady, J.

Capital Sums Directed to be Set Aside to Produce Annuities.—A testatrix bequeathed to each of two persons an annuity for life, and directed that there should be set aside in the names of her trustees sufficient capital sums to produce the annuities, and that until such sums were set aside the annuities should be paid out of the income, or in default thereof out of the capital of her residuary estate, and subject as aforesaid she devised and bequeathed her residuary estate to her four sons as tenants in common,—*Held*, that so much of her residuary estate as was required and set aside to produce the annuities was "settled" property within section 5, sub-section 1 of the Finance Act, 1894, and consequently that settlement estate duty was leviable in respect thereof on the death of the testatrix. *Att.-Gen. v. Owen. Att.-Gen. v. Coulson*, 68 L. J. Q.B. 779; [1899] 2 Q.B. 253; 81 L. T. 121; 63 J. P. 611—D.

Capital Sums Directed to be Raised on Death of Life Rentrix and Annuitants.—A testator directed his trustees to stand possessed of his residuary estate upon trust to pay the income to his wife for life, and after her death to pay to his four daughters respectively annuities of 300*l.*, 300*l.*, 200*l.*, and 200*l.* for life, and after the death of his wife and the respective deaths of his four daughters to raise out of his residuary estate four several sums of 9,000*l.*, 9,000*l.*, 6,000*l.*, and 6,000*l.*, to be held on certain trusts in favour of the issue of his four daughters respectively; and he declared that on failure of the trusts declared concerning any of the said sums the same should fall into his residuary estate, and that his trustees should stand possessed of his residuary estate in trust for his son absolutely:—*Held*, that so much of his residuary estate as would be required to provide the said four sums was "settled" property within the above enactment, and consequently that settlement estate duty was leviable in respect thereof on the death of the testator. *Id.*

Trust for Conversion—Real Estate Abroad—Power to Postpone Sale—"Property situate out of the United Kingdom."—The testator, a domiciled Englishman, was at the date of his death in 1896 entitled to real estate in Assam, where he carried on the business of a tea planter. By his will, after bequeathing certain legacies, he left the residue of his property, including the estate in Assam, to

trustees upon trust to sell the same; and he directed his trustees to apply the income of his residuary estate among eight named persons, or the survivor or survivors of them, in equal shares. He did not provide what was to happen to the *corpus* after the death of the last of the eight named persons. The testator authorised his trustees, until the sale of the estate in Assam, to carry on the business which he had carried on there, and for that purpose to employ and retain therein the capital which at his death should be employed therein, and such additional capital as they should think fit to advance from time to time out of his residuary estate; and he further empowered them to postpone the sale and conversion of any part of his estate for so long as they might think desirable, and in the meantime he declared that the annual produce arising from the unconverted part of his estate should be applied in the same manner as if it were income arising from the proceeds of the conversion of his estate. The will was proved in England, and the trustees, who were all resident in England, postponed the sale of the estate in Assam, and continued to carry on there the testator's business of a tea planter. On the death of two of the beneficiaries the Crown claimed estate duty and succession duty on the interests accruing to the survivors in respect of the estate in Assam or the proceeds thereof:—*Held*, that the interest in the property in Assam which passed on the death of the two beneficiaries was property not situate out of the United Kingdom within the meaning of section 2, sub-section 2 of the Finance Act, 1894, and therefore was liable both to estate duty and succession duty. *Sudeley (Baron) v. Att.-Gen.* (65 L. J. Q.B. 281; 66 L. J. Q.B. 21; [1896] 1 Q.B. 354; [1897] A.C. 11) and *Smyth, In re*; *Leach v. Leach* (67 L. J. Ch. 10; [1898] 1 Ch. 89), applied. *Att.-Gen. v. Johnson*, 76 L. J. K.B. 1150; [1907] 2 K.B. 885; 97 L. T. 720—Bray, J.

Direction to Pay Legacies Free from Duty—Incidence—"Express provision to the contrary."

—A direction to pay legacies free from duty is "an express provision to the contrary" within the meaning of section 19, sub-section 1 of the Finance Act, 1896, and throws the burden of the settlement estate duty leviable in respect of a settled legacy upon the deceased's general estate. If the estate is deficient, the settlement estate duty must, like the legacy duty, be also treated as an additional legacy, and be added to the original legacy for the purposes of abatement. *Turnbull, In re*; *Skipper v. Wade*, 74 L. J. Ch. 438; [1905] 1 Ch. 726; 53 W. R. 440—Farwell, J.

Legacies Payable on Death of Annuitant—Gift of Residue.

—A testator died in 1869, having devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion, payment of funeral and testamentary expenses, and investment, and out of the income to pay an annuity to his widow. He directed that after the death of his widow (who died in 1900) certain legacies, amounting to 2,000*l.*, should be paid and the residue be divided among certain persons named:—*Held*, that under the Finance Act, 1894, s. 8, sub-s. 4, the estate duty which became payable on the widow's death in respect of the legacies, so far

as they represented real estate, must be borne by the legacies. *Berry v. Gaukroger*, 72 L. J. Ch. 435; [1903] 2 Ch. 116; 88 L. T. 521; 51 W. R. 449—C.A.

Per VAUGHAN WILLIAMS, L.J.—Estate duty in a case in which property passes on the death of the deceased, and his executor is not accountable for estate duty, is not analogous to probate duty, but rather to succession duty. *Ib.*

Per ROMER, L.J.—The word "property" in section 8, sub-section 4, is used in an elastic sense, and each pecuniary legatee could, under section 8, sub-section 4, be made liable by the Crown only for the duty chargeable against his pecuniary legacy; but (*semble*) not only the trustees, but also the residuary legatees, could, at the instance of the Crown, have been made to pay the whole duty on the fund; but in that case there would have been a right of adjustment as between the pecuniary and residuary legatees; and (*semble*) the residuary legatees, paying the whole duty, would, under section 9, sub-section 6, be entitled to a charge for the proportion properly payable by the pecuniary legatees. *Ib.*

Determination of Annuity—Grant of Annuity for Full Consideration in Money or Money's Worth—Exemption from Duty.—The defendant charged his life interest in freehold estates in Dorsetshire, and policies of assurance on his life, with an annuity of 400*l.*, in consideration of the annuitant releasing from a rentcharge of the same annual value freehold estates in Lincolnshire which the defendant had sold subject to, and whose purchaser he was bound to indemnify against, the rent-charge:—*Held*, that this arrangement amounted only to the substitution of a new security for an existing annuity, and not to the grant of an annuity for full consideration in money or money's worth, paid to the grantor for his own use and benefit within section 3, sub-section 1 of the Finance Act, 1894, and consequently that the defendant was not exempted by that sub-section from payment of estate duty on the death of the annuitant. *Att.-Gen. v. Smith-Marriott*, 69 L. J. Q.B. 59; [1899] 2 Q.B. 595; 81 L. T. 359; 48 W. R. 12; 64 J. P. 54—D.

Residue Charged with Death Duties Payable on Testator's Death on Property of which he was Tenant for Life—Heirlooms of National Interest Exempted from Duty till Sold or in Possession of Person Competent to Dispose of them—Succession Duty on Proceeds of Sale of Timber Cut by Succeeding Tenant for Life.—By his will, made in 1900, a testator, who died in 1901, directed the general trustees thereof to pay out of the residuary proceeds of his estate—first, so much of the estate duty and other death duties which under or by virtue of the Finance Act, 1894, or any statute amending, extending, or modifying the same, should become payable upon or by reason of his death in respect of all the estates and property of which he should immediately before his death be tenant for life under or by virtue of or by reference to a certain will or re-settlement as the capital moneys and investments subject thereto should be insufficient to pay; and secondly, all such succession duty as should become payable upon his death in respect of

the same estates and property. Under the re-settlement the testator was immediately before his death tenant for life of heirlooms of great value, as to which the Treasury had certified, under section 20 of the Finance Act, 1896, that they were of national interest, and which were settled so as to be enjoyed in kind in succession by different persons on the testator's death, and which were therefore exempt from estate duty, under the provisions of the section, till they were sold or in the possession of some person competent to dispose of them. The capital moneys and investments subject to the settlement were insufficient to pay the duties. Some of the timber on the settled estates had been cut by the succeeding tenant for life, who was chargeable under section 23 of the Succession Duty Act, 1853, with succession duty upon his interest in the net proceeds of sale thereof. Upon a summons taken out by the general trustees of the will for the determination of the question whether upon the true construction of the will they were bound to retain in their hands during the lifetime of the present tenant for life or for any other and what period a sufficient part of the residuary estate to meet (a) the estate duty which might become payable on the exempted heirlooms; and (b) the succession duty on the proceeds of sale of the timber:—*Held*, that they were bound, during the lifetime of the present tenant for life or until further order, to set aside a sufficient sum to pay the estate duty on the heirlooms, but that for the succession duty on the proceeds of sale of the timber they were not bound to make any provision. *Leconfield, In re; Wyndham v. Leconfield*, 89 L. T. 434—Joyce, J. See s.c. on appeal, col. 2069.

Interest in Expectancy—Option as to Time for Payment of Duty—Payment when Interest Falls into Possession—Increased Value of Interest—Amount upon which Duty Payable.—By section 7, sub-section 6 of the Finance Act, 1894, "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—

"(a) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and

"(b) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained":—*Held*, that where, in the exercise of the option conferred by the above sub-section, the duty upon a reversionary interest is not paid with the estate duty in respect of the rest of the estate, it must be paid upon the value of such interest at the date when it falls into possession. *Eyre (deceased), In re*, 76 L. J. K.B. 227; [1907] 1 K.B. 331; 96 L. T. 236—Bray, J.

Letters Patent—Grant of Duty on Coal to a Man and Heirs of His Body—Annuity Substituted for Coal Duties—Annuity Redeemed and Estates Purchased—Estates Tail Limited by

Private Act of Parliament—Power of Tenant in Tail to Bar Entail—"Tenementa"—Reversion in Crown.—Certain coal duties, which had been granted by the burgesses of Newcastle-upon-Tyne to Queen Elizabeth and to her successors, and which had afterwards been validated by statute, were granted by Charles 2 by letters patent to his infant son the Duke of Richmond and the heirs of his body, with certain remainders. An Act of 30 Geo. 2, passed to vary these limitations, contained recitals that the coal duties were entailed and a direct enactment that they should be entailed, specifying the descent, and by a saving clause bound the King and all persons claiming through the first duke. In 1799 these coal duties were purchased and an annuity of 19,000*l.* charged upon the Consolidated Funds substituted for them. The Act of 39 Geo. 3, c. 84 contained a recital that the ultimate reversion in the duties was vested in his Majesty, and enacted that the annuity in lieu of the duties should be payable to the Duke of Richmond and the heirs male of his body, and after certain intermediate limitations to the heirs of the body of the first duke, and in default the annuity should revert to his Majesty and his successors, and it was also provided that the persons taking under these limitations should have the same and no larger estate and power of disposition in the annuity as they had in the coal duties. This annuity was afterwards redeemed and converted into Three per Cent. Bank Annuities, and it was provided that the trust funds should always be vested in the First Commissioner of the Treasury and four other trustees. The Act of 39 & 40 Geo. 3, c. ciii., gave the trustees power to sell part of the annuity or stock and to lay out the money in the purchase of land, and directed that the land when purchased should be settled, conveyed, and assured to the use of such persons and for such estates as the annuity of 19,000*l.* would have stood limited if it had not been funded or redeemed. The Act also contained provisions in regard to leasing, liability for waste, and cutting timber, which were restrictions upon the usual powers of an ordinary tenant in tail. The Goodwood estates were purchased under the powers contained in this Act, and were conveyed to the predecessors of the present trustees. On the death of the sixth Duke of Richmond in 1903 the Attorney-General claimed that it might be declared that estate duty became payable upon the principal value of the estates to which the sixth duke was entitled as tenant in tail male in possession under the above limitations:—*Held*, that the coal duties granted by Charles 2 were *tenementa* within the Statute *De Donis*, and therefore entailable; and that the statute of 39 Geo. 3, c. 84 only substituted the annuity of 19,000*l.* for the coal duties, the annuity being entailable in the same way as the coal duties; and that the sixth Duke of Richmond was an actual tenant in tail of the Goodwood estates within the meaning of section 15 of the Fines and Recoveries Act, 1833, notwithstanding that the limitations were created by a special Act of Parliament, and therefore, as the case did not fall within any of the exceptions contained in section 18 of the Fines and Recoveries Act, he was entitled to bar the entail, including the reversion of the Crown, and therefore estate duty was payable on the principal value of the

estates under section 1 of the Finance Act, 1894. *Att.-Gen. v. Richmond (Duke)* (No. 1), 76 L.J. K.B. 1049; [1907] 2 K.B. 940; 23 T. L. R. 742; 97 L. T. 791—Bray, J.

Will Charging Residue with Duties Payable on Testator's Death on Property of which he was Tenant for Life—Succession Duty on Proceeds of Sale of Timber Cut by Succeeding Tenant for Life—Heirlooms of National Interest.]—By his will, dated in 1900, a testator, who died in 1901, directed the trustees to pay out of the residuary proceeds of his estate—first, so much of the estate duty and other death duties which under the Finance Act, 1894, or any amending statute, should become payable upon or by reason of his death in respect of all the estates and property of which he should immediately before his death be tenant for life under a certain will or resettlement as the capital moneys and investments subject thereto should be insufficient to pay; and secondly, all such succession duty as should become payable upon his death in respect of the same estates and property:—*Held*, that, as to the duty in respect of the sale of certain timber, the provision of the will was applicable to duty payable in respect of a succession on the death of the testator, which duty was payable out of his residuary estate. *Held*, also, that as to certain heirlooms of national interest, the duty did not become payable upon the death of the testator, and would not until the happening of the event mentioned in section 20 of the Finance Act, 1896. *Leconfield, In re; Wyndham v. Leconfield*, 90 L. T. 399; 20 T. L. R. 347—C.A.

Husband and Wife Entitled to Property—Interest of Survivor—Right to Capital and Income—“Income.”—Where under a disposition which has taken effect before the commencement of the Finance Act, 1894, a husband or wife is entitled to the income of property settled by the other, and on his or her death the survivor becomes entitled to the capital as well as the income of such settled property, estate duty is payable in respect of the property passing on the death, and the case does not come within the exception in section 21, sub-section 5 of the Finance Act, 1894. The sub-section only applies to a case where the survivor becomes entitled to the income as distinguished from the capital of the settled property. *Att.-Gen. v. Strange*, 67 L. J. Q.B. 629; [1898] 2 Q.B. 39; 78 L. T. 516; 46 W. R. 663—C.A.

—Trust Fund Consisting of Husband's Property and Wife's Property—Annuity to Wife during Joint Lives—Income to Husband subject to Annuity—Income to Wife after Death of Husband—Trusts for Children—Contingent Interests—Property Passing on Death of Husband—Exemption from Duty—Corpus of Wife's Property Producing Annuity—Residue of Wife's Property—“Disposition of property”—“Interest created by disposition”—“Interest determining by reason of death”—“Subsequent limitation subsisting.”—Certain hereditaments described as “the husband's fortune” and other hereditaments, sums of money, and securities, described as “the wife's fortune,” were settled upon trustees in trust to sell and to invest the sale moneys, and out of the income arising therefrom to pay during the joint lives of the husband and wife an annuity of 400*l.* to the

wife for her separate use without power of anticipation, and subject thereto to pay the residue of the income, and after the decease of the wife to pay the whole thereof, to the husband during his life, and after his decease then to pay the whole income to the wife during her life; and after the decease of the survivor to stand possessed of the trust property upon trust for such of the children and issue of the marriage as the husband and wife should by deed jointly or the survivor should by deed or will appoint, and in default of appointment upon trust for the children of the marriage who should attain the age of twenty-one years or being daughters should marry before that age, in equal shares as tenants in common; and failing issue that the trustees should, after the death of the husband and wife, stand possessed of the husband's fortune in trust for his executors &c., and of the wife's fortune upon trust, if she should survive her husband, for her executors &c. There was no issue of the marriage. The wife survived her husband:—*Held*, that as to so much of the wife's fortune as was properly applicable to the annuity of 400*l.* estate duty was not payable on the death of the husband, as his interest therein failed or determined by reason of his death before it became an interest in possession, and a subsequent limitation—namely, that to the wife, her executors &c.—continued to subsist, and therefore by section 5, sub-section 3 of the Finance Act, 1894, the property was not deemed to pass on his death; but *held*, that as to the residue of the wife's fortune estate duty was payable, notwithstanding section 15, sub-section 1 of the Finance Act, 1896, for that, assuming that there was a disposition of this property within the meaning of that enactment, another interest—namely, the contingent interest of the children of the marriage—was created by the said disposition. *Att.-Gen. v. Wood* (66 L. J. Q.B. 522; [1897] 2 Q.B. 102) considered. *Att.-Gen. v. Glossop*, 76 L. J. K.B. 199; [1907] 1 K.B. 163; 95 L. T. 823; 23 T. L. R. 103—C.A.

—Marriage Contract—Wife's After-acquired Property—Legacy to Wife.]—By post-nuptial marriage contract a wife assigned to trustees her whole estate then belonging to her or to which she might acquire right during the marriage, to be held by them for behoof of herself in life-tenant, and of the children of the marriage in fee. Thereafter her brother A, by will, left her a share of his property absolutely, which passed on his death under the after-acquired property clause in the marriage contract to the trustees of that contract. Estate duty was paid on the whole of his estate, including the legacy to his sister. On the wife's death the Crown claimed estate duty upon her estate. The marriage contract trustees claimed exemption under section 5 (2) of the Finance Act, 1894, as regards A's legacy, on the ground that it was property settled by the marriage contract on which estate duty had been paid subsequent to the date of the settlement:—*Held*, that the estate duty paid by A's estate was duty on an estate which vested in the legatees absolutely as unsettled estate, that no duty had been paid in respect of the wife's legacy as settled property, and that the Crown was entitled to the estate duty sued for. *Inland Revenue Commissioners v. Harvey's Trustees*, 4 F. 43—Ct. of Sess.

— **Jointure**—“Free from all taxes and deductions except property tax and legacy or succession duty.”—A testator, who died in October, 1857, by his will, dated in September, 1856, empowered any tenant for life to charge on the estates thereby settled a jointure, not exceeding 3,000*l.* a year, for his widow “free from all taxes and deductions except property tax and legacy or succession duty”:—*Held*, that this was an “express provision to the contrary” within the meaning of section 14, sub-section 1 of the Finance Act, 1894, the testator’s intention clearly being that the jointure should be paid to the widow of the tenant for life free from all taxes and deductions except those specified by him. *Fitzhardinge (Lord), In re; Fitzhardinge (Lord) v. Jenkinson*, 80 L. T. 376—C.A.

Mortgage of Expectancy—Duty Greater than Value of Equity of Redemption.—The person entitled in expectancy to certain property mortgaged his reversion, and when that fell into possession he sought, for the purpose of assessing the value of the property passing to him, to deduct the amount of mortgages under section 21, sub-section 3 of the Finance Act, 1894:—*Held*, that he was not entitled to make such deduction, even although the estate duty payable exceeded the value of the equity of redemption. *Vernon, In re*, 83 L. T. 535; 64 J. P. 804—D.

Lunatic—Committee—Estate Duty on Real Estate Paid out of Personal Estate—Charge on Real Estate—Surplus Rents—Discharge of Incumbrance—Next-of-Kin—Heir-at-Law—Incidence of Duty.—The committee of a lunatic absolutely entitled to residuary real and personal estate, paid the estate duty on the real estate out of the personal estate, the committee himself being the executor and devisee in trust of the real estate under the will. The surplus rents of the real estate, after providing rateably for the lunatic’s maintenance, would have been sufficient, if so applied during the lunatic’s life, to keep down the interest on and pay off the capital amount of the estate duty paid in respect of the real estate. On a petition by the lunatic’s next-of-kin for a declaration that they were entitled to a charge on his real estate in respect of the estate duty in question, the Court, assuming but without deciding, that the estate duty so paid became a charge on the real estate under section 9, sub-section 1 of the Finance Act, 1894,—*Held*, that the surplus rents of real estate ought to be treated as having been applied in discharging the incumbrance—in the first place by keeping down the interest, and then by paying off out of the accumulations the charge itself. *LORD ST. LEONARDS’* decision in *Leitrim (Lord) v. Enery* (6 Ir. Eq. 357) adopted and followed. *Hole, In re; Davies v. Witts*, 74 L. J. Ch. 689; [1905] 2 Ch. 384; 93 L. T. 153; 54 W. R. 73—Farwell, J.

Policy of Life Insurance—Insurable Interest—Payment of Policy-money under Void Policy—Settlement—“Property”—“Interest provided by deceased in concert or by arrangement” with Another—Property Passing on Death.—A father effected with an insurance company a policy of insurance on the life of his son, and paid all the premiums due in respect of it. By a deed of settlement made in contemplation of the son’s

marriage, the father, with the approbation of the son, assigned the policy to trustees upon trust to invest the policy-money when paid, and to pay the income thereof after the death of the son to the son’s intended wife for her life, and after her death as therein directed. It did not appear that the father had any insurable interest in the son’s life. On the death of the son, who survived his father, the insurance company paid the policy-money to the trustees, who invested it, and applied the income as directed by the settlement:—*Held*, that, even assuming that the policy as between the father and the insurance company was void for want of insurable interest under the Life Assurance Act, 1774, yet the policy-money, having in fact been paid to the trustees by the insurance company, was held by them on the trusts of the settlement, inasmuch as such payment must be treated as made in respect of the policy, and all the same consequences must follow as if the Act of 1774 had not been passed. *Held*, also, that a policy is plainly “property” within section 2 of the Finance Act, 1894, so as to be an “interest” within the meaning of sub-section 1 (d) of that section. *Held*, also, that, apart from the Life Assurance Act, 1774, this particular policy was the property of the father alone, inasmuch as it was “provided” not by the son, but by the father, and consequently the policy-money was not brought within section 2, sub-section 1 (d) of the Finance Act, 1894, as being an interest purchased or provided by the son in concert or by arrangement with the father, so as to be liable to estate duty under section 1 of the Act on the death of the son. *Att.-Gen. v. Murray*, 73 L. J. K.B. 66; [1904] 1 K.B. 165; 89 L. T. 710; 52 W. R. 258; 68 J. P. 89; 20 T. L. R. 137—C.A.

Worthington v. Curtis (45 L. J. Ch. 259; 1 Ch. D. 419) and *Att.-Gen. v. Dobree* (69 L. J. Q.B. 223; [1900] 1 Q.B. 442) followed. *Att.-Gen. v. Robinson* ([1901] 2 Ir. R. 67) approved. *Ib.*

— “Interest purchased or provided by deceased.”—In 1885 an equitable tenant for life concurred with his son, the equitable tenant in tail, in disentailing the estates. As part of a family arrangement the father and son joined in mortgaging the estates. Shortly afterwards the estates were re-settled upon trusts for management, payment of annuities and other charges, and of the premiums on fifteen policies on the life of the father. The indenture provided also that an annuity should be paid to the son and that the premiums should still be paid to the son even if he should have surrendered any of the policies to the offices whence they were issued. The ultimate trusts were for the father for life with remainder to the son in fee-simple. On the same date the policies were assigned absolutely to the son. In 1898 the father, for valuable consideration, assigned his life interest to the son, the assignment being subject to the trusts for keeping the policies on foot so far as was necessary for the protection of the mortgagees. The son continued to pay the premiums which became due until his father’s death in November, 1902. In January, 1902, the son paid off the mortgage debts. The son, in concurring with his father in the mortgage, sustained considerable loss. The Crown claimed estate duty on the proceeds

of the policies:—*Held*, that no duty was payable, as the policies were not an "interest purchased or provided for by the deceased by himself alone or in concert or by arrangement with any other person," under the Finance Act, 1894, s. 2, sub-s. 1 (*d*). *Lethbridge v. Att.-Gen.*, 76 L. J. K.B. 84; [1907] A.C. 19; 95 L. T. 842; 23 T. L. R. 123—H.L. (E.)

Policy of Insurance in Favour of Wife of Deceased—Policy-moneys Received by Trustees.]

—A policy of insurance was effected by the deceased upon his own life in favour of his intended wife. By a post-nuptial settlement the policy was assigned to trustees, and it was declared that the moneys to be received under it should be held by the trustees upon trust for the wife of the deceased for life, and afterwards upon certain other trusts. The husband covenanted that he would keep up the policy and pay the premiums during his life, and he in fact did so. The trustees having received the policy-moneys on the death of the husband,—*Held*, that the estate duty was payable in respect of such moneys as being "property passing on the death of deceased" within the meaning of section 2, sub-section 1 (*d*) of the Finance Act, 1894. *Att.-Gen. v. Dobree*, 69 L. J. Q.B. 223; [1900] 1 Q.B. 442; 81 L. T. 607; 48 W. R. 413; 64 J. P. 24—D.

Policies of Insurance—No Part of Premiums Paid by Deceased—Property Passing at Death.]

—R., upon the occasion of his marriage in 1843, assigned four policies of insurance, and his wife assigned a sum of 3,500*l.* to trustees. Under the provisions of the settlement the policies were kept up, and the annual premiums paid exclusively out of the income of the moneys of the wife, until the death of R. in 1898, when the money secured by the policies became payable:—*Held*, that the moneys payable under the policies were liable to estate duty under section 2, sub-section (*d*) of the Finance Act, as being an "interest purchased or provided by the deceased, either by himself alone, or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased," and therefore property "deemed to pass" within the meaning of the section. *Att.-Gen. v. Robinson*, [1901] 2 Ir. R. 67—Q.B. D.

Settlement of Policy-moneys — Residue.]—Section 14 of the Finance Act, 1894, is not intended to provide for the incidence of estate duty. *Wade v. Wade*, 67 L. J. Ch. 527; [1898] 2 Ch. 276; 78 L. T. 808; 47 W. R. 43—Keke-wich, J.

Where, therefore, a settlor has assigned to the trustees of his marriage settlement a policy upon his life for 5,000*l.* upon trust, at his death, to raise 4,000*l.* out of the policy-moneys and hold the same upon certain trusts, and has then disposed of the residue to others, upon the death of the settlor the trustees must pay the estate duty in a lump sum out of the whole fund before setting apart the 4,000*l.* and handing over the residue to those entitled. *Id.*

Agricultural Property — Principal Value — Land in the Occupation of Tenant.]—In estimating, for the purpose of estate duty, the

principal value of agricultural land in the occupation of a tenant, where no part of such principal value is due to the expectation of an increased income, the proviso to section 7, sub-section 5 of the Finance Act, 1894, applies, and the tenant is entitled to have the principal value limited, as therein provided, to "25 times the annual value, as assessed under schedule A of the Income Tax Acts, after making such deductions as have not been allowed under that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management, not exceeding 5 per cent. of the annual value so assessed." *Att.-Gen. v. Robinson*, [1901] 2 Ir. R. 67—Q.B. D.

Colonial Bond to Bearer containing Charge on Property in Colony—Bond Situate in England.]

—A colonial bond to bearer, even though containing a charge on property in such colony, if negotiable by the law of such colony, is also negotiable in the country where such bond is physically situated. Therefore, as the bailee of such bond must get a good discharge before he can deliver it up, where such bonds are actually in England at the death of the deceased estate duty is payable in respect of such bonds. *Att.-Gen. v. Glendinning*, 92 L. T. 87—Phillimore, J.

Shares—Restriction in Transfer—Principle of Valuation.]

—By the articles of association of a company it was provided that any member proposing to transfer a share should serve a notice upon the company of his intention, which notice constituted the company his agent for the sale of the share to any member at the "fair value thereof," the latter being defined as a sum of 100*l.*, or such other sum as should from time to time be fixed as the "fair value" by resolution of the company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the "fair value." Upon the company within twenty-eight days of the transfer notice finding a member willing to purchase, the retiring member was bound to transfer the share at the "fair value," and in default of doing so the company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the company not finding a purchaser within twenty-eight days, the retiring member might within three months sell and transfer the share to any one, subject to the approval of the directors, and at any price. Upon the death of a testator holding shares in the company,—*Held*, that the principal value of the shares was to be estimated at the price which the same would, in the opinion of the Commissioners, fetch if sold in open market at the time of the testator's death, and that such principal value was not necessarily limited to the par or "fair value" of 100*l.* a share. *Held*, also, *per* BOYD, J., and KENNY, J. (PALLIS, C.B., dissenting), that in estimating the principal value, regard should be had to the special provisions in the articles of association with reference to alienation and transfer of shares, and to the "fair value" thereof. *Att.-Gen. v. Jameson*, [1904] 2 Ir. R. 644—K.B. D.

Sum Transferred by Father to Son as Condi-

tion of Settlement by Third Party on Son's Marriage—Death of Father within Twelve Months—"Gift."—In contemplation of the defendant's marriage, the father of his intended wife agreed to settle 20,000*l.* on the usual trusts of a wife's property, on condition that the defendant's father paid the defendant 10,000*l.* The defendant's father accordingly transferred 10,000*l.* to the defendant, and subsequently the settlement was made and the marriage took place. The defendant's father died within twelve months after making the transfer:—*Held*, that the transfer operated as a "gift" within the meaning of the provisions incorporated in section 2, sub-section 1 (c) of the Finance Act, 1894; and as it had not been made twelve months before the death of the deceased, pursuant to these provisions, estate duty under the Act became payable by virtue of that clause thereof upon the 10,000*l.* as property passing on the death of the defendant's father. *Att.-Gen. v. Holden*, 72 L. J. K.B. 420; [1908] 1 K.B. 882; 83 L. T. 729; 51 W. R. 685; 67 J. P. 135—Ridley, J.

Gift Inter Vivos—Death of Donor within Twelve Months—Release of Donor from Prior Covenant for Payment of Gift after Death—Liability of Gift to Estate Duty.—In 1892 a person covenanted with trustees that within three months after her death her executors should pay the sum of 5,000*l.*, free of all duties and deductions, to the trustees upon trust for a certain charity. Some eight years afterwards, the donor, with the object of giving the sum in her lifetime, executed another deed by which she covenanted to pay the 5,000*l.* at once, and by this deed she, her executors and estate, were relieved from payment of the 5,000*l.* under the former deed. The 5,000*l.* was paid over, and the owner died within twelve months from the execution of the deed and the payment. Upon her death the Crown claimed estate duty upon this sum of 5,000*l.*:—*Held*, that the payment of the 5,000*l.* was "an immediate gift *inter vivos*," within the meaning of section 38, sub-section 2 (a) of the Customs and Inland Revenue Act, 1881; that it was none the less a gift because there was a release of the donor and her estate from the obligation under the prior deed, and that, as the donor died within twelve months from the making of the gift, estate duty was payable under section 2, sub-section 1 (c) of the Finance Act, 1894. *Att.-Gen. v. Cobham (Viscount)*, 90 L. T. 816; 20 T. L. R. 337—Channell, J.

— Transfer of Possession.—A lady some years before her death granted a deed of gift of her whole movable estate in favour of her daughter and her daughter's husband. After her death it appeared that certain funds in the hands of a body of trustees having fallen to her under the *Thellusson* Act had really been *in bonis* of her estate during her lifetime, though that fact was unknown to her and also to the trustees. No formal intimation of the deed of gift had been made to the trustees, but the daughter's husband, who knew of the deed, and was a beneficiary under it, was one of the trustees, and the solicitors who prepared the deed were also the solicitors to the trust:—*Held*, that there was no such assumption of possession of these trust funds by the donees as to satisfy the provisions of section 2, sub-

section 1 (c) of the Finance Act, 1894, and that consequently estate duty was exigible on the value of the trust funds. *Lord Advocate v. Heywood-Lonsdale*, 8 F. 724—Ct. of Sess.

— Interest Retained by Settlor.—By a settlement dated September 4, 1902, C. conveyed to trustees a sum of 15,000*l.* invested on mortgage, upon trust to pay out of the income a sum of 575*l.* to his daughter Mrs. D. for life, and after her death, as to the said sum of 15,000*l.*, in trust for such child or children as Mrs. D. should appoint, and in default of appointment for the children equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry. There was a power to Mrs. D. to appoint to her husband an annuity of 300*l.* a year for his life in the event of his surviving his wife. If there should be no child who being a son should attain twenty-one, or a daughter attain that age or marry, the trustees were to hold the trust funds after the death of Mrs. D. (but subject to the annuity to the husband) in trust for C. absolutely. The trustees, during the life of Mrs. D., were to hold the balance of the income produced by the 15,000*l.* after payment of the annuity of 575*l.* to Mrs. D. (or the annuity to the husband) upon trust for C. absolutely. The mortgage on which the 15,000*l.* was invested produced 675*l.* per annum. C. died on September 11, 1904:—*Held*, that neither the trust for C. of the surplus income, after payment to Mrs. D. of the annuity of 575*l.*, nor the ultimate contingent trust for C. of the *corpus* of the fund, rendered the gift one "of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of clause (a) of the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, as amended by section 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, s. 2, clause (c), and that neither estate duty nor settlement estate duty was payable by the executors of C. in respect of such part of the 15,000*l.* as was settled on Mrs. D., her husband, and issue. *Cochrane, In re*, [1906] 2 Ir. R. 200—C.A.

Gift by Will within Twelve Months of Death—Ademption of Legacy—Account.—When there has been partial ademption of a legacy to a child of the testator by a gift to the legatee within a year of the testator's death, the amount to be brought into account by the legatee is the value of the property given at the date of the gift, less the estate duty which became a charge upon the property under section 9, sub-section 1 of the Finance Act, 1894. *Beddington, In re*; *Micholls v. Samuel*, 69 L. J. Ch. 374; [1900] 1 Ch. 771; 82 L. T. 557; 48 W. R. 552—Byrne, J.

Settled Property—Mortgage by Tenant for Life and Remaindermen—Mortgage for Benefit of Remaindermen—Indemnity of Life Tenant from another Source—Deduction of Mortgage Debt in Estimating Value.—Where the tenant for life and remaindermen of a settled estate join in mortgaging the fee for the exclusive benefit of the remaindermen, who out of another estate belonging to them create a rentcharge

in favour of the tenant for life by way of indemnity against the mortgage debt and interest, and the tenant for life is in fact thereby kept indemnified, the whole property, without deduction of the mortgage debt, passes, or is deemed to pass, to the remaindermen, and duty is chargeable thereon accordingly. *Att.-Gen. v. Montagu (Lord)*, 73 L. J. K.B. 707; [1904] A.C. 316; 90 L. T. 726; 53 W. R. 115; 20 T. L. R. 523—H.L. (E.)

— **Husband's Life Interest.**—By a marriage settlement a life interest in the settled funds was given to the husband, then a life interest to the wife, and after the death of the survivor the trustees were to hold the trust property and the income thereof, in the event, which happened, of there not being a child of the marriage who should attain the age of twenty-one years or be married, for such person or persons as the wife, notwithstanding coverture, might by deed or will appoint. The wife died a month before her husband, having by will exercised her power of appointment over the settled property. On the wife's death estate duty was paid on the principal value of the settled property after deduction of the estimated value of the husband's life interest. On the husband's death further duty was claimed on the full value of the property. The trustees of the settlement claimed return of this duty subject to deduction of duty on the value of the husband's life interest:—*Held*, that the trustees were entitled to the return of the duty which they claimed, as the duty had already been paid on the death of "a person competent to dispose of" the property under the Finance Act, 1894, s. 5, sub-s. 2. *Held*, further, that no duty was payable in respect of the husband's life interest, as full duty, in accordance with section 2, sub-section 1 (a), was on the wife's death paid on the then value of "property of which" she "was at the time of" her "death competent to dispose." *Inland Revenue Commissioners v. Priestley*, 70 L. J. P.C. 41; [1901] A.C. 208; 84 L. T. 700; 49 W. R. 657—H.L. (Ir.)

Dicta of RIGBY, L.J., in *Att.-Gen. v. Dodington* (66 L. J. Q.B. 684; [1897] 2 Q.B. 373) and of FALLES, C.B., in the Queen's Bench Division ([1900] 2 Ir. R. 281), and HOLMES, L.J., in the Court of Appeal below, approved. *Ib.*

— **Wife's Reversionary Interest.**—By a marriage settlement dated October 7, 1861, certain trust funds were settled upon trust for A, the husband, for life, with remainder to B, the wife, for life, and after the death of the survivor, then in the event, which happened, of there being no children of the marriage, upon trust as to the capital of the funds for such person or persons as the wife should appoint. The wife died on March 14, 1897, and on her death estate duty was claimed and paid on the value of her reversionary interest in the capital of the trust funds. The husband died on April 14, 1897, and duty was thereupon claimed on the entire funds comprised in the settlement:—*Held*, that the duty paid on the death of the wife was in respect of "settled property" within the meaning of section 5, sub-section 2 of the Finance Act, 1894, and that credit for it should be given as regards the duty which would otherwise have been payable on the death of the

husband. *Studdert, In re*, [1900] 2 Ir. R. 400—C.A.

— **Reservations in Favour of Grantor—Conditional Power of Revocation.**—Where a conveyance of real estate contains a reservation to the grantor of an annual rentcharge out of the property, and provides that his debts to the time of his death shall be paid by the grantee, and contains also a power of revocation in certain events, estate duty is payable under the Finance Act, 1894, ss. 1 and 2, sub-s. 1 (c), upon the death of the grantor, upon the principal value of the whole property as being property passing on death. *Grey (Earl) v. Att.-Gen.*, 69 L. J. Q.B. 308; [1900] A.C. 124; 82 L. T. 62; 48 W. R. 383—H.L. (E.)

Property Settled on Husband and Wife for Life—Annuity Settled on Wife Derived Partly from Husband's Fortune and Partly from Wife's Fortune—Property Passing on Death of Husband—Whether Estate Duty Payable at Husband's Death on Corpus Producing Annuity.—Certain property described as "the husband's fortune" and other property described as "the wife's fortune" were settled upon trustees on trust to sell and invest the sale moneys, and pay out of the income during the joint lives of the husband and wife an annuity of 400*l.* to the wife, and the residue of the income during the life of the wife to the husband; and after the death of the wife, if the husband survived, to pay the whole income to the husband for life; and after the death of the husband, if the wife survived, to pay the whole income to the wife for life; and after the death of the survivor upon certain trusts for children, and, failing children, that the trustees should, after the death of the husband and wife, stand possessed of the husband's fortune in trust for his executors &c., and of the wife's fortune upon trust, if she should survive her husband, for her executors &c. There was no issue of the marriage. The wife survived her husband. Estate duty under the Finance Act, 1894, was paid, on the death of the husband, on the property described as the husband's fortune, but not on the wife's fortune. An information having been filed by the Attorney-General praying that it might be declared that upon the death of the husband estate duty became payable upon the principal value to be ascertained of all the property settled by the wife and described in the deed of settlement as the wife's fortune,—*Held*, (following *Att.-Gen. v. Penrhyn*, 83 L. T. 103), that section 15, sub-section 1 of the Finance Act, 1896, afforded no defence to the claim of the Crown; that upon the death of her husband the wife became entitled not merely to the income, but also to the *corpus* of the settled property, and that therefore (following *Att.-Gen. v. Strange*, 67 L. J. Q.B. 629; [1898] 2 Q.B. 39) the case was not within section 21, sub-section 5 of the Finance Act, 1894, and that estate duty was payable on part of the wife's fortune. But *held*, that for the purposes of estate duty the husband's fortune might be separated from the wife's fortune; that so much of the wife's fortune as formed part of the capital which produced the income of 400*l.* a year did not pass on the husband's death; and that, having regard to section 5, sub-section 3 of the Finance Act, 1894, estate duty was not payable on that part for the ascertain-

ment of which there must be an apportionment. *Cowley (Earl) v. Inland Revenue Commissioners* (68 L. J. Q.B. 435; [1899] A.C. 198) is no authority upon the construction of section 5, sub-section 3 of the Finance Act, 1894. *Att.-Gen. v. Glossop*, 75 L. J. K.B. 151; [1906] 1 K.B. 284; 94 L. T. 27; 54 W. R. 976; 22 T. L. R. 204—Walton, J. Affirmed, 23 T. L. R. 103—C.A.

— **Death of Settlor within Twelve Months from Execution of Settlement.**—Estate duty is payable upon the death of a settlor in respect of property included in an ante-nuptial settlement executed by him, within twelve months before his death, on the marriage of his son, for which settlement there was no consideration in money or money's worth, although no estate for his life, or for any period determinable by reference to his death, is reserved to the settlor by the settlement. *Att.-Gen. v. Smyth*, [1905] 2 Ir. R. 553—K.B. D.

— **Interest in Possession—Conveyancing Form.**—Where, under a settlement, H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, &c., and to accumulate the surplus upon trust, if he should attain age, for him; but, if he should die under age, for the persons who should ultimately become indefeasibly entitled, and H. dying under age, the defendants became indefeasibly entitled as tenants in common in fee of all the lands in the settlement including H.'s shares,—*Held*, that estate duty was not payable as on a property passing on H.'s death; that H.'s interest had not become a beneficial interest in possession in the lands at his death, and that, accordingly, section 5, sub-section 3 of the Finance Act, 1894, was applicable. *Held* also, that the real nature of the transaction must be considered, and not only the conveyancing form. *Att.-Gen. v. Power*, [1906] 2 Ir. R. 272—K.B. D.

Semble, that estate duty might be payable on the actual sums received by H. for maintenance upon the analogy of the provision with regard to legacy duty. *Id.*

— **Surrender of Life Interest to Remainderman—Death of Tenant for Life Within Twelve Months.**—Where a tenant for life of settled property, having released the life interest in favour of the remainderman, dies within twelve months from the date of the deed of release, estate duty does not become payable by the remainderman under section 2, sub-section 1 (c) of the Finance Act, 1894, in respect of the property as being property passing on the death of the tenant for life. *Att.-Gen. v. De Preville*, 69 L. J. Q.B. 288; [1900] 1 Q.B. 225; 81 L. T. 690; 48 W. R. 193—C.A.

— **Death of Tenant for Life—Surrender by Tenant for Life of Life Interest to Remainderman more than Twelve Months before Death.**—Estate duty is not payable under the Finance Act, 1894, upon the death of the tenant for life of settled property, where the tenant for life has, more than twelve months before the death, surrendered his life interest in the

property to the remainderman so as to merge the life estate in the estate in remainder. *Att.-Gen. v. Beech*, 67 L. J. Q.B. 595; [1893] 2 Q.B. 147; 78 L. T. 584; 46 W. R. 435; 62 J. P. 371—C.A. Affirmed in H.L., December 6, 1898.

— **Life Interest—No other Interest Created—Exemption.**—By a settlement made on the marriage of C. J. V. and C. M. V., then C. M. S., certain property was assigned by C. M. V. to trustees, out of which they were to pay her 100l. a year and the residue to C. J. V. during his life, and after the decease of either, the whole income was to be paid to the survivor for life, and then to such children of the marriage as they should appoint, or, in default, to such as should attain twenty-one years, or, being daughters, marry. If there were no children who attained a vested interest, then it was to be held for C. M. V., her executors, &c. C. J. V. died during the lifetime of C. M. V., and there was no issue of the marriage:—*Held*, that the property that reverted to C. M. V. under the settlement by reason of the death of C. J. V. was not exempt from duty under section 15, sub-section 1 of the Finance Act, 1896. *Att.-Gen. v. Penrhyn*, 83 L. T. 103; 64 J. P. 552—D.

— **Jointure—Estate Duty—Succession Duty.**—By a private Act of Parliament passed in 1535 certain estates were settled upon two persons as tenants in tail, with a proviso that they should not alien, bargain, give, or sell the same, nor do anything to the hurt or disinheritation of their heirs, but only for the jointure of a wife. A tenant in tail of the estates, who died in 1902, by a codicil to his will appointed a life interest in his share of the estates to his widow by way of jointure:—*Held*, that the power of sale and exchange conferred by the Settled Land Acts did not make the tenant in tail capable of alienating the land in the sense in which that term was used in section 5, sub-section 5 of the Finance Act, 1894, and that consequently estate duty was payable out of the property or interest of the successor passing upon the death of the person in possession of the estate, such interest being valued as provided by that statute. *Held*, further, that no succession duty was payable by a widow in respect of a jointure appointed or granted to her by her husband as predecessor. *Bolton Settled Estates, In re*, 73 L. J. Ch. 688; [1904] 2 Ch. 289; 91 L. T. 259—Joyce, J.

— **Scottish Entail—Limited Owner—Payment of Instalments of Duty by Heir of Entail—Charge upon the Estate.**—The meaning of section 9, sub-section 6 of the Finance Act, 1894, by which a person having a limited interest in property who pays estate duty in respect thereof, "shall be entitled to the like charge as if the Estate Duty in respect of that property had been raised by means of a mortgage to him," is that he is in right of that charge, and not merely that he is in a position to do something which will create a charge. Thus, where an heir of entail in Scotland pays estate duty the money so paid becomes an asset of his estate, and on his death estate duty is chargeable thereon. *Lord Advocate v. Moray (Countess)*, 74 L. J. P.C. 122; [1905] A.C. 531; 93 L. T. 569; 21 T. L. R. 715—H.L. (Sc.)

— **Money Settled by Will**—"Express provision to the contrary"—"**Duties payable out of my estate.**"—Where a specified fund is settled by a will dated after the Finance Act, 1896, which directs that funeral and testamentary expenses, "including all duties payable out of my estate," shall be paid out of residue, those words do not amount to an "express provision to the contrary" within the meaning of the Finance Act, 1896, s. 19; and the settlement estate duty must be paid out of the settled fund. *Lewis, In re*; *Lewis v. Smith*, 69 L. J. Ch. 406; [1900] 2 Ch. 176; 82 L. T. 291; 48 W. R. 426—Kekewich, J.

— **Property "passing" on Death—Surrender by Tenant for Life of Life Interest to Remainderman more than Twelve Months before Death.**—Estate duty is not payable under the Finance Act, 1894, upon the death of the tenant for life of settled property, where the tenant for life has, more than twelve months before his death, surrendered his life interest in the property to the remainderman so as to merge the life estate in the estate in remainder. *Att.-Gen. v. Beech*, 68 L. J. Q.B. 130; [1899] A.C. 53; 79 L. T. 565; 47 W. R. 257; 63 J. P. 116—H.L. (E.)

— **Reservation in Favour of Grantor—Conditional Power of Revocation.**—Where a conveyance of real estate contains a reservation to the grantor of an annual rentcharge out of the property, and also a power of revocation in certain events, estate duty is payable under the provisions of section 1 and section 2, sub-section 1 (c) of the Finance Act, 1894, upon the death of the grantor, upon the principal value of the whole property as being property passing on his death. *Att.-Gen. v. Grey (Earl)*, 67 L. J. Q.B. 947; [1898] 2 Q.B. 534; 79 L. T. 235; 47 W. R. 37—C.A.

Principal and Derivative Settlements—Death of Person "during the continuance of the settlement competent to dispose of" Property.—By indentures of 1855 and 1856, funds were settled upon trust for a lady for life, and after her death for her children in equal shares. By an indenture of 1888, one of her children, on his marriage, settled his share, reserving to himself only a life interest therein. On the death of the lady in 1894, estate duty under the Finance Act, 1894, was paid in respect of the funds. On the death of her son in 1897, *Held*, that estate duty was payable in respect of the share of the funds comprised in the indenture of 1888, he having been, within the meaning of section 5, sub-section 2 of the Act, "during the continuance of the settlement competent to dispose of such property." *Att.-Gen. v. Hay*, 68 L. J. Q.B. 557; [1899] 2 Q.B. 245; 80 L. T. 712—D.

Family Arrangement—Disentail—Mortgage of Fee for Benefit of Tenant for Life—Policies on Life of Tenant for Life brought into Settlement—Death of Tenant for Life—Liability of Policy-moneys to Duty.—A father and son were tenant for life and tenant in tail respectively of real and personal estate. Pursuant to a family arrangement between them they disentailed the estate, granting it to trustees to hold to such uses as they should jointly appoint, and subject to any appointment to the use of the father for life, with remainder to the son in fee, but with

power to the son to appoint part of the personal estate as he should think fit; they raised a sum required for paying the father's debts as to 70,000*l.* by a mortgage in fee of the freehold estate and as to the balance by a sale of part of the personal estate; and the father assigned to trustees certain policies of insurance on his life for sums amounting to 69,500*l.* on trust to apply all moneys payable thereunder during his life towards the discharge of the mortgage debt, and subject to such trust to hold the policies, moneys, and accumulations in trust for the son, and conveyed to these trustees his life estate on trust to pay out of the income the interest on the mortgage and the premiums on the policies, and to pay the surplus income as to two-thirds to the father and as to one-third to the son. The father and son were on bad terms, and in carrying out the arrangement they dealt with each other at arm's length. On the death of the father in 1898 the Crown claimed from the son estate duty on the moneys received by him under the policies:—*Held*, that these moneys were property passing on the death of the deceased within section 2, sub-section (1) (d) of the Finance Act, 1894, but were not property passing on the death of the deceased by reason of a purchase within section 3, and consequently that the duty was payable. *Att.-Gen. v. Hawkins*, 70 L. J. K.B. 195; [1901] 1 K.B. 235; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791—D.

Settlement Estate Duty.—The expression "the deceased" in section 19 of the Finance Act, 1896, means a person dying after July 1, 1896. *Gibbs, In re*; *Thorne v. Gibbs*, 67 L. J. Ch. 282; [1898] 1 Ch. 625; 78 L. T. 239; 46 W. R. 477—Stirling, J.

The incidence of settlement estate duty, in the case of settled pecuniary legacies or shares of residue of the personal estate of a testator dying prior to July 2, 1896, is governed by the rule established in *Webber, In re*; *Gribble v. Webber* (65 L. J. Ch. 544; [1896] 1 Ch. 914) and is upon the general residue and not upon the settled legacies or shares. *Ib.*

— **Direction in Will to Pay "Testamentary expenses."**—A settled fund must bear the settlement estate duty notwithstanding a provision in the will that the executors are to pay testamentary expenses out of residue. *King, In re*; *Travers v. Kelly*, 73 L. J. Ch. 210; [1904] 1 Ch. 363; 90 L. T. 281; 52 W. R. 230; 20 T. L. R. 187—Swinfen Eady, J.

— **Will—Legacy of Specific Chattels—Direction to Pay "death duties" out of Specific Fund—Exoneration of Specific Chattels.**—The bequest of a specific fund of money upon trust "to pay thereout . . . the death duties payable out of my estate" throws the burden of the payment of settlement estate duty, payable in respect of property specifically bequeathed, upon the specific fund in exoneration of the property specifically bequeathed. *Lewis, In re*; *Lewis v. Smith* (69 L. J. Ch. 406; [1900] 2 Ch. 176), distinguished; *Pimm, In re*; *Sharpe v. Hodgson* (73 L. J. Ch. 627; [1904] 2 Ch. 345), applied. *Cayley, In re*; *Awdry v. Cayley*, 74 L. J. Ch. 31; [1904] 2 Ch. 781; 53 W. R. 144—Swinfen Eady, J.

— **Estate Contingently Settled—Repayment**

of Duty.]—Trustees were directed to hold the residue of a trust estate for the truster's unmarried daughter in life, and her children in fee, it being provided that if she had no children the fee should go as she might direct by any writing under her hand, and, failing such direction, to certain third parties. On the truster's death in 1895, the trustees paid estate duty and settlement estate duty on the residue as a settled estate under the provisions of the Finance Act, 1894. The daughter died unmarried on January 11, 1898. On her death estate duty was claimed and paid on the residue as an unsettled estate. In an action by the trustees for repayment of the amount paid as settlement estate duty, on the ground that the estate was only contingently settled on the daughter leaving issue, and that this contingency had not arisen,—*Held*, that, as there was no enactment in the Finance Act, 1894, or otherwise entitling the trustees to repayment, they were not entitled to repayment. *Watherston's Trustees v. Lord Advocate*, 3 F. 429—Ct. of Sess.

—Contingent Settlement—Interpretation of Statutes.]—Whether the case of *Att.-Gen. v. Fairley* (66 L. J. Q.B. 454; [1897] 1 Q.B. 698) was or was not rightly decided in the first instance, the Legislature by the Finance Act, 1898, s. 14, has adopted and confirmed the construction put upon the Finance Act, 1894, s. 5, in that case, and the Court is equally bound to adopt that construction in the case of the will of a testator who died before the commencement of the Finance Act, 1898. *Att.-Gen. v. Clarkson*, 69 L. J. Q.B. 81; [1900] 1 Q.B. 156; 81 L. T. 617; 48 W. R. 216—C.A.

Testator, who died in 1895, gave his residue in trust for such of his children as should attain twenty-five years in equal shares, with provisions for maintenance and accumulation of income in the meantime, and directed each daughter's share to be held in trust for the daughter for life, and after her death for her children. Testator left two sons and four daughters, all under twenty-five:—*Held*, that settlement estate duty was leviable on the entire residue. *Id.*

Testator, who died in 1895, gave a legacy of 30,000*l.* to A, if and when he should attain twenty-five years, with interest in the meantime, and, in case A should die under that age leaving issue, directed the legacy to be held upon trusts in favour of A's children; and, in case A should die under that age without leaving issue, directed the legacy to fall into his residue. A was under twenty-five at the testator's death, but had since attained twenty-five:—*Held*, that settlement estate duty was leviable on the legacy. *Id.*

—Will—Legacy of Specific Chattels—Direction to Pay "death duties" out of Specific Fund—Exoneration of Specific Chattels.]—The bequest of a specific fund of money upon trust "to pay thereout . . . the death duties payable out of my estate" throws the burden of the payment of settlement estate duty, payable in respect of property specifically bequeathed, upon the specific fund in exoneration of the property specifically bequeathed. *Lewis, In re; Lewis v. Smith* (69 L. J. Ch. 406; [1900] 2 Ch.

176), distinguished; *Pimm, In re; Sharpe v. Hodgson* (73 L. J. Ch. 627; [1904] 2 Ch. 345), applied. *Cayley, In re; Airdry v. Cayley*, 70 L. J. Ch. 31; [1904] 2 Ch. 781; 91 L. T. 743; 53 W. R. 144, 260—Swinfen Eady, J.

—Settled Property—Succession—Fund Set Aside to Produce Sufficient Income to Pay Annuities.]—A testator by his will devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and, after the bequest of certain legacies, he directed his trustees to set aside a sufficient amount of his residuary estate upon trust to pay annuities to certain annuitants for their respective lives, and, subject thereto, to distribute the residue among the residuary legatees:—*Held*, that so much of the residuary estate as was set aside for the payment of the annuities was "settled" property within section 5, subsection 1 of the Finance Act, 1894, and consequently that settlement estate duty was leviable in respect thereof on the death of the testator. *Att.-Gen. v. Owen* (68 L. J. Q.B. 779; [1899] 2 Q.B. 253) approved. *Campbell, In re; 71 L. J. K.B. 160; [1902] 1 K.B. 113; 85 L. T. 708—C.A.*

—Precatory Trust—Letter with Wishes of Testator.]—N. C., by his will dated December 13, 1901, devised and bequeathed all his estate and effects of every description to his brother C. T. C. absolutely, and he appointed his said brother, H. J. M., and C. G. executors and trustees of his will. On January 11, 1902, N. C. signed a document or letter (which has not been admitted to probate) which was headed: "Instructions to my executors Crawford, Morgan, and Gasquet.—Dear Brother Crawford (I dictated this to Gasquet).—Like many others who have gone before me, I have failed to make provision for the distribution of my property amongst my relatives and friends before it became too late to do it with care. For this reason I have left all my estate to you in the fullest reliance that you will, as far as possible and to the utmost, carry out any wish that I may express in writing now or later, or which may be conveyed to you verbally by Gasquet or my good-hearted cousin Henry. I have made a settlement on P. D. which should suffice for him in the struggle of life which we all have to face. As regards our family, you will be the best judge how and when a suitable distribution should be made. I do not fetter your discretion in any way. You are an old man, and therefore do not delay the distribution." And then followed the directions as to the disposal of certain property and amounts to be paid to certain persons. The document concluded: "Finally, these are the instructions referred to in my will. They are not in any way to fetter Crawford, and may probably be added to if I am spared, or I may carry some out in my own lifetime." A copy of this document was sent to C. T. C., who, on January 14, 1902, wrote to C. G. a letter in which he said: "All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, and as far as all we three executors are concerned, for his wishes are sacred, every word." The effect of this letter was communicated to N. C. N. C. died on February 18, 1902, and his will was proved by all the executors, and estate duty and

legacy duty was paid on his estate, including sums given or settled by the testator within twelve months of his death. C. T. C. took possession as beneficial owner of the residuary personal estate and of the freehold and leasehold estate of N. C., and he made on May 13, 1902 (with twelve months next before his death), a settlement of 5,000*l.* on each of his four nephews and niece. C. T. C. also gave and paid other sums to various persons in accordance with the instructions in the letter of January 11, 1902. C. T. C. died on December 13, 1902:—*Held*, that no trust was created, and that the settlement of 5,000*l.* so made was a gift made by C. T. C. within twelve months of his death, and so estate duty and settlement estate duty were payable in respect thereof. *Att.-Gen. v. Chamberlain*, 90 L. T. 581; 20 T. L. R. 359—Channell, J.

— **Entailed Estate—Money Directed to be Invested in Land to be Entailed.**—A testator gave money in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will. By a codicil he authorised the trustees (if in their discretion they should think it desirable), in place of purchasing land in Scotland, to purchase land in England to be entailed according to English law:—*Held*, that so much of the money as remained uninvested in land was not “entailed estate,” and not liable to settlement estate duty within the meaning of the Finance Act, 1894. *Lord Advocate v. Stewart*, 71 L. J. P.C. 66; [1902] A.C. 344; 86 L. T. 603; 50 W. R. 673—H.L. (Sc.)

By LORD ROBERTSON.—Money directed to be laid out in the purchase of land in Scotland to be entailed is “entailed estate” within the Scottish Entail Acts, and therefore comes within section 23, sub-section 16 of the Finance Act, 1894. *Ib.*

— **Incidence of Duties and of Arrears of Interest General Residue Insufficient—Liability of—Annuitants to Contribute.**—A testator who died in the year 1895, by a bequest held to be specific, bequeathed “all my moneys invested in and upon any stocks or funds, whether in or out of the United Kingdom, and all my railway stocks, shares, debentures, and bonds, and generally all and every my securities for money,” to trustees upon trust during the life of his sister to pay three sums of 1,000*l.*, 500*l.*, and 500*l.* annually respectively, and the residue and the remainder thereof to his brother W. during his life. After the death of his sister the trustees were to hold the trust fund, as to two sums of 21,000*l.* and 18,000*l.*, upon certain trusts in favour of two of the testator’s brothers respectively and their issue, and were to stand possessed of the residue of the trust fund, including the 18,000*l.* in the event of his brother’s death without issue upon trust for W. for life, with remainders over. The testator bequeathed all the residue of his personal estate of whatever kind to W., subject to the payment of his funeral and testamentary expenses and debts and certain annuities. The residuary personalty was insufficient to pay the testator’s debts and funeral and testamentary expenses, so that a part of the estate duty had to be paid out of the trust fund:—*Held*, that the interest given to W. in each case was not a share of the fund, but an interest in the actual

residue after payment respectively of the annuities and the two sums of 21,000*l.* and 18,000*l.*; and therefore the annuities and those two sums were not liable to diminution by reason of the estate duty having to be borne by the fund or on account of the settlement estate duty being payable in respect of the fund. *De Quetteville v. De Quetteville*, 93 L. T. 579—C.A.

— **Will—Direction to Pay “my duties” out of Residue—Exoneration of Specific Property.**—A residuary gift upon certain trusts, after payment of “my debts, funeral and testamentary expenses, and duties,” throws the burden of the payment of estate duty and settlement estate duty, payable in respect of real estate specifically devised, on the residue, in exoneration of the specific property. *Pimm, In re; Sharpe v. Hodgson*, 73 L. J. Ch. 627; [1904] 2 Ch. 345; 91 L. T. 190; 52 W. R. 648—Farwell, J.

Estate Duty not Merely Stamp Duty.—See *Kingdon & Wilson, In re, post*, SOLICITOR.

Bequest of Sum to Pay Estate Duty.—See *Mexborough, In re; Savile v. Mexborough*, 88 L. T. 131, *post*, WILL.

(iii.) Incidence.

By Whom to be Borne—Estate Divisible among Children and Residuary Legatee.—Estate duty payable on death of tenant for life held to be borne rateably by the shares into which the estate became divisible and by the residuary legatee. *Power, In re; Power v. Howell*, 47 W. R. 183—Kekewich, J.

General Power of Appointment Exercised by Will—Appointed Fund—Residue—“Testamentary expenses”—**Property Passing to Executor “as such.”**—Testator, who died in 1900, was at the date of his will and of his death entitled to a general power of appointment by will over the husband’s trust fund settled by his marriage settlement. In the events which had happened the fund stood settled upon trust for the testator for life, and after his death for his wife for life, and after the death of the survivor as the testator should appoint. By his will the testator exercised the power and appointed that the trustees of the settlement should after his wife’s death hold the fund in trust as the wife should by will appoint, and in default of appointment upon trust to transfer the fund to the trustees of his will as part of his residuary estate; and he directed payment of his testamentary expenses out of the general estate:—*Held*, that the persons accountable for estate duty under section 8, sub-section 4 of the Finance Act, 1894, were the persons to whom the beneficial interest in the property passed, or the trustees in whom the fund was vested, and that the duty was therefore payable out of the *corpus* of the appointed fund. *Held*, also, that, inasmuch as the executors were not accountable for the duty, the duty was not a “testamentary expense.” *Power, In re; Acworth v. Stone* (70 L. J. Ch. 778; [1901] 2 Ch. 659), commented upon. *Dixon, In re; Penfold v. Dixon*, 71 L. J. Ch. 96; [1902] 1 Ch. 248; 85 L. T. 622; 50 W. R. 203—Buckley, J.

Appointment by Will.—The estate duty on a fund appointed by a will made in execution of a testamentary power of appointment must be borne by the appointed fund, and not by the residue. *Treasure, In re; Wild v. Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), followed in preference to *Moore, In re; Moore v. Moore* (*infra*). *Maddock, In re; Llewellyn v. Washington*, 70 L. J. Ch. 660; [1901] 2 Ch. 372; 85 L. T. 12; 50 W. R. 54—Kekewich, J. See also *Orlebar, In re; Wynter v. Orlebar*, 77 L. J. Ch. 54; [1908] 1 Ch. 136; 98 L. T. 19—Neville, J.

General Power of Appointment by Will—Exercise of Power—Property Passing to the Executor “as such.”—Property appointed under a general power of appointment by will does not pass to the executor “as such” within the Finance Act, 1894, s. 9, sub-s. 1, and consequently estate duty is, in the absence of any direction to the contrary, payable out of the appointed property and not out of the residuary estate of the appointor. *Power, In re; Acworth v. Stone* (70 L. J. Ch. 778; [1901] 2 Ch. 659), followed. *Dodson, In re; Gibson v. Dodson*, 76 L. J. Ch. 182; [1907] 1 Ch. 284; 96 L. T. 254—Warrington, J.

— **Testamentary Expenses.**—Where a testatrix has made a will in exercise of a general testamentary power of appointment over a fund, and has directed her “testamentary expenses” to be paid by her executors, although the appointed fund will not be deemed to pass to the executors “as such,” the estate duty payable in respect of it must be paid out of the residuary estate of the testatrix as a “testamentary expense,” and not be charged upon the appointed fund. *Clemow, In re; Yeo v. Clemow* (69 L. J. Ch. 522; [1900] 2 Ch. 182), followed. *Treasure, In re; Wild v. Stanham*, 69 L. J. Ch. 751; [1900] 2 Ch. 648; 83 L. T. 142; 48 W. R. 696—Kekewich, J.

Fund Appointed in Exercise of General Power—Residue—Property Passing to the Executor “as such.”—“Testamentary expense.”—Where an executor receives personal property appointed in pursuance of a general power, such property constitutes “assets which he has received as executor” within the meaning of section 8, sub-section 3 of the Finance Act, 1894, and cannot be said to be “property which does not pass to the executor as such” within the meaning of section 9, sub-section 1. *Fearnside, In re; Baines v. Chadwick*, 72 L. J. Ch. 200; [1903] 1 Ch. 250; 88 L. T. 57; 51 W. R. 186—Swinfen Eady, J.

Assets which a person rightly receives as executor are assets which pass to him as executor within the meaning of the Act, even although not strictly speaking assets to which he is entitled *virtute officii*. *Ib.*

Estate duty payable in respect of personal property appointed by a testator in pursuance of a general power is a “testamentary expense,” and therefore included in a direction to the executors to pay testamentary expenses. *Ib.*

Contingent Legacies and Annuities—Insufficiency of Personality—Charge on Realty—Residuary Personality Settled.—Where a testator by his will gave certain contingent legacies and

annuities and directed that the same should be primarily payable out of his personality, and charged his real estate in aid but not in exoneration of his personality with the same if the personality should be insufficient, and after devising his real estate in strict settlement he declared that if his residuary personality should be insufficient for payment of funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits, and not by raising a capital sum to provide for the same, and he charged the residuary personality with the payment of the legacies and annuities and directed that the ultimate residue of the personality was to be invested and was to follow the limitations of the real estate, and the executors had paid settlement estate duty in respect of the contingent legacies and annuities, it was held, there being a probability that the personality would be insufficient to pay the funeral and testamentary expenses, legacies, and annuities, that the contingent legacies were to be treated as settled, and that the settlement estate duty must be borne by the legatees, in accordance with *Maryon-Wilson, In re; Wilson v. Maryon-Wilson* (69 L. J. Ch. 310; [1900] 1 Ch. 565), and that as regarded the annuities it must be taken that *Att.-Gen. v. Owen* (68 L. J. Q.B. 779; [1899] 2 Q.B. 253) applied to the personality, and consequently that the annuitants must bear the proper proportion of the settlement estate duty in accordance with the rule established in *Parker-Jervis, In re; Salt v. Locker* (67 L. J. Ch. 682; [1898] 2 Ch. 643). *St. Albans (Duke), In re; Loder v. St. Albans (Duke)*, 69 L. J. Ch. 863; [1900] 2 Ch. 873; 49 W. R. 74—Stirling, J.

General Residue.—The term “estate duty” in the Finance Act, 1894, includes settlement estate duty. Where, therefore, the trustees of a will are directed to stand possessed of residuary personal estate upon trust to pay thereout the estate duty on the whole of the real and devised and personal estate bequeathed by the will, the settlement estate duty payable in respect of properties settled by the will must be paid out of the residuary personal estate and not out of the respective settled properties. *Leveridge, In re; Spain v. Lejoindre*, 71 L. J. Ch. 23; [1901] 2 Ch. 830; 85 L. T. 458; 50 W. R. 205—Joyce, J.

Money Charged on Real Estate in Favour of Trustees of Marriage Settlement—Will—Devise Subject to Charge.—The persons entitled to a sum of money charged by a testator upon his real estate during his life in favour of the trustees of his marriage settlement (being a charge which cannot, under section 7, sub-section 1 of the Finance Act, 1894, be deducted from such real estate before estimating its amount for the purposes of estate duty) must by section 14, sub-section 1, pay a proportionate amount of the duty which section 9, sub-section 1, makes a first charge upon the real estate in question. *Hacket, In re; Hacket v. Gardiner*, 76 L. J. Ch. 249; [1907] 1 Ch. 385; 96 L. T. 420—Joyce, J.

Marriage Settlement—Jointure—“Without any deduction whatsoever”—Mode of Assessing Duty—Limited Owner.—The scheme of the

Finance Act, 1894, is that estate duty is to be borne by the inheritance as a whole. *Parker-Jervis, In re*; *Salt v. Locker*, 87 L. J. Ch. 682; [1898] 2 Ch. 643; 79 L. T. 403; 47 W. R. 147—Kekewich, J.

Upon the death of a settlor estate duty became payable on certain estates which passed as a whole. At the same time a jointure of 1,000*l.* a year became raisable in favour of A, to be paid to her "without any deduction whatsoever, except in respect of income tax," and another jointure of 500*l.* a year became raisable in favour of B, but without any such words of exemption:—*Held*, as to A's jointure, that the words "without any deduction &c." amounted to an "express" provision to the contrary, within the meaning of section 14, sub-section 1 of the Finance Act, 1894, and that A was not to be charged with any part of the estate duty, or interest thereon. *Held*, as to B's jointure, that she must be treated as tenant for life of a sum equivalent to the capitalised value of the jointure, to be ascertained at the same number of years' purchase as the whole estate was capitalised for the purpose of duty; and that she must pay interest on so much of the estate duty as was properly attributable to such capital sum at the rate actually paid in respect of the duty raised upon mortgage of the estate. *Ib.*

Real and Personal Estate—Residuary Legatee—Lunatic—Payment of Duty on Realty out of Personality—Surplus Rents—Next-of-kin—Heir-at-law.—The committee of a lunatic absolutely entitled to residuary real and personal estate under a will of which the committee was himself sole executor and trustee, paid the estate duty on the testatrix's death on the real estate out of the personal estate. An allowance had been ordered in lunacy for the lunatic's maintenance out of the income of the residuary estate without distinguishing between the real and personal estate, and the surplus rents of the real estate, after providing rateably for the lunatic's maintenance, would have been sufficient, if so applied during the lunatic's life, to keep down the interest on, and to repay to the personal estate, the capital amount of the estate duty paid in respect of the real estate. On the lunatic's death intestate his next-of-kin claimed to have a charge on the real estate in respect of the estate duty so paid. The charge was not required by the executor for the purposes of administration:—*Held*, that any charge created on the real estate under section 9 of the Finance Act, 1894, must under the circumstances be considered to have been merged or extinguished in the lunatic's lifetime, and that the next-of-kin had no equity as against the heir to require it to be raised. *Hole, In re*; *Davies v. Writts*, 75 L. J. Ch. 362; [1906] 1 Ch. 673; 94 L. T. 451—C.A.

Decision of FARWELL, J. (74 L. J. Ch. 639; [1905] 2 Ch. 384), affirmed, but his observations that the committee ought to be treated as a mortgagee in possession dissented from. *Ib.*

Payment by Instalments—Interest whether Raisable out of Inheritance.—A tenant for life, who under section 6, sub-section 8. of the Finance Act, 1894, elects to pay estate duty by

instalments, is not under ordinary circumstances entitled by virtue of section 9, sub-section 5, to raise the interest on the instalments by sale or mortgage of the inheritance as between himself and the remaindermen, but must keep down the interest himself. *Howe's (Earl) Settled Estates, In re*; *Howe v. Kingscote*, 72 L. J. Ch. 461; [1903] 2 Ch. 69; 88 L. T. 438; 51 W. R. 468—C.A.

Per ROMER, L.J.—If a person were to advance money at the request of the tenant for life for the payment of such interest with notice of the rights of the remaindermen, he would not obtain a good title as against the remaindermen. *Ib.*

Gift of Annuity.—See ANNUITY.

(iv.) *Deductions.*

Marriage Settlement—Bona Fide Purchase—Partial Consideration in Money or Money's Worth.—By a settlement on the marriage of L. and D., L., the husband, in consideration partly of the transfer to him by D., the wife, of 600 Grand Canal shares, and partly of the marriage, granted certain lands in trust for himself for life, and after his death for D. absolutely. Upon L.'s death the lands, portion of which had in the meantime been sold, were represented by 8,119*l.* 4*s.* The Commissioners of Inland Revenue claimed estate duty upon the full sum of 8,119*l.* 4*s.*, as being the principal value of the property passing to D. upon the death of L., ascertained in accordance with the provisions of the Finance Act, 1894. They disputed D.'s right to a deduction of 6,600*l.*, being the value at the date of the settlement of the consideration in Grand Canal shares, upon the ground that the transaction embodied in the settlement was not one in which the 8,119*l.* 4*s.*, the value of the land, was to pass to her upon the death of L., by reason only of a *bona fide* purchase from him for partial consideration in money or money's worth, within the meaning of section 3, sub-section 2 of the Act:—*Held*, that the expression "partial consideration in money or money's worth," in section 3, sub-section 2, was intended to relate to contracts in which the consideration was partly money or money's worth and partly marriage, and that the sum in respect of which D. was liable to pay estate duty was to be ascertained by deducting 6,600*l.*, the value of the consideration in money or money's worth, from 8,119*l.* 4*s.*, the value of the property passing to her under the settlement upon the death of L. *Lombard, In re*, [1904] 2 Ir. R. 621—K.B. D.

Annuities and Mortgages Created by Owner of Interest in Expectancy.—The provisions of sub-section 3 of section 21 of the Finance Act, 1894, do not entitle the owner of an interest in expectancy, who has, before the commencement of the Act, and in the lifetime of the tenant for life, charged his interest with annuities and mortgages, to deduct, upon the death of the tenant for life, the capitalised value of the annuities and the sums secured by the mortgages from the principal value of the properties passing on death upon which estate duty is payable. *Vernon, In re*, 70 L. J. K.B.

202; [1901] 1 K.B. 297; 83 L. T. 535; 49 W. R. 192—D.

— A father and son, who were respectively equitable tenant for life and equitable tenant in tail in remainder of settled estates, executed a disentailing assurance, and then, in the exercise of a joint power of appointment extending over the whole equitable interest, executed a mortgage of the equitable interest in fee to secure money advanced to father and son, which they jointly and severally covenanted to repay. The mortgage embodied transfers of pre-existing mortgages on the father's life estate, which life estate was kept alive for the purpose of protection against *mesne* incumbrances during the life of the tenant for life. Subsequently the estates were re-settled, and an annuity granted thereout to the son during his father's life:—*Held*, that on the death of the father the son was entitled to deduct from the principal value of the property chargeable with estate duty the amount due under the mortgage. *Held also*, that no deduction ought to be made for the capitalised value of the annuity. *Cowley (Earl) v. Inland Revenue Commissioners*, 68 L. J. Q.B. 435; [1899] A.C. 198; 80 L. T. 361; 47 W. R. 525; 63 J. P. 436—H.L. (E.)

Deductions Allowable as Debts — Marriage Contract Provisions — Interim Alimony to Widow.—An obligation by a husband in a marriage contract to make certain payments to his marriage contract trustees for behoof of his wife and children, as the counterpart of similar obligations by his wife, cannot be regarded on his death as a debt incurred by him "for full consideration in money or money's worth wholly for the deceased's own use and benefit," in the sense of section 7, sub-section 1 (a) of the Finance Act, 1894, and does not form a proper deduction in determining the value of his estate for the purpose of estate duty. A similar obligation by a father in his son's marriage contract, as the counterpart of an obligation by the son's wife and her father, cannot be deducted as a debt. *Inland Revenue v. Alexander's Trustees*, 7 F. 367—Ct. of Sess.

Fund in Court—Payment Out.—See *Taylor v. Poncia*, ante, PRACTICE, col. 1926.

(v) Raising Duty.

Charge on Property.—Trustees, acting under a will, having paid the estate, settlement estate, and succession duties due on the death of the testator, applied to the Court for authority under section 9, sub-section 5 of the Finance Act, 1894, and section 44 of the Succession Duty Act, 1853, to grant a bond and disposition in security over the property for the amount of the duties so paid and the expenses of settling the same and of the application. The will contained no power to borrow, and it was stated that no person could be found willing to lend the amount on the security of the estate without the sanction of the Court:—*Held*, that the trustees were entitled to authority to charge the property for the duties paid and also for the expenses incurred in settling the duties, but not for the costs of the application. *Harris's Trustees v. Harris*, 6 F. 470—Ct. of Sess.

(c) Legacy Duty.

Gift of Legacies to Males and Females—Direction to Pay Legacies in Favour of Females Free of Legacy Duty—Gift of Residue to Males and Females as Tenants in Common.—After giving certain legacies to males and females, the testatrix declared that all legacies, devises, and bequests thereinbefore or thereafter given or made in favour of females should be free of legacy duty, the residue being given to three males and three females as tenants in common. —*Held*, that the legacy duty in respect of the shares of the females in the residue fell to be paid out of their respective shares. *Dalrymple, In re; Bircham v. Springfield*, 49 W. R. 627—Kekewich, J.

Incidence—Assignment of Part of Fund.—By a marriage settlement which recited the title of the settlor in reversion under a will to a mortgage for 15,000*l.*, and that it had been agreed to settle 10,000*l.*, part thereof, the settlor assigned to the trustees all that sum of 10,000*l.* part of the said mortgage debt or sum of 15,000*l.*, to which he was entitled in reversion, and the interest and income of the said sum of 10,000*l.*, to hold the said sum of 10,000*l.* and premises upon the trusts therein declared. The settlement contained a covenant for further assurance at the cost of the trust estate. And it was agreed and declared that, from and after the solemnisation of the marriage the trustees should stand possessed of the said sum of 10,000*l.*, and of the shares and interests thereinbefore expressed to be assigned, and of the interest, dividends, and income thereof respectively, upon trust to permit the whole or any part of the said sum of 10,000*l.*, when the same should have fallen into possession, to remain in its actual state of investment or with the consent or at the discretion therein mentioned to call in and compel payment of the said sum of 10,000*l.*; and after a trust for investment the settlement directed the trustees to pay the income of the said sum of 10,000*l.*, and of the stocks, funds, shares, and securities in or upon or into or for which the same sum, or any part thereof, might be invested, converted, or transposed as in the said settlement mentioned:—*Held*, that this was in effect an assignment of two-thirds of the mortgage debt and not an assignment of a sum of 10,000*l.*, and that the 10,000*l.* must bear its proportion of the legacy duty and costs under the testator's will. *Repington, In re; Wodehouse v. Scobell*, 73 L. J. Ch. 533; [1904] 1 Ch. 811; 90 L. T. 663; 52 W. R. 522—Farwell, J.

Heirlooms—Re-settlement of Estate and Heirlooms—Absolute Owner—Liability of Trustees.—The second Marquis of A. by will directed that certain chattels in or about his mansion should be annexed to the mansion as heirlooms to be enjoyed by the persons entitled, under the limitations of a settlement of 1837, to the mansion-house. Under the settlement the mansion-house was settled at the death of the second marquis on the third marquis for life with remainder to the first son of the testator's nephew in tail male, with remainders over. The second marquis having died, the third marquis and Viscount S. (afterwards fourth marquis) by deed re-settled the estate

and appointed the defendants trustees of the settlement, assigning to them the chattels on trust to allow them to remain as heirlooms. The third marquis died in 1886, and the fourth marquis became bankrupt and died in 1894. The Crown thereupon claimed from the defendants legacy duty upon all the chattels settled by the will of the second marquis;—*Held*, that but for the re-settlement, the chattels would have become the absolute property of the fourth marquis, and that the defendants, as his assignees, became liable to pay the duty upon the death of the third marquis. *Att.-Gen. v. Bruce*, 70 L. J. K.B. 767; [1901] 2 K.B. 391; 85 L. T. 114; 49 W. R. 519; 65 J. P. 329—D.

Power of Appointment — Whether Power Exercised.]—A testator directed his trustees to hold half the residue of his estate for payment of the income thereof to his sister, so long as she remained unmarried, and on her death unmarried “to pay the capital of said half of my estate to the person or persons to whom she may bequeath the same by any will,” and, failing any direction by her, to pay it to certain specified legatees. The testator’s sister, who survived him and died unmarried, left a will which, after reciting the provisions of her brother’s will relating to this half of his estate, proceeded: “I now hereby declare that it is my wish and desire that the capital of the said half of the deceased’s whole estate shall be divided among the legatees appointed by him” under his will, and then, on the narrative that she now desired to “settle my own proper means and estate,” went on to dispose of her whole property to trustees for certain trust purposes. On the death of the sister the Crown claimed legacy duty on the half of the brother’s estate life-rented by her, on the plea that she exercised the power of appointment, and that the fund was a bequest by her to the appointees:—*Held*, that the sister had not exercised the power of appointment, and therefore that the legacy duty claimed was not payable. *Lord Advocate v. Rountledge’s Trustees*, [1907] S.C. 327—Ct. of Sess.

Power to Charge Profit-Costs—Administration—Solicitor-Trustee—Insolvent Estate.]—Where a solicitor is appointed executor and trustee of a will, and is empowered by his testator to make professional charges as solicitor to the estate, he will not be entitled to his profit-costs as against the creditors if the estate proves insolvent. The right to charge profit-costs is a legacy, and is liable to legacy duty. *White, In re*; *Pennell v. Franklin*, 67 L. J. Ch. 139; [1898] 1 Ch. 297; 77 L. T. 793; 46 W. R. 247—*Kekewich, J.* Affirmed in C.A., 67 L. J. Ch. 502; [1898] 2 Ch. 217; *see post*, SOLICITOR.

Gift—Trust to Carry on Testator’s Business—Share of Profits Payable to Employees.]—A testator provided for his business being carried on after his death and eventually being acquired by certain selected employees. He gave his trustees control of the business to the extent of appointing managers, granting authority to sign the firm name, and deciding as to winding up; but he selected fifteen employees to carry on the business, and provided that the free profits of the business, after paying 3 per cent. interest on his capital, should be divided annually in certain shares among these selected employees,

10 per cent. of each share being paid to the employee entitled thereto, the remaining 90 per cent. being retained by the trustees in part payment of the price of the business. When the fund formed by the 90 per cent. so retained amounted to the capital value of the business, the trustees were to convey the whole business to the selected employees. The provisions in favour of each of the selected employees were only to remain in force so long as the employee remained in the business, and the trustees were given power to dismiss any employee. The employees were to continue to receive their salaries as well as the 10 per cent. of the profits. After the testator’s death the business was successfully carried on under this arrangement, and large sums having been paid to the employees under the 10 per cent. provision, the Inland Revenue claimed legacy duty on these sums:—*Held*, that these sums were gifts payable out of the personal or movable estate of the testator within section 4 of the Stamp Act, 1845, and were not remuneration for services, and that consequently legacy duty was due. *Thorley, In re* (60 L. J. Ch. 537; [1891] 2 Ch. 613), followed. *Lord Advocate v. Dick’s Trustees*, [1907] S.C. 880—Ct. of Sess.

Shares—Restriction in Transfer—Principle of Valuation.]—By the articles of association of a company it was provided that any member proposing to transfer a share should serve a notice upon the company of his intention, which notice constituted the company his agent for the sale of the share to any member at the “fair value thereof,” the latter being defined as a sum of 100%, or such other sum as should from time to time be fixed as the “fair value” by resolution of the company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the “fair value.” Upon the company within twenty-eight days of the transfer notice finding a member willing to purchase, the retiring member was bound to transfer the share at the “fair value,” and in default of doing so the company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the company not finding a purchaser within twenty-eight days, the retiring member might within three months sell and transfer the share to any one, subject to the approval of the directors, and at any price. Upon the death of a testator holding shares in the company,—*Held*, that the principal value of the shares was to be estimated at the price which the same would, in the opinion of the Commissioners, fetch if sold in the open market on the terms that the purchaser should be entitled to be registered as the holder of the shares, and should take and hold them subject to the articles of association, including the articles relating to the alienation and transfer of the shares of the company. *Att.-Gen. v. Jameson*, [1905] 2 Ir. R. 218—C.A.

Payment—Direction to Pay “free from duty” —Insufficient Estate—Duties treated as Additional Legacies—Abatement.]—Where legacies are given “free from duty,” and the estate is insufficient to pay the legacies and the respective duties in full, the duty on each particular legacy is to be regarded as an additional legacy

and added to the original legacy, and then both legacies must abate rateably. *Turnbull, In re*; *Skipper v. Wade*, 74 L. J. Ch. 438; [1905] 1 Ch. 726; 53 W. R. 440—Farwell, J.

(d) *Succession Duty.*

Tenant for Life—Tenant in Tail—Disentailing Deed—Conveyance to Purchaser in Fee—Death of Purchaser—Death of Tenant for Life—Double Duty—Alienation—Acceleration.]—A tenant for life in possession and the tenant in tail in remainder of certain land executed a disentailing deed whereby they limited the land to such uses as they should jointly appoint. They then appointed the fee-simple in possession to a purchaser. The purchaser devised the land and died in the lifetime of the appointors. The devisee devised the land to the defendant (appellant) and died also in the lifetime of the appointors. The defendant paid succession duty on this death. Subsequently the appointor who had been tenant for life died:—*Held*, that succession duty was payable upon this death also, and that it must be calculated upon the actuarial value of the interest of the defendant, and not upon the life of the person who before the disentailing deed was tenant in tail in remainder. *Cooper and Harlech, In re* (46 L. J. Ch. 133; 4 Ch. D. 802), overruled. *Solicitor-Gen. v. Law Reversionary Interest Society* (42 L. J. Ex. 146; L. R. 8 Ex. 233) approved. *Northumberland (Duke) v. Att.-Gen.*, 74 L. J. K.B. 734; [1905] A.C. 406; 93 L. T. 88; 54 W. R. 31; 21 T. L. R. 639—H.L. (E.)

Full Enjoyment of Succession Deferred—Duty on Increased Value Accruing on Determination—"Successor."]—A testator devised real property let on lease, not purporting to be at a rack-rent, to a devisee in fee-simple. The devisee paid succession duty assessed on the rent reserved by the lease, and before the determination of the lease sold the property to the defendants subject to the lease. The annual value of the property at the determination of the lease was greater than the rent reserved by the lease. Upon an information on behalf of the Crown claiming succession duty from the defendants in respect of the increased value accruing to them on the determination of the lease as upon the value of an annuity equal to the amount of the increase of the annual value during the residue of their lives,—*Held*, that the succession to the property became fully vested in the devisee upon the death of the testator, and that the defendants, not being successors within the meaning of the Act, were only liable, under section 42 of the Act, as persons claiming in right of the successor, for duty as upon the value of an annuity equal to the amount of the increase of annual value for the residue of the life of the devisee. *Att.-Gen. v. Mander*, 65 L. J. Q.B. 246—D.

Annuity out of Rents of Real Estate—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life of Estate Subject to Trust.]—Testator, who died in 1876, by his will gave certain real estate to the use of trustees for a term of five hundred years, and subject thereto to uses in strict settlement, under which J. was tenant for life, with divers remainders over.

The trusts of the term were out of the rents and profits of the estates to raise and pay an annuity to the person for the time being entitled to the rents and profits subject to the term. Subject to that trust, the trustees were during twenty-one years from the testator's death to accumulate the rents and profits and invest them in land to be settled to the uses of the will, and, after the determination of the twenty-one years, to pay the rents and profits to the person for the time being entitled to the estates in reversion expectant upon the term:—*Held* (RIGBY, L.J., dissenting), that the duty payable in respect of the annuity was legacy duty and not succession duty. *In re, De Hoghton*; *De Hoghton v. De Hoghton* (No. 1), 65 L. J. Ch. 528; [1896] 1 Ch. 855—C.A.

Predecessor—Settlor—Marriage Portion.]—A step-daughter, who was contemplating marriage, was possessed of forty-five bank shares which had been presented to her by her step-father. These shares, at the request of the step-father, who told her that he had left her much more than their value, she handed over to her brother, and the step-father gave her a "marriage portion" of 5,000*l.*, which was put in settlement. The step-father died shortly after the marriage, and by his will, which was made some months before the marriage, he left the step-daughter a legacy of 5,000*l.* In a former suit the step-daughter and her husband had established that this legacy was not adeemed by the marriage portion of 5,000*l.*, and upon the death of her husband the Inland Revenue Commissioners claimed from the eldest son of the marriage, who was the successor, succession duty, under the Succession Duty Act, 1853, at the rate of 10 per cent. in respect of the 5,000*l.* put in settlement, upon the ground that the predecessor was the step-father, a stranger in blood. The eldest son contended that it was his mother who settled the 5,000*l.*, and that she was the predecessor:—*Held*, that before and at the time of the settlement the 5,000*l.* put in settlement belonged to the step-father and not to the step-daughter, and that he was the predecessor. *Held* also (*per* GIBSON, J., and KENNEDY, J.), that, notwithstanding the use of the word "portion" in the settlement, the step-father, and not the step-daughter, was to be deemed the settlor. *Att.-Gen. v. Biggs*, [1907] 2 Ir. R. 400—K.B.D.

Settlement by Father—Life Estate to Father—Remainder to Son subject to Defeasance on Predeceasing Father—Joint Power of Appointment to Father and Son—Appointment to Son in Fee in Lifetime of Father—Acceleration of Title—Extinction of Prior Interests.]—By an indenture made in 1833 a father, in view of the marriage of his son, conveyed an estate to trustees to hold the same on such trusts as the father and son should jointly appoint, and in default of and until such appointment to the use of the father for life, and after his decease to the use of the son in fee-simple in case he should survive the father, but if the son should die in the lifetime of the father, then if he should leave a son or sons who should have attained or should attain the age of twenty-one years, to the use of the son who should first or alone attain that age, but if he should leave no such son, then to the use of the father in fee-simple. By indenture made in September, 1894, the

father and son in exercise of the power of appointment jointly appointed the estate to the son in fee. The father died in May, 1895:—*Held*, that the execution of the power defeated the succession of the son under the settlement, and gave him a new title under the power of appointment, and consequently did not accelerate the succession of the son by the surrender or extinction of prior interests within the meaning of section 15 of the Succession Duty Act, 1853, and that the son did not become liable on the death of the father for succession duty under that Act in respect of the estate. *Att.-Gen. v. Selborne (Earl)*, 71 L. J. K.B. 289; [1902] 1 K.B. 338; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132—C.A.

Power of Appointment—Stock Sufficient to Raise "net sum."—The donee of a power of appointment under a settlement appointed that "so much of the stocks, funds, shares, and securities" subject to the settlement "as shall be sufficient to raise the net sum of 2,000*l.*" should thenceforth belong to and be vested in E., an object of the power:—*Held*, that E. was entitled to have the succession duty on the sum appointed paid out of the funds remaining unappointed. *Banks v. Braithwaite* (32 L. J. Ch. 35) questioned. *Saunders, In re*; *Saunders v. Gore*, 67 L. J. Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450; 46 W. R. 180—C.A.

Partnership Between Father and Son—Death of Father—Sale.—The father of the appellant, who had carried on a business for a long time, entered into partnership with his son, the appellant, for a term of years. The son brought no capital into the business, but, by the deed of partnership, it was agreed that one-third of the capital was to be deemed the son's, and that the profits were to be divided accordingly. It was also agreed that, if the partnership continued for the stipulated term, or was terminated by any other cause than the death of one partner, the son's share of the capital was to be one-half; and if the father died during the term, the son was to have the whole business and pay 10,000*l.* to the father's executors, and if the son died during the term, the father was to have back the whole business and pay 15,000*l.* to the son's executors. The father died during the term, and the Crown claimed succession duty from the son:—*Held*, that the partnership deed was of the nature of a family arrangement, and not a sale of the business to the son upon the footing of a commercial transaction, and that the duty was payable. *Brown v. Att.-Gen.*, 79 L. T. 572—H.L. (E.)

Charitable Society—Money Paid to Society in Lieu of Legacy—Agreement by Society to Pay Annuity to Donor—Purchase—Bona fide Sale—Estate Duty.—A charitable society accepted from one of its directors a sum of 500*l.* in lieu of a legacy, subject to a contract on their part for the payment of an annuity of 25*l.* to the donor during his life, and after his death to his wife during her life, in case she should survive him. The funds were not charged with the payment of the annuity, but the annuity was paid by the directors as one of the ordinary outgoings of the society. The commercial value of the annuity was 210*l.* The donor died in 1895, and his widow in 1900:—*Held*, that as the transaction amounted to a gift of 500*l.* to the society,

and not to a *bona fide* purchase of an annuity, estate duty became payable by the society, on the death of the donor, under section 2, sub-section 1 (c) of the Finance Act, 1894, upon the whole 500*l.*, and not merely upon 290*l.*—the difference between 500*l.* and 210*l.*, the value of the annuity. *Held*, further, that as there was a gift of the 500*l.* to the society, and not a disposition of property by *bona fide* sale within the exception in section 7 of the Succession Duty Act, 1853, the Crown was entitled to claim from the society succession duty upon the death of the widow in respect of the determination of the payment of the annuity. *Att.-Gen. v. Johnson*, 72 L. J. K.B. 323; [1903] 1 K.B. 617; 88 L. T. 445; 51 W. R. 487; 67 J. P. 113—C.A.

Annuity—Contract Inter Vivos—Alienation of Part of Succession.—A deed of arrangement was made between, first, the tenant for life of a residue—the widow of a testator who was a peer; secondly, five persons entitled in remainder to such residue contingently on their surviving the widow; and thirdly, the appellant, who, on failure of such survival, was entitled in remainder. By the deed the parties assigned their respective interests under the will to trustees, and an annuity was granted thereout during the widow's lifetime to the appellant, and after his death the said annuity was to be paid to the person for the time being holding the title. On the widow's death the five persons paid legacy duty on the whole residue:—*Held*, that the appellant's annuity, having been carved out of the succession of the five persons, was merely an alienation of part of that succession, and that the Crown was not entitled to duty thereon as upon a succession coming to the appellant from the testator's widow, or from the five persons, or from both; and by section 18 of the Succession Duty Act, 1853, the charge for succession duty was cleared by the payment of legacy duty. *Cooper and Allen's Contract, In re* (46 L. J. Ch. 133; 4 Ch. D. 802), disapproved. *Wolverton (Baron) v. Att.-Gen.*, 67 L. J. Q.B. 829; [1898] A.C. 535; 79 L. T. 58; 47 W. R. 97; 62 J. P. 708—H.L. (E.)

Devise—Rentcharges—Payment without Deduction except for Legacy Duty—Will—Confirmation by Codicil.—A testator gave certain annuities charged on real estate, "to be paid without any deductions except for legacy duty and income tax," by a will dated August 10, 1882. On May 16, 1888, the Customs and Inland Revenue Act, 1888, became law, by section 21, sub-section 2 of which "legacy duty" was abolished in the case of annuities charged on land, and a larger "succession duty" was substituted in its place. The testator confirmed his will by a codicil dated July 12, 1888:—*Held*, that the confirmation by codicil amounted to a republication of the will; that the reference to "legacy duty" must, under those circumstances, be construed as a *falsa demonstratio* for "succession duty"; and that the "succession duty" must, accordingly, be paid by the annuitants. *Rayer, In re*; *Rayer v. Rayer*, 72 L. J. Ch. 280; [1903] 1 Ch. 685; 87 L. T. 712; 51 W. R. 538—Farwell, J.

Policy of Life Insurance—Premiums—Marriage Settlement—Predecessor—Disposition.—In 1853 a policy of insurance for 4,000*l.* was

effected on his own life by A in contemplation of his second marriage, and by a contemporaneous marriage settlement C (the mother of his first wife), who was entitled for her life to the interest upon certain securities representing 3,500*l.* late currency, and A, who was entitled to the interest on the same securities for his life from the death of C, joined in assigning their interest in these securities during the life of A to trustees upon trust during the life of A to pay out of the annual proceeds thereof the premiums on the said policy of insurance, which, by the settlement, was assigned by A to the same trustees upon the trusts of the settlement. The settlement also contained a personal covenant by A with the trustees to pay the annual premiums upon the policy. The premiums were (it was assumed) paid by the trustees out of the annual proceeds of the trust securities. A died in 1876, leaving a widow and children of the second marriage, and C died in 1880, a stranger in blood to these children:—*Held*, that C was not a “predecessor” within the meaning of section 2 of the Succession Duty Act, 1853, and that succession duty at the rate of 10*l.* per cent. in respect of a moiety of the proceeds of the said policy of insurance, as upon a succession from C, was not payable under sections 2 and 13 of the same Act. *Att.-Gen. v. Riall*, [1906] 2 Ir. R. 122—K.B. D.

Purchaser for Valuable Consideration—Trustees of Marriage Settlement—Statute of Limitations.]

—In 1857 on the death of A lands became the subject of succession duty. B, the successor, died in 1867, having by will made in 1863 charged the lands with 5,000*l.* in favour of C. In 1872 C, on his marriage, assigned the charge for 5,000*l.* to the trustees of his settlement, on the ordinary trusts of a marriage settlement. The lands were afterwards sold at the suit of an incumbrancer, and the Inland Revenue Commissioners claimed to have the succession duty which became payable in 1857 satisfied out of the proceeds of the sale in priority to the trustees of the marriage settlement of 1872:—*Held*, that the trustees of the marriage settlement were purchasers for valuable consideration within the meaning of section 12 of the Customs and Inland Revenue Act, 1889, that as against them the succession duty was barred after the lapse of twelve years, and that they were accordingly entitled to priority over the Inland Revenue Commissioners. *Donelan's Estate, In re*, [1902] 1 Ir. R. 109—C.A.

Acceleration of Interest.]—By settlement certain property was conveyed to trustees for such uses as the settlor and his son should, with the consent of the son's wife, appoint, and in default of appointment to the use of the settlor for life, and after his death to the settlor's son in fee. The settlor and his son with the consent of the son's wife appointed the property to the son, his heirs, and assigns for his absolute use and benefit:—*Held* (PHILLIMORE, J., dissenting), that succession duty was payable by the son on the death of his father, inasmuch as under section 15 of the Succession Duty Act, 1853, the former's interest had been accelerated. *Att.-Gen. v. Selborne (Earl)*, 65 J. P. 342—D. Reversed, C.A. See col. 2097.

Property Situate Abroad—Gift by Foreigner to

English Company.]—By an indenture made between the owner of certain property situated abroad and the defendants, reciting that he had agreed to give and the defendants had agreed to accept the stocks, shares, bonds, and securities specified in the schedule on the terms therein-after expressed, it was witnessed that the defendants would, during the life of the donor, permit the donor or his agents to receive the income of the investments, and would after his death apply the stocks, shares, and securities for the benefit of the Russian Jews generally and principally for the promotion of their emigration and settlement in North and South America. The defendants were a company registered in England under the Companies Acts, and having a registered office in London where the register of members was kept. The annual general meetings of the company were held in England, but some of the business of the company was transacted at the donor's house in Paris. The defendants paid to the donor the income of the investments during his life. He died in 1896 domiciled in Austria:—*Held*, that the defendants were liable to pay estate duty under the Finance Act, 1894, and succession duty under the Succession Duty Act, 1853, in respect of the value of the stocks, shares, bonds, and securities specified in the schedule to the indenture. *Att.-Gen. v. Jewish Colonisation Association*, 70 L. J. K.B. 101; [1901] 1 K.B. 123; 83 L. T. 561; 49 W. R. 230; 65 J. P. 21—C.A.

Executor's Right of Retainer—Plene Administravit.]—A debt in respect of which an executor has exercised his right of retainer must be treated as a debt paid by him, and not as money remaining in his hands. Where therefore an executor has, without notice of any claim for succession duty, fully administered his testator's estate, retaining a portion of the assets in payment of a debt to himself, a subsequent claim for succession duty cannot be enforced against the portion of the assets so retained by the executor. *Fludyer, In re; Wingfield v. Erskine*, 67 L. J. Ch. 620; [1898] 2 Ch. 562; 79 L. T. 298; 47 W. R. 5—Romer, J.

5. EXCISE.

Auctioneer's Licence—“Same town or place.”]—The respondent, an auctioneer, as agent for T., sold certain wine at Sydenham, in the county of London. T. was duly licensed to sell intoxicating liquors in the City of London, in the same county:—*Held*, that Sydenham and the City of London are not “in the same town or place” within section 1 of the Revenue Act (No. 2), 1864. *Casey v. Rose*, 82 L. T. 616; 19 Cox C.C. 510—D.

Beer—Conditional Contract of Sale—Incidence of Tax.]—By section 20 of the Customs Consolidation Act, 1876, as applied by section 8 of the Finance Act, 1900, the new excise duty on beer imposed by the latter Act may be added to the contract price of the beer where the contract or agreement for the sale or delivery of the beer duty-paid was made before the passing of the Act. An agreement under which the purchaser is bound to buy his beer from a certain brewer, provided the latter is willing to sell it to him duty-paid, at a certain price, is not a contract for the sale or delivery

of the beer within section 20. The contract for sale in such case is made only when the order for the delivery of beer is given to the brewer in pursuance of the conditional agreement, and if such order was given after the passing of the Finance Act, 1900, the brewer is not entitled under section 8 to add the new duty to the price payable by the purchaser though the conditional agreement was made before it. *Newbridge Rhondda Brewery Co. v. Evans*, 86 L. T. 453—D.

"Carriage"—Motor Bicycle.]—A motor bicycle is, within the meaning of section 4 of the Customs and Inland Revenue Act, 1888, a "carriage" for which a licence is required, as being a carriage drawn or propelled upon a road by mechanical power. *O'Donoghue v. Moon*, 90 L. T. 843; 68 J. P. 349; 20 T. L. R. 495—D.

—Governess Cart—Vehicle "constructed or adapted for use" solely for Conveyance of Goods.]—Upon the hearing of an information charging the respondent with keeping a carriage without a licence, it was proved that he drove a pony attached to a governess cart. The respondent gave evidence that the vehicle was used solely for the purposes of his business of a wardrobe dealer, and that he never used it for pleasure, but only drove in it to private houses to call for and bring away goods after receiving orders:—*Held*, that the vehicle did not come within the exception to the definition of "carriage" in section 4, sub-section 3 of the Customs and Inland Revenue Act, 1888, of "a waggon, cart, or other such vehicle, which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry." *Moore v. Lewis*, 75 L. J. K.B. 89; [1906] 1 K.B. 27; 93 L. T. 812; 54 W. R. 194; 70 J. P. 26; 22 T. L. R. 51—D.

The word "solely" in that clause applies to the preceding words "constructed or adapted for use." *Id.*

A governess cart that was used for collecting debts and obtaining orders by a travelling upholsterer, and which was used for the conveyance of goods and solely in connection with the business, is not a vehicle "constructed or adapted for use and is used solely for the conveyance of any goods . . . in the course of trade," and so exempt from requiring a carriage licence. *Whitham v. Morris*, 93 L. T. 813; 70 J. P. 11; 21 Cox C.C. 64—D.

—Cars on Light Railway—"Railway"—General Enactment relating to Railways.]—A light railway constructed under a Light Railway Order made pursuant to the Light Railways Act, 1896, is a "railway," and therefore the cars running thereon are, by sub-section 3 of section 4 of the Customs and Inland Revenue Act, 1888, exempt from the Excise duty on carriages. *Wakefield and District Light Railway v. Wakefield Corporation* (76 L. J. K.B. 634; [1907] 2 K.B. 256) applied. *Att.-Gen. v. Yorkshire (Woollen) District Electric Tramways*, 77 L. J. K.B. 33; [1907] 2 K.B. 991; 97 L. T. 343; 71 J. P. 506; 5 L. G. R. 1098; 23 T. L. R. 712; 5 L. G. R. 1098—Bray, J.

—Farm Cart Carrying Labourers.]—The

respondent, who was a farmer, owned a cart, which he was in the habit of using for the conveyance of farm produce, and also for occasionally driving his farm hands to and from their work. The cart was once used for conveying, among others, a person who was on a visit to the farmer, and who had during his visit assisted in the farm work. Upon an information charging the respondent with keeping a carriage without a licence, the quarter sessions held that farm labourers driven to and from their work were "burden in course of . . . husbandry" within the exception in section 4 of the Customs and Inland Revenue Act, 1888, and dismissed the information:—*Held*, that, upon the facts, the quarter sessions were right in refusing to convict. *Latchford v. Kelsey*, 96 L. T. 620; 71 J. P. 225; 23 T. L. R. 416—D.

—Penalty—First Offence.]—Section 4 of the Summary Jurisdiction Act, 1879, as far as reduction of fines is concerned, applies only to first offences. Fines for second and subsequent offences are regulated by 7 & 8 Geo. 4, c. 53, s. 78, under which such fines cannot be reduced below one-fourth of their full amount as imposed by statute. To constitute a second offence under 32 & 33 Vict. c. 14, s. 27, it is not necessary to be convicted twice in the same year of keeping a carriage without having a licence for that year. A conviction in one year of keeping a carriage without a licence for that year, following a conviction in a previous year for keeping a carriage without a licence for that year, is a second conviction for the same offence. *Phillips v. Stephens*, 79 L. T. 280; 62 J. P. 789; 19 Cox C.C. 172—D.

"Male Servant"—Apprentice not Included.]—An apprentice is not a male servant within the meaning of sections 18 and 19 of the Customs and Inland Revenue Act, 1869. *Horan v. Hayhoe*, 73 L. J. K.B. 133; [1904] 1 K. B. 288; 90 L. T. 12; 52 W. R. 281; 68 J. P. 102; 20 T. L. R. 118—D.

— "Gardener"—"Under-gardener"—Employed "in any capacity involving the duties" of Gardener or Under-gardener—Spade work in Garden.]—Whether a workman employed all his time in working in a garden is or is not a gardener or under-gardener or a person employed in any capacity involving the duties of a gardener or under-gardener, within 32 & 33 Vict. c. 14, ss. 18 and 19 (3), is a question of fact to be decided by the Justices on the evidence submitted to them. *Dillon v. Bath (Marquis)*, 81 L. T. 186; 63 J. P. 597—D.

The mere employment in a garden of a man doing work which a single-handed gardener would have to do does not necessarily make the man a gardener, and Justices, in deciding the point, are entitled to consider whether or not the work done by him is work for the proper execution of which skill in gardening is required. *Id.*

—Steward of Working Men's Club.]—The respondents, the committee of a working men's club, had power to discharge the steward, who had to be a member of the club, and was paid by the committee 38s. a week. He served at a bar at a window, but did not leave the bar

to wait on the members, but passed what was ordered through the window. Besides accounting for moneys he received, this was the only service rendered by him. No licence had been taken out by the defendants in respect of such steward:—*Held*, that he was a "male servant" within section 19, sub-section 3 of the Customs and Inland Revenue Act, 1869, and that the respondents should have taken out a licence in respect of him. *Solomon v. Cropper*, 79 L. T. 301; 62 J. P. 758—D.

— **Waiter—Persons Employed at Shop—Carrying up Meals for Employees and Waiting on them.**—The appellant company owned large premises where they carried on business, and they employed a large number of assistants. The assistants were served daily with meals on the premises, and the company employed a certain number of men, whose duty it was to carry the joints, vegetables, dishes, plates, &c., from the kitchen to the room where the meals were eaten, to wait on the assistants at the meals, to clear the table and lay it for the next meal, and to clean the knives and plates. These men did not sleep on the premises, but came early in the morning and left in the evening, and after leaving they were free from the company's control, and might engage in other employments. None of the directors, managers, or shareholders of the company resided on the premises:—*Held*, that these men were not "male servants" within section 18 of the Revenue Act, 1869, as defined by section 19, sub-section 3 of the Act. *Whiteley v. Burns*, 77 L. J. K.B. 467; [1908] 1 K.B. 705; 72 J. P. 127—D.

— **"Manufacture"—Increasing the Sweetness of Saccharin—Chemical Process.**—The appellants, who were dealers in saccharin, having purchased certain 330 saccharin, subjected it to a chemical process, the result of which was to convert it into 550 saccharin—an article possessing much greater sweetness than 330 saccharin. The appellants at the time they so treated the 330 saccharin had not in force an Excise licence for the manufacture of saccharin:—*Held* (RIDLEY, J., dissenting), that the appellants had not manufactured saccharin within the meaning of section 9 of the Finance Act, 1901, and section 2 of the Revenue Act, 1903, and that they were, therefore, not bound to take out an Excise licence. *McNicol v. Pinch*, 75 L. J. K.B. 741; [1906] 2 K. B. 352; 95 L. T. 530; 70 J. P. 438; 21 Cox C.C. 299; 22 T. L. R. 654—D.

— **Plate—Duty on—Coupons Delivered with Packets of Tea—Prizes in Exchange for Coupons—"Trading in or selling" Plate.**—The appellants, a firm of tea merchants, sold packets of tea, with which were delivered coupons entitling the purchasers, or other persons into whose hands the coupons might come, to participate in the chance of obtaining prizes offered by the appellants. Some of the prizes which were offered and awarded were gold watches:—*Held*, that this amounted to a "trading in or selling" of plate within the meaning of section 1 of the Revenue Act, 1867, and consequently that the appellants were liable to the penalty imposed by section 3 of that Act for dealing in plate without being licensed so to do. *Scott v. Solomon*, 74 L. J. K.B. 262; [1905] 1 K.B. 577; 92 L. T. 325; 53 W. R. 459; 69 J. P. 137; 21 T. L. R. 230—D.

— **Public-house—Billiard Saloon in Flat above Public-house—No Internal Communication.**—Immediately above, and in the same building with a public-house, was a flat which was let to the occupier of the public-house, and was occupied by him as a billiard saloon. The upper flat did not have internal communication with the public-house premises, but separate access was obtained thereto by means of an outside stair:—*Held*, that, in charging licence duty the Inland Revenue Commissioners were not entitled to aggregate the value of the billiard saloon with the value of the public-house premises. *Paterson v. Lord Advocate*, 8 F. 880—Ct. of Sess.

— **Spirits in Bond—Licence for the Sale of—"Dealer in spirits."**—The appellant, a ship store merchant, rented a Customs bond in which he kept a quantity of spirits. He sold twelve quart bottles of these spirits to the captain of a foreign vessel in an English port. The goods were conveyed to the ship in the ordinary course, and were there sealed up by a Customs official. The seal was not broken until the vessel was at sea outside territorial waters:—*Held*, that the appellant was a "dealer in spirits" within the meaning of section 2 of the Excise Licences Act, 1825, and must take out an excise licence. *Tinwell v. Mayhew*, 73 L. J. K.B. 699; [1904] 2 K.B. 790; 91 L. T. 145; 53 W. R. 14; 68 J. P. 350; 20 T. L. R. 488—D.

— **Possession of Spirits Exuding from Wood of Empty Casks—When Offence Committed—Extraction of Spirits Absorbed in the Wood.**—Section 4, sub-section 1 of the Finance Act, 1893, does not include as an offence the innocent possession of spirits which, having been absorbed, have afterwards exuded from the wood of empty casks without any active or permissive process to lead to the extraction of the spirits. For the purposes of the section "extraction" is the drawing-out of the spirit from the wood by some process natural or artificial, as distinguished from the natural exudation or sweating to which empty casks are liable. *Robinson v. Dixon*, 72 L. J. K.B. 717; [1903] 2 K.B. 701; 89 L. T. 132; 52 W. R. 8; 67 J. P. 386; 20 Cox C.C. 521—D.

— **Soliciting Orders at Unlicensed House—Executing Orders at Licensed House—Penalty.**—A grocer carried on business at two sets of premises, at one of which he was licensed to sell beer by retail, and at the other of which he was not so licensed. At the unlicensed premises he solicited orders which he executed at the licensed premises:—*Held*, that he was rightly convicted of soliciting orders without having in force a proper Excise licence authorising him so to do within the meaning of section 17 of the Revenue Act, 1867. *Elhas v. Dunlop*, 75 L. J. K.B. 168; [1906] 1 K.B. 266; 94 L. T. 164; 70 J. P. 103; 22 T. L. R. 162; 21 Cox C.C. 105—D.

6. INCOME TAX.

(a) Exemption.

— **Crown—County and Municipal Buildings.**—(1) A hall in the Sheriff Court buildings of Lanark used for purposes of county administra-

tion, and occasionally for the holding of police and magistrates' Courts; (2) offices in the same building occupied by the town clerk; and (3) offices occupied by the Procurator-Fiscal of the Sheriff Court, used by him for private as well as official business, were held assessable to income tax in respect that they were not used and occupied exclusively for the service of the Crown. *Surveyor of Taxes v. Smith*, 4 F. 31—Ct. of Sess.

Limited Company.—A limited company is not entitled to exemption from payment of income tax under section 163 of the Income Tax Act, 1842, and section 34 of the Finance Act, 1894, notwithstanding that the aggregate annual amount of its income does not exceed 160*l.* *Myham v. Market Harborough Advertiser Co.*, 74 L. J. K.B. 205; [1905] 1 K.B. 708; 92 L. T. 94; 53 W. R. 478; 21 T. L. R. 201—Phillimore, J.

Society or Association.—The area of exemption under the Income Tax Acts is not co-extensive with the area of charge, but is confined to persons strictly so called. Thus the respondents, an unincorporated society, with an income of less than 160*l.*, were held not to be entitled to the exemption conferred by the Finance Act, 1894. *Curtis v. Old Monkland Conservative Association*, 75 L. J. P.C. 31; [1906] A.C. 86; 94 L. T. 7; 22 T. L. R. 177—H.L. (Sc.)

Unincorporated Society.—An unincorporated society whose aggregate annual income is less than 160*l.* is entitled to exemption from income tax. *Inland Revenue v. Old Monkland Conservative Association*, 7 F. 119—Ct. of Sess.

Untruly Declaring Income—Penalty.—A person found guilty under section 166 of the Income Tax Act, 1842, of untruly declaring his income is liable in the forfeiture mentioned in the section, although no exemption or abatement has in fact been allowed. The amount upon which the treble duty is to be calculated is the person's whole income, including income upon which duty has already been deducted or paid. *Lord Advocate v. M'Laren*, 7 F. 934—Ct. of Sess.

Per LORD KINNEAR.—To involve liability for the penalties specified in section 166 the declaration must be not merely inaccurate, but false and untruthful. *Ib.*

(b) *What Property Liable to.*

What is Income Tax.—Income tax is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties assessed under Schedule D and those assessed under Schedule A or any of the other schedules. *London County Council v. Att.-Gen.*, 70 L. J. K.B. 77; [1901] A.C. 26; 83 L. T. 605; 49 W. R. 686; 65 J.P. 227—H.L. (E.)

Interest on Money Borrowed—"Payable out of profits or gains brought into charge to such tax"—**Rents—Interest on Money Lent.**—By section 24, sub-section 3 of the Customs and Inland Revenue Act, 1888, "upon payment of any interest of money or annuities charged

with income tax under Schedule D, and not payable or wholly payable out of profits or gains brought into charge to such tax," the person paying such moneys is to deduct the tax and render an account to the Commissioners of Inland Revenue "of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge":—*Held*, that the words "charged with income tax under Schedule D" mean "charged under Schedule D with income tax," and the words "such tax" mean the tax which is called in the Act "income tax"; and that the appellants were entitled to the income tax deducted under Schedule A from the rents paid by their tenants on so much of the dividends on their Consolidated Stock as was paid out of the said rents, as well as to the tax deducted from interest paid under Schedule D. *Ib.*

"Person residing in the United Kingdom"—"Trade exercised within the United Kingdom"—**Company—Incorporation and Registration Abroad—Head Office Abroad—General Meetings Abroad—Office in England—Directors' Meetings in England and Abroad—Control and Management in England.**—A foreign company may be a "person residing in the United Kingdom" within the meaning of section 2, Schedule D, Income Tax Act, 1853, notwithstanding that its head office is situated abroad and its general meetings are held abroad. A company incorporated and registered abroad, which has an office in London and directors living in the United Kingdom, is resident here within the meaning of the Income Tax Act, 1853, s. 2, Sched. D, and liable to income tax in this country. *De Beers Consolidated Mines, Lim. v. Howe*, 75 L. J. K.B. 358; [1906] A.C. 455; 95 L. T. 221; 22 T. L. R. 756; 13 Manson, 394—H.L. (E.)

A company incorporated and registered in South Africa had its head office in Kimberley, in the Cape of Good Hope, and an office in London. The general meetings were held in Kimberley and the general accounts were kept there. Any member might name an address in South Africa to be registered as his address for service of notices, and if he did not do this he was deemed to have waived service. The company owned extensive diamond mines and property in South Africa. Its profits were made from the sale of diamonds to a syndicate of diamond merchants in London under contracts of sale, executed in London, which provided for the sale of diamonds with delivery at Kimberley, to the syndicate in specified amounts at specified prices with various options, and entitled the company to share in certain profits made by the syndicate on re-sale, and contained terms regulating the output of diamonds, the effect of which was to control the diamond trade of the world. The management of the company was entrusted to three life governors and sixteen ordinary directors, of whom four had to reside in England. Two of the life governors and nine of the ordinary directors resided in the United Kingdom; the chairman and six ordinary directors resided in the Cape Colony. Meetings of directors were held weekly in Kimberley and London with an exchange of minutes between the two places. The proceedings of the board of directors sitting in

Kimberley and in London were regulated by by-laws, providing (1) that the course of business respecting the technical management of the company's work, payment of wages, &c., should be determined upon by the directors in Kimberley, they consulting the directors in London upon matters of exceptional importance; (2) that all other expenditure exceeding 25,000*l.* should be determined upon by the majority of all the directors, but the directors in Kimberley, with the sanction of the chairman, might in special circumstances incur an expenditure not exceeding at one time 50,000*l.* in addition, but that no further expenditure should be incurred unless the authority of the Kimberley directors was confirmed by the majority of all the directors; (3) that the policy of the board respecting the disposal of diamonds and other assets, the working or development of the mines, application of profits, and appointment of directors should be determined by the majority of all the directors; (5) that matters to be determined by the majority of all the directors should be determined by resolution to be submitted to meetings of directors in Kimberley and London, and that the ultimate decision should be in accordance with the vote of the majority thus ascertained; (6) that except as before provided the directors in Kimberley and the directors in London should have equal and concurrent authority. Matters under by-law 8 were always dealt with in London; as regards such matters and matters under by-law 5 the majority of directors voting was always in London. The directors in London, under powers conferred upon the directors generally, had appointed four committees in London to deal with various departments of the company's business:—*Held*, first, that the company was "a person residing in the United Kingdom"; and secondly, that it exercised its trade within the United Kingdom, so as on either ground to be chargeable with income tax under section 2, Schedule D of the Income Tax Act, 1853. *Ib.* S.C. in C.A., 74 L. J. K.B. 934; [1905] 2 K.B. 612; 93 L. T. 63; 54 W. R. 9; 21 T. L. R. 578.

Company — Incorporation and Registration Abroad—Head Office in England—General Meetings—Directors' Meetings—Company's Business.]—A company may be a "person residing in the United Kingdom" within the meaning of section 2, Schedule D of the Income Tax Act, 1853, notwithstanding that it is incorporated and registered abroad. *Goers v. Bell*, 73 L. J. K.B. 448; [1904] 2 K.B. 136; 90 L. T. 675; 53 W. R. 64; 20 T. L. R. 848—Channell, J.

A company was incorporated and registered abroad for the purpose of prospecting and developing mining properties abroad and of floating companies for working them and of making a market for the shares in those companies. The general meetings of the company were held abroad. The head office was in London. The directors had power to appoint agencies for managing the affairs of the company abroad. The meetings of the directors, some of whom resided abroad and some in the United Kingdom, were held in London. The accounts were made up and audited, the dividends were declared, and the books of the company were kept in London. The greater part of its capital was invested abroad. The greater

part of its business was done in London:—*Held*, that the company was a "person residing in the United Kingdom" within the meaning of section 2, Schedule D of the Act. *Ib.*

Company Registered in England—Business Carried on and Profits Made Abroad—Profits Partly Transmitted to England.]—An English company, registered under the Companies Acts, and having its registered office in London, was formed for the purpose of acquiring the shares in an American brewery company, and for the purpose of carrying on a brewery business. The vendors of the American company sold to the English company all the shares except three in the American company, and all the personal property of the American company was transferred to the English company. In order to avoid any difficulties with regard to the American laws of real property, the American company was kept on foot. The English company found the capital for carrying on the brewery business, which was wholly carried on in America. All the profits were earned in America. The directors of the English company had the entire right of control of the affairs of the American company and of the staff and business in America, with full power to appoint or dismiss any of the managers or officials of the business in America. In fact, the directors of the English company delegated these powers to the managers of the brewery in America, who were also the directors of the American company, and appointed them managers of the business in America. A portion of the profits earned was transmitted to England for the expenses incurred in England and for distribution amongst the English shareholders. The rest of the profits remained in America, and were distributed among American shareholders:—*Held*, that the business was in fact partly carried on in England, and therefore the English company was liable to pay income tax upon the whole of the profits earned by the business, and not merely upon that part of the profits which was transmitted to England. *San Paulo (Brazilian) Railway v. Carter* (65 L. J. Q.B. 161; [1896] A.C. 31) followed. *Apthorpe v. Peter Schoenhofen Brewing Co.*, 80 L. T. 395—C.A.

Company Resident in England—Business Carried On and Profits Made Abroad—Profits Partly Distributed Abroad and Partly in England to English Shareholders.]—An English company registered under the Companies Acts, and with a registered office in London, was formed to acquire the whole or any part of the capital stock of the St. L. B. A. in America, to carry on the business of brewers, and for other purposes. It acquired 50,872 shares out of 50,886 of the St. L. B. A. The brewing business upon which the whole of the profits depend is carried on exclusively at St. Louis in America under the immediate management of the directors of the American corporation. These directors in the printed reports of the English company are termed the "board of management in St. Louis." The banking account of the American corporation and all the books are kept at St. Louis. An English accountant is appointed by the appellant company, who proceeds to America at the end of each financial year and audits the accounts of the eighteen breweries at St. Louis. At the same time a balance-sheet of the American

corporation and a profit and loss account are prepared shewing the result of the brewing business for the past year. A copy is forwarded by the American corporation to the appellant company, and the directors of the appellant company then consider the accounts and agree upon the rate of dividend which they consider should be declared. They communicate their decision to the American corporation, who then have always declared a dividend upon the shares of the American corporation at the rate mentioned. The directors of the American corporation having declared the dividend, the directors of the appellant company then declare a dividend upon the shares of the appellant company. No dividend warrant is issued by the American corporation. Each shareholder, upon production of his certificate, is entitled to be paid the amount due to him. The amount of dividend on the shares held by the appellant company is sent over in bulk by telegram, so far as it is required for the English shareholders and for the current expenses in England. Such portion of the dividend as is required for American shareholders is retained in America by the American company and distributed there direct:—*Held*, that this was a business carried on in America by the English company, and that they were therefore liable to pay income tax on the whole of the profits. *St. Louis Breweries v. Apthorpe*, 79 L. T. 551; 47 W. R. 334; 63 J. P. 135—D.

Company—Registration and Registered Office Abroad—Control and Direction in United Kingdom.—A shipping company was registered in New Zealand, and had its registered office in that country. Its head office in the United Kingdom controlled and directed the business of the company in the United Kingdom and elsewhere:—*Held*, that the company was rightly assessed to income tax under Schedule D as residing within the United Kingdom. *New Zealand Shipping Co. v. Stephens*, 96 L. T. 50; 23 T. L. R. 213—Bray, J. Affirmed in C.A., 24 T. L. R. 172.

Foreign Company—Shares held by English Company—Control by English Company—Liability of English Company to be Taxed on Profits of Foreign Company.—A company was incorporated in England, and registered under the Companies Acts, to acquire (*inter alia*) not less than 95 per cent., and did in fact acquire 98 per cent., of the share capital of a foreign company, the remaining 2 per cent. being held by shareholders abroad who were independent of the English company:—*Held*, that the right of the English company as regards the profits of the foreign company was a right to receive dividends only, that the English company was not the principal of the foreign company so as to make the latter their mere agent (the control of the English company over the business of the foreign company being a control as a shareholder only), or to make the business of the foreign company the business of the English company; and, consequently, that the latter could not be taxed on the profits made by the former. *Kodak, Lim. v. Clark*, 72 L. J. K.B. 369; [1903] 1 K.B. 505; 88 L. T. 155; 51 W. R. 459; 67 J. P. 213—C.A.

— **Control by English Company—Part of Profits of Foreign Company Set Aside for**

Depreciation—Liability of English Company to be Taxed on the Profits of Foreign Company so Set Aside.—A company was incorporated in England and registered under the Companies Acts to acquire the business and assets of another English company which was largely interested in a German company. The new company, in fact, acquired all the shares in the German company, and nominated the officers of the German company. The English company in its report for the year ending June, 1901, included a sum of 79,348l., the profits of the German company, but of that amount 15,000l. was, in accordance with the regulations of the German company, transferred to a depreciation fund with reference to patents:—*Held*, that the business of the German company was not the business of the English company; that the English company was only entitled as a shareholder of the German company to the dividends which were declared; that the profits of the German company were not the profits of the English company, and that consequently the English company was not liable to pay income tax on the sum so set aside by the German company for the depreciation of patents. *Gramophone and Typewriter, Lim. v. Stanley*, 75 L. J. K.B. 1031; [1906] 2 K.B. 856; 95 L. T. 461—Walton, J. And see *infra*, FOREIGN SECURITIES.

Residence in United Kingdom.—A British merchant carried on business in Madras, and usually resided there, but his wife, with the children, lived for a number of years in the United Kingdom, occupying latterly a house belonging to her and purchased with his and her money, and he resided with them for months at a time when he came to the United Kingdom, as he did nearly every year. In the year of assessment ending April 5, 1903, he was never in the United Kingdom. In a question as to his liability to be assessed for income tax for that year,—*Held*, that he was not a person "residing in the United Kingdom" within the meaning of the Income Tax Act, 1853, and therefore not liable to assessment. *Turnbull v. Inland Revenue*, 7 F. 1—Ot. of Sess.

An American citizen, having his ordinary residence, and practising his profession, in New York, held for some years a lease of a furnished shooting-lodge and shootings in Scotland. He resided at the shooting-lodge for two months in each year, and the lodge was ready for his use at any time. His residence in New York was also kept open for his use at any time:—*Held*, that he was a person "residing in the United Kingdom" (within the meaning of section 2, Schedule D of the Income Tax Act, 1853, and was therefore liable to assessment for income tax, and that he did not fall within the exemption in section 39 of the Income Tax Act, 1842, of a person in Great Britain "for some temporary purpose only, and not with any view or intent of establishing his residence therein." *Inland Revenue v. Cadwalader*, 7 F. 146—Ot. of Sess.

Agent—Underwriting Transactions—Agent in Receipt of Profits Belonging to other Persons—List of Names and Addresses of Constituents and Profits of Each.—A firm acted as underwriters, both in their own name and for other persons, under a mandate, by which they were authorised,

as agents for these persons, to underwrite in their names and for their account a sum not exceeding a certain amount on each risk, on such terms as the firm thought fit. The firm under their contract at the end of each year drew out a statement of the balance of profit and loss on the underwriting transactions on behalf of each of the persons for whom they underwrote, and, if there was a balance of profit, handed it over to him, under deduction of a commission and of a sum which, it was stipulated, should remain in their hands as security:—*Held*, on the construction of sections 42 and 51 of the Income Tax Act, 1842, that the firm were bound to deliver to the assessor of income tax a list of the persons for whom they conducted the business of underwriting, with the names and addresses of such persons, and to include in such list the amount of profit belonging to each person. *Lord Advocate v. Gibb*, 8 F. 887—Ct. of Sess.

— **Foreign Principal—Sales through Agent in United Kingdom—Exercising Trade within United Kingdom.**—Where goods are consigned by a foreign merchant to an agent in the United Kingdom merely for the purpose of sale, the foreign merchant exercises a trade within the United Kingdom within the meaning of section 2 of the Income Tax Act, 1853, and is chargeable with income tax in the name of such agent; and it makes no difference that the agent fixes the prices and sells the goods in his own name. *Watson v. Sandie*, 67 L. J. Q.B. 319; [1898] 1 Q.B. 326; 77 L. T. 528; 46 W. R. 202—D.

— **"Almshouse"—Income Tax—Exemptions from Payment—Inhabited-house Duty—"House provided for the reception or relief of poor persons."**—An institution was founded and endowed, and conveyed by the founder to trustees upon trust that it might at all times thereafter be used as a home for ladies in reduced circumstances. By the rules of the institution a person to be an inmate must be fifty years old or upwards, and must be possessed of a fixed yearly income of not less than 25*l.* or more than 55*l.* Each inmate was entitled to the use of the common room and to the exclusive use of one or two rooms, and to be supplied with coals, gas, and attendance free of cost, but was required to provide her own furniture, food, clothing, washing, and medical attendance:—*Held*, that the institution was an "almshouse" within the meaning of the Income Tax Act, 1842, s. 61, No. 6, clause 2, and a "house provided for the reception or relief of poor persons" within the meaning of the House Tax Act, 1808, Sched. B, Case IV., and was therefore exempt from property tax and inhabited-house duty under those enactments respectively. *Mary Clark Home (Trustees) v. Anderson*, 73 L. J. K.B. 806; [1904] 2 K.B. 645; 91 L. T. 457; 20 T. L. R. 626—Channell, J.

— **"Annuity"—Purchase of Railway—Payment by an "Annuity" for a Term of Years—Capital and Income.**—The Government of India, in exercise of powers contained in a contract made in 1849 between the East India Co. and the Great Indian Peninsular Railway Co., purchased the railway, the purchase-money to be paid by an "annuity" during the residue of the term limited in the contract, and the interest to be calculated at 2*l.* 17*s.* per cent.:—*Held*, that the word "annuity" was not used

in the sense in which it is used in the Income Tax Acts, but constituted a form of payment, with interest on the amount from time to time outstanding, of an antecedent debt, and that income tax was only payable upon so much of the annuity as represented interest. *Secretary of State in Council of India v. Scoble*, 72 L. J. K.B. 617; [1903] A.C. 293; 89 L. T. 1; 51 W. R. 675—H.L. (E.)

— **Purchase of Indian Railway—Annuity Consisting partly of Interest and partly of Sum to Produce Sinking Fund to Replace Capital.**—The Secretary of State for India was empowered under certain contracts to purchase the plaintiff company's railways at the expiration of a specified number of years, either for a gross sum or for an annuity for a term of years. Before the period arrived at which the option to purchase was exercisable, negotiations were entered into between the parties for the purchase of the railways, and an agreement was arrived at, subsequently sanctioned by Parliament, by which the Secretary of State purchased the railways for an annuity terminable at the end of seventy-three years, and payable half-yearly to the plaintiffs, the annuity being 5*l.* 12*s.* 6*d.* for each 100*l.* of capital stock commuted at a price of 125*l.* This annuity was calculated on the basis of 5*l.* 7*s.* 6*d.*, part thereof, being interest at the rate of 4*l.* 6*s.* per cent. on the 125*l.*, and of a sum of 5*s.* other part thereof, being the amount required to be set aside and invested half-yearly at a like rate of interest in order to produce, by means of a sinking fund, the capital sum of 125*l.* at the end of the seventy-three years:—*Held*, first, that the annuity was partly a payment of capital by instalments and partly a payment of interest on the unpaid capital, and that income tax was payable only upon so much of it as represented interest on unpaid capital; and secondly, that in estimating in each half-yearly payment the amount on which income tax was payable, the proportion representing capital must be taken as continually increasing, and the proportion representing interest on unpaid capital as continually decreasing. *Secretary of State of India v. Scoble* (72 L. J. K.B. 617; [1903] A.C. 299) applied. *East India Railway v. Secretary of State for India*, 74 L. J. K.B. 779; [1905] 2 K.B. 413; 93 L. T. 220; 54 W. R. 4; 21 T. L. R. 606—C.A.

— **Deduction of Tax by Person Liable.**—Under a deed of separation a husband bound himself to make payment of a free yearly allowance of 1,000*l.* to his wife. The husband's whole income consisted of—first, an annuity of 3,000*l.* paid to him by his father in terms of the son's marriage contract, and secondly, sums voluntarily paid to him by his father. The husband having deducted income tax from his wife's annuity, she challenged his right to do so on the ground that her annuity had been taxed at its source, the father having paid the tax on his own income, but deducted nothing therefrom from the sums paid by him to his son, and the Crown having made no claim on the son for income tax:—*Held*, that the wife's annuity being payable as a personal debt or obligation in virtue of a contract, the husband was entitled to deduct the income tax therefrom, and that the question whether he was bound to account for it to the Crown was a

question between him and the Crown, with which the wife had no concern. *Dalrymple v. Dalrymple*, 4 F. 545—Ct. of Sess.

Semble, the father was entitled to deduct income tax from the son's annuity, and that if he did not do so the amount was a gift to the son. *Ib.*

— **Purchase of Property—Deduction from Purchase Price—Lump Sum.**—The plaintiff, who was the owner of a term of years in a certain property, which was let for the whole term less twenty-one days at an annual gross rental of 1,925*l.*, entered into two contemporaneous deeds with the defendants, who were his sub-lessees. By the first deed he assigned to the defendants his reversion in the property in consideration of 1,000*l.* and the deed of covenant of even date. By the latter deed the defendants covenanted to pay the plaintiff the annual sum of 1,625*l.*, which was the net rent the plaintiff had previously received from the property. No gross sum was fixed upon as the purchase-price of the property. The defendants having in making these annual payments of 1,625*l.* deducted income tax therefrom, the plaintiff sought to recover the sums so deducted:—*Held*, that the defendants were right in deducting income tax from the annual payments as falling within section 40 of the Income Tax Act, 1853. *Chadwick v. Pearl Life Assurance Co.*, 74 L. J. K.B. 671; [1905] 2 K.B. 507; 93 L. T. 25; 54 W. R. 78; 21 T. L. R. 456—Walton, J.

— **Agreement for Payment of—“Clear of all deductions”**—**Right of Party Making Payment to Deduct Tax.**—By an agreement for separation between husband and wife the husband undertook to make his wife, during their joint lives, an annual allowance payable quarterly in advance “clear of all deductions” and to secure the annuity on his estates:—*Held*, that the agreement came within sections 102 and 103 of the Income Tax Act, 1842, and that the husband was entitled, and bound to make, and the wife bound to allow, a deduction of income tax in respect of each future instalment of the annuity. *Shrewsbury v. Shrewsbury*, 22 T. L. R. 598—Kennedy, J.

Bank—Purchase of Business of Another Bank—Succession—Profits.—In 1899 the County of Stafford Bank, which carried on business at Wolverhampton only, sold as from December 31, 1895, the whole of its business, with its premises, furniture, fixtures, and the assets shewn in certain balance-sheets, for 225,000*l.* to the National Provincial Bank of England, which carried on business at a head office in London and numerous branches in England and Wales. The business of the purchased bank was carried on as usual, but for the benefit and at the expense of the purchasing bank, until the close of business on March 5, 1899. On March 6 the same premises were opened as their Wolverhampton branch by the purchasing bank, who had never previously carried on any business at Wolverhampton. The manager and the whole of the staff were taken over by and continued in the employ of the purchasing bank. From December 31, 1898, the profits, if any, earned at the Wolverhampton branch, merged in and formed part of the profits of the purchasing bank. For the year ending April 5,

1900, the purchasing bank was assessed for income tax on its own return based on the average profits of the bank for the three years preceding the year of assessment, in accordance with the first rule of the First Case of Schedule D, section 100 of the Income Tax Act, 1842. The profits of the purchased bank for the three years preceding the year of assessment were not included in the calculation on which the return was based. A further assessment was made on the purchasing bank based on the average of the profits of the purchased bank for the three preceding years, on the ground that the purchasing bank had succeeded to the business of the purchased bank within the meaning of the fourth rule applying to the First and Second Cases of Schedule D:—*Held*, that the purchasing bank had succeeded to the business of the purchased bank within the meaning of the rule, and that the further assessment based on the profits of the purchased bank for the three preceding years was rightly made on the purchasing bank. *Bell v. National Provincial Bank of England*, 73 L. J. K.B. 142; [1904] 1 K.B. 149; 90 L. T. 2; 52 W. R. 406; 68 J. P. 107; 20 T. L. R. 97—C.A.

Brewery Company—Balance of Profits and Gains—Repairs to “Tied” Houses let to Tenants.—The words “premises occupied for the purpose of such trade” in the Third Rule applying to the First Case under Schedule D in section 100 of the Income Tax Act, 1842, mean “premises occupied by the person assessed for the purpose of his trade.” *Brickwood v. Reynolds*, 67 L. J. Q.B. 26; [1898] 1 Q.B. 95; 77 L. T. 456; 46 W. R. 130; 62 J. P. 51—C.A.

A brewery company, upon being assessed under Schedule D in section 2 of the Income Tax Act, 1853, in respect of the profits of their trade, claimed to deduct from the amount of those profits a sum expended by them upon repairs to certain “tied” houses owned by them, and let to tenants upon the terms that the tenants should buy from the company all the ale, beer, &c., sold by them upon their premises. It was found as a fact that the profits of the company were materially increased by the maintenance of these “tied” houses:—*Held*, that the company were not entitled to the deduction claimed. *Held*, further, that the sum expended in repairs was expended principally for the purposes of the trade of the company's tenants, and only partly for the purposes of the company's own trade, and was not, therefore, “money wholly or exclusively laid out or expended for the purposes of” the company's trade within the meaning of the First Rule of the Rules applying both to the First and Second Cases under the above-named schedule, so as to entitle the company to the deduction claimed. *Ib.*

Brewery Company Owning and Occupying Inn—Damages for Personal Injury Recovered by Guest at Inn—Money Expended “wholly and exclusively” for Purposes of Trade.—Damages and costs recovered by a guest in an action against an innkeeper for injuries sustained in consequence of the innkeeper's negligence are not a proper deduction in the estimation of the “balance of the profits or gains” for the purposes of income tax. *Strong & Co. of Romsey, Lim. v. Woodfield*, 75 L. J. K.B. 864; [1906]

A.C. 448; 95 L. T. 241; 22 T. L. R. 754—H.L. (E.)

Semble, by the LORD CHANCELLOR, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. *Ib.*

Chaplain's Stipend—Special Public Act—Salary Payable without Deduction.—Where a special public Act, incorporating a charity, passed previously to the Income Tax Act, 1842, provides for the payment of a salary to an official "without any deduction or abatement for taxes or otherwise howsoever," the official is not exonerated from income tax, but it must be deducted by the charity from his salary, as provided by the Income Tax Act, 1842. *Lund v. Liverpool School for Indigent Blind*, 67 L. J. Ch. 680; [1898] 2 Ch. 669; 79 L. T. 68; 47 W. R. 6; 62 J. P. 728—Byrne, J.

Charitable Institution—Restaurant—Profits.—The Y.M.C.A. is a philanthropic association having classes, gymnasium, and publication department. Its expenses are defrayed by charitable subscriptions, donations, and fees, the latter of which are not sufficient to cover the expenditure. It also carries on a restaurant on the usual commercial principles, which is open to the public.—*Held*, that the losses of the association on its other branches could not be set off against the profits of the restaurant. *Grove v. Young Men's Christian Association*, 88 L. T. 696; 67 J. P. 279—Ridley, J.

Collections in Church.—Portions of collections made in a church were paid to the incumbent. They were paid to him by reason of his being incumbent, but they would not have been paid to him if he had not been poor.—*Held*, that he was not assessable to income tax in respect of the amount so received. *Turton v. Cooper*, 92 L. T. 863; 21 T. L. R. 546—Channell, J.

Contingent and Defeasible Interest—Sums Placed to Credit.—By a deed of arrangement the owner of a manufacturing business, with a view to its continuance after his decease, provided that from and after his death certain of his employees should have a "prospective interest" in the profits of the business and the business itself "if acquired by them." It was provided—first, that the provisions in favour of the selected employees should not become vested interests until the whole of the grantor's capital had been paid out; secondly, that it should not be competent for any employee to sell or dispose of his interest; thirdly, that the whole net profits of the business, after paying interest on the grantor's capital, rent, and depreciation, should be divided among the selected employees, and that 10 per cent. thereof should be paid to them in cash, but that the remaining profits should not be drawn out by them, but merely credited to their accounts until the whole of the grantor's capital had been paid out; fourthly, that upon payment of the grantor's capital and a sum fixed as the price of the factory, and of the amount at the credit of deceased, bankrupt, or retired employees, the grantor's testamentary trustees should convey the business and the factory to the surviving employees; and fifthly, that the employees should at any time be entitled to purchase the business for the sum

at the grantor's credit. The business was to be carried on by the employees, but the grantor's testamentary trustees were given power to appoint managers, to settle questions as to salaries and wages, and to determine what was to be left in the business as working capital and what should be paid out to account of the grantor's capital, sole power to grant authority to sign the firm's name, power to inspect the books, and to dismiss any of the selected employees for misconduct, and power, if the business could not be carried on at a profit, to wind it up. In a question as to abatement of income tax arising before the trustees had been paid out,—*Held*, that the share of the 90 per cent. of profits placed to the credit of one of the selected employees in the books of the business under the provisions of the deed was not to be reckoned as part of his income for the purposes of the Income Tax Acts. *Hudson v. Gribble* (72 L. J. K.B. 212; [1903] 1 K.B. 517) and *Smyleth v. Stretton* (90 L. T. 756) distinguished. *Walker v. Keith*, 8 F. 331—Ct. of Sess.

Easter Offerings—Personal Non-official Free-will Gift to Clergyman.—Sums which the incumbent of a parish receives as Easter offerings, although given voluntarily, are nevertheless received by him in his capacity as incumbent, and are therefore profits accruing to him by reason of his office within the meaning of section 146 of the Income Tax Act, 1842, and assessable to income tax. *Cooper v. Blakiston*, 76 L. J. K.B. 1041; [1907] 2 K.B. 638; 97 L. T. 531; 23 T. L. R. 663—C.A.

Foreign Securities—Interest Arising from—Receipt in United Kingdom—Entry in Yearly Accounts of Profit and Loss.—Under the Fourth Case of section 100, Schedule D of the Income Tax Act, 1842, "The duty to be charged in respect" of interest arising from foreign securities "shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction or abatement"—*Held*, that the tax was to be assessed only on the sums actually received in this country in respect of such interest, and not on the sums included as received, or constructively received, in yearly accounts of profit and loss. *Gresham Life Assurance Society v. Bishop*, 71 L. J. K.B. 618; [1902] A.C. 287; 86 L. T. 693; 50 W. R. 593; 66 J. P. 755—H.L. (E.)

Revenue Earned Abroad—Constructive Remittance.—Where interest derived from the foreign and colonial investments of a proprietary insurance company was not remitted home but retained in the countries where it was earned, and invested or otherwise applied there,—*Held* (LORD YOUNG dissenting), that by being entered in the company's accounts and taken into account in estimating the amount of profit to be divided by way of bonus, dividend, or otherwise, it was not constructively received in this country so as to be chargeable with duty under case iv. of Schedule D of section 100 of the Income Tax Act, 1842. *Gresham Life Assurance Society v. Bishop* (70 L. J. K.B. 298; [1901] 1 K.B. 153) disapproved. *Standard Life Assurance Co. v. Allan*, 3 F. 805—Ct. of Sess.

— **Investment in and Remittances from**

Colony—Capital or Income.]—Where money has been sent abroad for investment, and sums are sent home out of a bank account in which there are no separate statements of capital and income, and the whole amount left abroad after the remittances have been sent home is larger than the sums originally sent abroad, those remittances must be considered as representing interest or profits, and be held liable for income tax for the year in which they were sent home. *Scottish Provident Institution v. Allan*, 72 L. J. P.C. 70; [1903] A.C. 129; 88 L. T. 478; 67 J. P. 341—H.L. (Sc.)

Husband and Wife—Separation Deed—Covenant to Pay Annuity to Wife—Alimony—Deduction of Income Tax.]—Where a separation has taken place between a husband and wife, and in a deed carrying out the award of an arbitrator settling the allowance to be made to the wife the husband has covenanted to pay to trustees an annuity during the life of the wife by way of alimony or maintenance, he will be entitled to deduct income tax from the annuity payable by him. *Barry's Trusts, In re; Barry v. Smart*, 75 L. J. Ch. 676; [1906] 2 Ch. 358; 95 L. T. 165; 54 W. R. 621—C.A.

Life Assurance Society—Branches in Foreign Countries—Interest on Foreign Securities—Constructive Receipt of Interest on Foreign Securities in United Kingdom.]—Where a life assurance society whose registered office is in London has funds invested in foreign countries upon securities there, and re-invests the interest in those countries, or remits it direct to other foreign countries for investment, but includes such interest as money received in the revenue and consolidated revenue accounts of the society under the head of "Interest, Dividends, and Rents," and takes it into account in arriving at the amount of life insurance, endowment, and annuity funds in the valuation balance-sheet upon which surpluses or profits are ascertained, such interest is constructively received in the United Kingdom, and is assessable to income tax under Case 4, Schedule D of the Income Tax Act, 1842, s. 100. And the result is the same where the society carries on business by means of local agents or managers in foreign countries, and applies interest of foreign securities either in re-investment in those countries, in establishment or other expenses there, in remitting direct to other foreign countries for investment, or for the general purposes of the society abroad, so long as such interest is included in the society's accounts in the manner above mentioned, although never received in the United Kingdom *in specifica forma*. *Gresham Life Assurance Society v. Bishop*, 68 L. J. Q.B. 967; 81 L. T. 442; 64 J. P. 7—D.

Life Assurance Society—Indian Branches—Interest on Indian Securities—Constructive Receipt of Indian Interest in United Kingdom.]—Interest accruing upon Indian securities held by a life assurance society, established in the United Kingdom and transacting business through its branches in India, retained in India as a matter of commercial convenience, but treated as part of the divisible profits upon which dividends are declared and paid at the society's chief office—although never actually received—is constructively received in the United Kingdom, and is assessable to income

tax under Case 4, Schedule D, section 100 of the Income Tax Act, 1842. *Universal Life Assurance Society v. Bishop*, 68 L. J. Q.B. 962; 81 L. T. 422; 64 J. P. 5—D.

—Surplus Premiums Returned to Policy-holders—Mutual Insurance—Annual Profits or Gains.]—Where the shareholders in an insurance company limit the interest they may receive on their capital in the company to a fixed rate per cent., and distribute the surplus arising from the payment of premiums by the policy-holders amongst such policy-holders, such surplus is, if the policy-holders are a body distinct from the company, profit in the hands of the company, which is liable to be assessed to income tax under Schedule D of the Income Tax Act, 1853, and its character is not altered by the fact of such repayment to the policy-holders. *Last v. London Assurance Corporation* (55 L. J. Q.B. 92; 10 App. Cas. 438) and *New York Life Insurance Co. v. Styles* (59 L. J. Q.B. 291; 14 App. Cas. 381) considered. *Equitable Life Assurance Society of the United States v. Bishop*, 69 L. J. Q.B. 252; [1900] 1 Q.B. 177; 81 L. T. 693; 48 W. R. 341—C.A.

Land Used for Business—Depreciation or Wasting of Capital—Deduction.]—Where land is acquired for commercial purposes of which one stratum only is of any value, and that stratum is in process of exhaustion, such land is "capital" within the meaning of the First Case of Schedule D of the Income Tax Act, 1842, and no deduction can be allowed in respect of such exhaustion, which is a "diminution of capital" for which deduction is prohibited by section 159. *Akmanza Co. v. Bell*, 75 L. J. K.B. 44; [1906] A.C. 18; 93 L. T. 705; 54 W. R. 413; 22 T. L. R. 94—H.L. (E.)

Land Charged with Redemption of Stock—Owner Occupying—Payment of Income Tax on Annual Value of Land—Payment of Interest on Stock less Income Tax—Right to Retain out of Tax Deducted from Interest on Stock a Sum Equivalent to Tax Paid on Land.]—The London County Council borrowed large sums of money by the issue of stock which, together with the dividends thereon, was specifically charged on the lands, rents, rates, and all other property of the Council, and in paying dividends on the stock deducted income tax pursuant to section 24, sub-section 3 of the Customs and Inland Revenue Act, 1888. The Council derived an income from rents and from interest on loans to local authorities, which they received less income tax. The Council also owned land, which they occupied for the purpose of their duties, and paid income tax under Schedule A upon its annual value. The interest on the stock issued was greater than the amount received from rents and interest on loans together with the annual value of the lands which they owned and occupied, and the Council raised the amount by which their income was insufficient to pay the interest on the stock by rates:—*Held*, that the Council were entitled to retain out of the income tax deducted from the dividends upon the stock a sum equivalent to the income tax paid under Schedule A on the lands which they owned and occupied, as well as the tax paid under Schedule A on the income they derived from rents and under Schedule D on the income

they derived from interest on loans. *Att.-Gen. v. London County Council*, 74 L. J. K.B. 787; [1905] 2 K.B. 375; 93 L. T. 378; 53 W. R. 677; 3 L. G. R. 951; 69 J. P. 333; 21 T. L. R. 604—C.A.

Master at School—Provident Fund Scheme—Additional Allowance—Allowance to go to Fund.]—Under a provident fund scheme at D. College the following increases of salaries came into operation: (a) Assistant masters having not less than five, but less than fifteen years' service, an increase of 5 per cent.; (b) those having fifteen years and over, 7½ per cent.; (c) a further addition equal to those sums subject to certain conditions. The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund. The conditions above referred to were that masters of less than ten years' service who resigned or ceased to belong to the college from any other cause than ill health were to be entitled to increase (a) and the accumulations thereof, but not to increase (c); if the master retired from ill health, the governors in addition to (a) might grant him (c); in the event of death both (a) and (c) were to be paid to his legal representative. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under (a) or (b) and (c) with accumulations, and in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (c):—*Held*, that these increases of salary were sums really added to the salary, and were assessable to income tax under section 146, Schedule E of the Income Tax Act, 1842. *Smyth v. Stretton*, 90 L. T. 756; 53 W. R. 288; 20 T. L. R. 443—Channell, J.

Minister—Grant from Stipend Augmentation Fund—Annual Profits or Gains Arising or Accruing from any Profession or Vocation.]—The minister of a chapel received a grant from a fund called the "Ministers' Stipend Augmentation Fund," which was vested in trustees and managed by a committee, who were to apply the fund towards the augmentation of the stipends of the ministers of such congregations as they should select. Grants could only be made for the current year, and, in making such grants, regard was to be paid to the state and condition of the congregation and to their ability to make adequate provision for their minister. Consideration was also paid to the applicant's private income as well as the stipend received from his congregation, his age, training, and length of his services. The grants were payable half-yearly, and ceased at the recipient's death, resignation, or removal, and any portion of the grant then unpaid was not paid to him, nor was any part paid to him or to his successor:—*Held*, that the amount of the grant was part of the profits or gains of the minister in his profession or vocation, and that he was chargeable with income tax in respect thereof. *Poynting v. Faulkner*, 93 L. T. 367; 21 T. L. R. 560—C.A.

Mortgage—Interest Payable in Lump Sum at End of Period—"Yearly interest or other annual payment."]—By a mortgage which recited that the mortgagor was indebted to the

mortgagee, and it had been agreed that payment of the debt should be postponed, the mortgagor covenanted to pay on the death of himself or his son, whichever should first happen, the amount of the debt with simple interest and if the aggregate amount of such sum and interest should not then be paid, the mortgagor should pay to the mortgagee interest for such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after the death of the mortgagor or his son. The mortgagor died before his son, and the debt, with simple interest, became thereupon payable:—*Held*, that the mortgagor's legal personal representative, on payment of the debt and interest, might deduct income tax on the interest. *Bebb v. Bunny* (1 K. & J. 216) applied. *Goslings & Sharpe v. Blake*, (58 L. J. Q.B. 446; 23 Q.B. D. 324) distinguished. *Craven's Mortgage, In re; Davies v. Craven*, 76 L. J. Ch. 651; [1907] 2 Ch. 448; 97 L. T. 475—Warrington, J.

Office—Profits Accruing by Reason of—Voluntary Grants from Charitable Fund to Augment the Stipends of Poor Benefices.]—Grants made from a charitable fund in augmentation of the income of benefices below a certain yearly value are "profits accruing to" the holder of the benefice "by reason of his office" within the meaning of section 146, Schedule E, rule 1 of the Income Tax Act, 1842, notwithstanding that the grants are purely voluntary and that the corporation distributing the fund cannot be legally compelled to make the payments. *Turner v. Cuxson* (58 L. J. Q.B. 181; 32 Q.B. D. 150) distinguished. *Herbert v. McQuade*, 71 L. J. K.B. 884; [1902] 2 K.B. 681; 87 L. T. 349; 66 J. P. 692—C.A.

Profits—Method of Ascertaining.]—A company, whose business consisted in buying and selling land and rights in land, bought a piece of vacant ground for 893*l.*, and after erecting houses upon it burdened each house with a feu duty; the feu duties in all amounted to 114*l.* per annum. The company then sold the feu duties for 3,135*l.*, but retained the land and houses. The Inland Revenue claimed income tax on the difference between 893*l.* and 3,135*l.* as profit earned by the company:—*Held*, that the claim could not be sustained, inasmuch as the price of 3,135*l.* could not have been obtained if the ground had remained vacant, but was partly due to the erection of houses by the company. *Furtado v. Cardonald Fearing Co.*, [1907] S.C. 36—Ct. of Sess. *And see DEDUCTIONS, infra.*

Profits of Business—Assignment for Benefit of Creditors—Trustee Carrying on Part of Debtor's Business—Sub-lease of Motive-power—Profit on Sub-lease—Liability of Trustee.]—By an indenture of sub-lease a firm of worsted spinners demised a part of their business premises together with steam power to be generated by them. They subsequently executed a deed of assignment for the benefit of their creditors empowering the trustee, with the consent of the committee of inspection, to carry on the business. The trustee continued to occupy the portion of the premises which the debtors had occupied for the purpose of winding up their business, and continued to supply motive-power to the sub-lessee in accordance with the sub-lease and a fresh sub-lease afterwards granted,

and the amount received by the trustee in respect of the power exceeded the cost of supplying it:—*Held*, that the difference between the cost of supplying the power and the payment received for it was a profit assessable under Schedule D, although the money was to be applied in payment of the creditors under the deed of assignment. *Armitage v. Moore*, 69 L. J. Q.B. 614; [1900] 2 Q.B. 363; 82 L. T. 618—D.

— **Average of Three Years—Sale of Business—Two Businesses—Succession.**—A person cannot be a successor within the meaning of rule 4 applying to the First and Second Cases of Schedule D of the Income Tax Act, 1842, of part of a concern, but if a company is carrying on two separate businesses and sells one the purchaser can be the successor of the separate business. *Stockham v. Wallasey Urban Council*, 95 L. T. 834; 5 L. G. R. 200; 71 J. P. 244—Bray, J.

Purchase and Re-sale of Property.—The C. company, with a capital of 28,000*l.*, expended 24,000*l.* in the purchase of a mining property and 4,000*l.* in its development. Thereafter it sold the property for 300,000*l.* to the F. company, the price to be payable by that company transferring 300,000 of its 400,000 *l.* shares, fully paid, to the C. company. The C. company having been assessed for income tax under Schedule D on profit arising from the transaction, the C. company appealed, contending that it had had no income, and that the sale was truly a transaction by which the company substituted for its capital in the form of land a capital in the form of shares:—*Held*, that, having regard to the various branches of business for which the C. company was formed, the transaction was a sale in the line of its business, resulting in a profit liable to income tax under Schedule D, and not a mere change in the mode of investment of its capital. *Californian Copper Syndicate v. Harris*, 6 F. 894—Ct. of Sess.

— **Purchase of Railway—Payment of Annuity instead of Gross Sum—Liability of Annuity to Income Tax.**—Where a contract for the purchase of a railway for the full amount of the value of all the shares or capital stock in the railway company contains a provision that it shall be lawful for the purchaser, instead of paying a gross sum of money in respect of the premises, to declare his option to pay an “annuity” from the time when the gross amount would be payable, and to continue the payment during a fixed term, the rate of interest used in calculating such “annuity” being ascertained by the average rate of interest during the preceding two years upon certain public obligations, income tax is payable upon the whole annual amount of the “annuity,” inasmuch as such annual amount is an annuity within the meaning of Schedule C of the Income Tax Act, 1853. *Foley v. Fletcher* (28 L. J. Ex. 100; 3 H. & N. 769) explained. *Scoble v. Secretary of State for India in Council*, 71 L. J. K.B. 727; [1902] 2 K.B. 419; 87 L. T. 896—Phillimore, J.

— **Guaranteed Interest by South African Republic—Line Taken by British Government—Payment of Arrears.**—On November 2, 1895, the

South African Republic granted a concession for the construction of a railway, and guaranteed to a company which was formed to take over the railway interest at 4 per cent. on its share capital. On October 11, 1899, war having broken out, the line was seized and worked by the British military authorities until the end of the war. On February 18 the British Government gave notice to expropriate the railway under the terms of the concession. They recognised the validity of the concession, and admitted liability to pay all arrears of interest. They paid 97,506*l.* 16*s.* 11*d.* as “guaranteed interest on share capital at 4 per cent. per annum from the 1st Jan. 1899 to 14th Nov. 1903,” in addition to the other payments on the expropriation. *Held*, that the Crown was entitled to income tax on the sum of 97,506*l.* 16*s.* 11*d.* *Pretoria-Pietersburg Railway v. Elwood*, 95 L. T. 468—Walton, J.

— **Succession to Trade, Adventure, or Concern.**—The mere purchase of a trading vessel does not of itself constitute “succession to the adventure” or concern of the former owners in the sense of the Income Tax Act, 1842, s. 100, Schedule D, and accordingly the purchaser falls to be assessed for income tax as for a new adventure and without regard to the profits earned by the ship (in the same line of trading it may be) prior to his purchase. *Watson v. Lothian*, 4 F. 795—Ct. of Sess.

“Rent payable”—**Landlord's Property Tax—Contribution to Compensation Fund under Licensing Act, 1904—Deduction of Amount from Rent.**—By the Income Tax Act, 1842, s. 60, Schedule (A), No. IV. (Ninth), the defendant, as tenant, at a rent of 100*l.* per annum, of licensed premises, of which the plaintiffs were the landlords, was entitled to deduct from the “rent payable” to the landlords a sum in respect of landlord's property tax equal to 1*s.* in the pound on such rent. Under section 3, sub-section 3, and Schedule II. of the Licensing Act, 1904, he had previously deducted from the rent the sum of 14*l.*, part of a sum of 20*l.* paid by him, under sub-section 1, as contribution to the compensation fund created by that Act:—*Held*, that he was entitled in respect of his payment of landlord's property tax to deduct a sum based on the full rent of 100*l.*, and not on that rent less the sum of 14*l.* *Hancock v. Gillard*, 76 L. J. K.B. 20; [1907] 1 K.B. 47; 95 L. T. 680; 71 J. P. 9; 23 T. L. R. 12—Bigham, J.

Royalties—Tax not Deducted on Payment by Lessee to Proprietor—Right of Lessee to Recover Amount of Tax from Proprietor.—A lessee of a colliery who had paid to the Inland Revenue income tax on royalties due by him to the proprietor, and who had paid the royalties without deducting the income tax, was held entitled to recover it from the proprietor. *Agnew v. Ferguson*, 5 F. 879—Ct. of Sess.

Sewer—“Hereditament capable of actual occupation.”—A sewer of which a local authority has the use and control is chargeable to income tax on the basis of its “annual value” under section 60, Sched. A, No. I., and not under No. III. The word “drains” in No. III. is not applicable to a public sewer, but must be construed on the *ejusdem generis* principle by the

context in which it occurs. Decision of the COURT OF APPEAL (76 L. J. K.B., p. 282; [1907] 1 K.B. 490) affirmed. *Ystradgynodwg and Pontypridd Main Sewerage Board v. Bensted*, 76 L. J. K.B. 876; [1907] A.C. 264; 97 L. T. 141; 71 J. P. 425; 5 L. G. R. 865; 23 T. L. R. 621—H.L. (E.)

Ship Owned by Company and other Persons—Two Assessments.]—The S. Steamship Co. owned the steamship *B.* and fifty-nine sixty-fourths of the steamship *G.*, the remaining five sixty-fourths being owned by other persons:—*Held*, that the company was rightly assessed by two assessments—one in respect of the steamship *B.*, and the other in respect of the steamship *G.* (as the latter was an adventure carried on by them jointly with other persons within the third rule—applying to both the first and second cases) to section 100 of the Income Tax Act, 1842. *Farrell v. Sunderland Steamship Co.*, 88 L. T. 741; 67 J. P. 209; 9 Asp. M.C. 416—Ridley, J.

Slaughter-houses Self-supporting, but not Profit-earning.]—The public slaughter-houses of a city were owned and administered by the magistrates under a statute which provided that the dues and rents levied therefrom should be regulated triennially so as to render the concern self-supporting, but not profit-earning:—*Held*, that the slaughter-houses fell to be assessed for income-tax purposes under the General Rule No. I. of Schedule A of the Income Tax Act, 1842, at the rent "at which the same are worth to be let by the year," and not as a profit-earning concern under No. III. of that schedule. *Inland Revenue v. Edinburgh Corporation*, [1907] S.C. 1233—Ct. of Sess.

Waterworks—Profits of Trading in Water—Sale of Water Outside Compulsory Area—Application of Profits to Sinking Fund.]—The local authority of the burgh of Irvine, in the exercise of their statutory powers, entered into contracts to supply with water the parish of Stevenston and the burgh of Saltcoats, districts outside the compulsory area of Irvine. The contracts provided that a sum should be payable annually by Stevenston and Saltcoats respectively, the amount of which, subject to a deduction of 10 per cent., was to be the amount produced by a compulsory water rate upon all assessable subjects within these districts, leviable by their own local authorities. The rate of assessment was to be the same as that from time to time imposed within its compulsory area by the local authority of Irvine:—*Held*, first, that the sums payable by Stevenston and Saltcoats, although leviable in these districts as a compulsory rate, were, as regards Irvine, the price of water supplied outside its compulsory area, and that the surplus, so far as derivable from this source, was profit, and chargeable with income tax; and secondly, following *Mersey Docks and Harbour Board v. Lucas* (8 App. Cas. 891), that it was not a valid ground of exemption that profit so earned was appropriated to a sinking fund. *Harris v. Irvine Corporation*, 2 F. 1080—Ct. of Sess.

(c) Deductions.

"Annual payment payable out of such profits or gains."]—By an agreement between the

plaintiffs and the defendants, the defendants had the exclusive right of selling and manufacturing articles by a secret process, and the defendants were to pay to the plaintiffs for forty years 8l. per cent. on the gross receipts of such sale. The plaintiffs resided abroad and were foreigners, and, before paying the amount payable to them under the agreement, the defendants deducted income tax payable in respect of the amount due under the agreement:—*Held*, that the income tax was rightly deducted. *Deluge v. Nugget Polish Co.*, 92 L. T. 632; 21 T. L. R. 454—Phillimore, J.

Brewery Company Owning and Occupying Inn—Damages for Personal Injuries Paid to Guest at Inn—Money Laid Out Wholly for Purposes of Trade.]—A brewery company who, as part of their business, owned and occupied various inns, had to pay a sum in respect of damages and costs incurred in consequence of personal injuries sustained in consequence of their negligence by a guest at one of their inns:—*Held*, that this sum was not a proper deduction to be made in estimating the balance of profits for income-tax purposes. *Strong & Co. of Romsey, Lim. v. Woodfield*, 74 L. J. K.B. 702; [1905] 2 K.B. 350; 93 L. T. 361; 53 W. R. 625; 21 T. L. R. 550—C.A.

Brewery—Profits of—New Licences—Expenses of Applications.]—The respondents, a firm of brewers, submitted accounts shewing a certain sum for profits. In arriving at the amount they had deducted sums expended in connection with unsuccessful applications made by them to the licensing Justices for new licences to houses owned and leased by them, and also to houses not owned by them, but for which they conducted the application, for the purpose of increasing their trade:—*Held*, that the respondents were not entitled to make the deductions as the expenses were not "money wholly and exclusively laid out or expended for the purposes of" their trade, but were a capital expenditure within the meaning of Schedule D of the Income Tax Act, 1842. *Southwell v. Savill*, 70 L. J. K.B. 815; [1901] 2 K.B. 349; 85 L. T. 167; 49 W. R. 682; 65 J. P. 649—D.

Depreciation of Stock—Capital—Cost of Raw Material.]—Where a company has a registered office in England, and owns nitrate grounds abroad, upon which are deposits of caliche from which they manufacture and sell nitrates and iodine, and the process necessarily exhausts the caliche, the stock of caliche is part of the company's capital, and therefore for the purpose of assessment to income tax under the Income Tax Act, 1842, s. 100, Sched. D, no allowance can be made for the caliche exhausted. *Alianza Co. v. Bell*, 73 L. J. K.B. 755; [1904] 2 K.B. 666; 91 L. T. 463; 53 W. R. 23; 20 T. L. R. 624—Channell, J.

—Amount.]—The appellant company claimed under section 12 of the Customs and Inland Revenue Act, 1878, to be allowed a deduction of 253,893l. on the ground that the same was a just and reasonable allowance as representing the diminished value by reason of wear and tear during the year. They arrived at this figure as being 5 per cent. on the original cost of the ships in their fleet. The

Commissioners found that the average duration of the service of ships in the fleet was seventeen years, though the average duration of life of the ships was twenty-eight years; and that an allowance at the rate of 6 per cent. on the diminished value of the fleet for the year of assessment, arrived at by taking the original cost of each vessel and writing it down year by year at the rate of 6 per cent. on the diminishing value, was a sufficient allowance to cover the diminished value by reason of wear and tear during the year, and they fixed the figure at 185,440*l.*:—*Held*, that the Commissioners had dealt with all that was properly before them, and that the questions were substantially questions of fact. *Peninsular and Oriental Steam Navigation Co. v. Lee*, 79 L. T. 118—D.

Fire and Accident Insurance—Balance of Profit—Unexpired Risks.—In ascertaining for income-tax purposes the annual profits of a company carrying on the business of fire, sickness, accident, and guarantee insurance, no deduction can be made in respect of estimated losses on risks unexpired at the end of the year. *General Accident Assurance Corporation v. McGowan*, [1907] S.C. 1004—Ct. of Sess.

Shipowner's Business—Deduction to be Allowed for Depreciation of Ships—Right to Take into Account Former Allowances.—Income Tax Commissioners, in estimating the deduction to be allowed from the profits of a shipowner's business under section 12 of the Customs and Inland Revenue Act, 1878, in respect of the diminished value of the ships by reason of wear and tear, must consider what is a just and reasonable allowance to make for the depreciation in their value during the particular years of assessment, and are not entitled to take into account allowances in respect of depreciation which have been made in previous years. *Hall & Co. v. Rickman*, 75 L. J. K.B. 178; [1906] 1 K.B. 311; 94 L. T. 224; 54 W. R. 380; 22 T. L. R. 131—Walton, J.

A hulk, formerly a sailing ship, used as a floating warehouse for coal, is "plant" within the meaning of section 12 of the Customs and Inland Revenue Act, 1878. *Ib.*

Shipowner Partially Insuring Vessel—Accumulating Funds out of Profits to Meet Loss of Vessels.—A shipping company partially insured one of its ships with underwriters, and partially took on itself the risk of the loss of the ship, transferring annually from its revenue account to its "insurance fund" a sum equivalent to the premium that would have been payable to an underwriter for taking the risk which the company thus took on itself. No deduction from the annual profits of the company in calculating income tax was allowed on the sums thus transferred from the company's revenue account to its "insurance fund." On the loss of the ship the company claimed the right, in ascertaining the balance of profits for the year for the purposes of income tax, to deduct the amount which it had been necessary to transfer from the company's "insurance fund" to meet the loss incurred:—*Held*, that the company was not entitled to make the deduction claimed on the ground that the loss was a loss of capital. *Inland Revenue Com-*

missioners v. Western Steamship Co., [1907] S.C. 1005—Ct. of Sess.

Money Wholly Expended for Purposes of Trade—Payment to Secure Controlling Interest in Rival Firm.—S. & L., a firm of tube manufacturers, entered into an agreement with W., another firm of tube manufacturers, whereby, in return for the right to nominate a majority of the directors of W., S. & L. undertook to pay to W. each half-year such sum as might be necessary to make up any deficit in the dividend on W.'s preference shares. In pursuance of this agreement, in the year 1904 S. & L. made payments to W. of sums amounting to 841*l.* In estimating their profits for that year for income-tax purposes, S. & L. claimed to deduct from the profits this sum of 841*l.* The Income Tax Commissioners held that S. & L. had expended this sum for the purposes of their trade and that they might sell their goods at a better price, and allowed the deduction:—*Held*, that the deduction had been rightly allowed. *Moore v. Stewarts and Lloyds*, 8 F. 1129—Ct. of Sess.

Wear and Tear.—The deduction which the Commissioners of Income Tax, in assessing the profits of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule D, are by section 12 of the Customs and Inland Revenue Act, 1878, required to allow as representing the diminished value by reason of wear and tear during the year of machinery and plant, may be the diminished value by wear and tear during the year next preceding, and need not be the average diminished value of the three years next preceding the year of assessment. *Cunard Steamship Co. v. Coulson*, 68 L. J. Q.B. 554; [1899] 1 Q.B. 865; 80 L. T. 326—D.

Arrears of Annuity—Income Tax not Deducted at Time of Payment.—A husband and wife agreed to live separate, and the husband agreed to allow her 4,000*l.* a year to be paid quarterly, clear of all deductions. Subsequently it was agreed that the allowance should be reduced to 3,000*l.* a year. Disputes arose as to how long the reduced allowance was to continue, and the wife brought an action to recover arrears of the allowance, and a consent order was made that the wife was entitled to the 4,000*l.* a year as from a year before the action was commenced. No income tax had been deducted by the husband from any of the payments of the allowance. The husband claimed to deduct income tax in respect of all the payments made and from the arrears:—*Held*, on a Special Case stated for the opinion of the Court, that the husband might deduct income tax from the arrears, but not from the payments already made. *Shrewsbury (Countess) v. Shrewsbury (Earl)*, 23 T. L. R. 100—Keke-wich, J. Appeal from this decision dismissed on the ground that no appeal lay, 23 T. L. R. 224—C.A.

Interest on Borrowed Money—Deduction of Tax from such Interest—Tax on Land in Occupation of Owner—Right to Retain out of Tax Paid on Interest a Sum Equivalent to Tax Paid on Land Occupied.—A public body, which issues stock on which it pays dividends after deducting tax, and also owns and occupies

premises for its own purposes on which it pays tax under Schedule A of the Income Tax Act, 1842, is not entitled to recoup itself for this tax out of the tax deducted from the dividends on the stock. *Att.-Gen. v. London County Council*, 76 L. J. K.B. 454; [1907] A.C. 131; 96 L. T. 481; 71 J. P. 217; 5 L. G. R. 465; 23 T. L. R. 390—H.L. (E.)

Interest on Loan for less than a Year.]—A municipal corporation is bound by section 24 of the Customs and Inland Revenue Act, 1888, to deduct income tax from the interest paid by it on loans for periods less than a year, and to render an account thereof to the Commissioners of Inland Revenue. *Lord Advocate v. Edinburgh Corporation*, 6 F. 1—Ct. of Sess.

Interest on Loans Borrowed by London County Council.]—The London County Council borrow loans part of which they lend again to local authorities. The fund out of which they pay interest on these loans is composed partly of interest received by them from such local authorities, less income tax already paid under Schedule D of the Income Tax Act, 1853, and partly of rents of their own properties, less income tax already paid under Schedule A:—*Held*, that the London County Council are entitled to deduct income tax already paid by the local authorities under Schedule D, but that they are not entitled to deduct income tax already paid by their tenants under Schedule A. *Att.-Gen. v. London County Council*, 63 L. J. Q.B. 823; [1899] 2 Q.B. 226; 80 L. T. 767—D.

Omission to Deduct—Liability to Crown.]—A municipal corporation, which was bound to deduct income tax from interest on loans, but had failed to do so, *held*, liable in payment to the Commissioners of Inland Revenue of the amount that should have been deducted. *Lord Advocate v. Edinburgh Corporation*, 7 F. 972—Ct. of Sess.

Land Situated Abroad—English Owner of—Manufacture from Deposit Thereon—Profits and Gains of Trade—Deduction for Depreciation of Value of Land—Sum Employed “as capital.”]—By rule 3 of the First Case of Schedule D of the Income Tax Act, 1842, in estimating the profits and gains of a trade chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from such profits and gains for any sum employed “as capital” in such trade. An English company acquired land in Chili, the upper stratum of which consisted of a substance called “caliche,” and carried on the trade of manufacturers of nitrates by loosening and removing the caliche, and extracting nitrates therefrom. The removal of the caliche rendered the land practically valueless:—*Held*, that in estimating the balance of the profits and gains of the trade for a particular year for the purpose of assessment to the income tax under Schedule D, the company were not entitled to deduct the cost price of the amount of caliche used in the year’s working, the original cost of the caliche being a sum employed “as capital” in the trade within the meaning of rule 3 of the First Case of Schedule D. *Alianza Co. v. Bell*, 74 L. J. K.B. 219; [1905] 1 K.B. 184; 92 L. T. 184; 53 W. R. 257;

21 T. L. R. 134—C.A. Affirmed, 75 L. J. K.B. 44; 22 T. L. R. 94—H.L. (E.)

Premium on Policy of Life Insurance—Premium Partly Paid with Money Borrowed from Insurer at Interest and Charged on Policy.]—Where under a policy of life insurance and an agreement between the parties thereto, the insured has paid only one-half of the premium in cash and the other half by means of a loan from the insurer repayable on demand and bearing interest (the principal and interest being charged upon the policy), he is only entitled under section 54 of the Income Tax Act, 1853, to deduct the amount paid by him in cash in respect of premium from his assessable income (LORD JAMES OF HEREFORD dissenting). *Hunter v. Att.-Gen.*, 73 L. J. K.B. 381; [1904] A.C. 161; 90 L. T. 325; 52 W. R. 593; 20 T. L. R. 370—H.L. (E.)

Public Office—Sum Payable or Chargeable on Salary by Virtue of Act of Parliament.]—A compulsory annual contribution made under sections 12 and 13 of the Poor Law Officers’ Superannuation Act, 1896, by a clerk to a guardians assessment committee and school-attendance committee, is a duty or other sum payable or chargeable by virtue of an Act of Parliament within the meaning of the Income Tax Act, 1842, s. 146, Sched. E, Rule I., and ought to be deducted from the salary of the clerk in estimating the net sum upon which income tax is payable by him. *Beaumont v. Bowers*, 69 L. J. Q.B. 600; [1900] 2 Q.B. 204; 83 L. T. 126; 48 W. R. 557; 64 J. P. 552—D.

Removal to New Premises—Expenses of.]—A company, engaged in the buying and selling of granite, found it necessary to transfer its business to a larger yard:—*Held*, that the expenses incurred in removing stones and cranes from the old yard to the new yard and in re-erecting the cranes in the new yard did not form a proper deduction in estimating the company’s annual profits chargeable with income tax. *Granite Supply Association v. Inland Revenue*, 8 F. 55—Ct. of Sess.

Salary—Thrift Fund—Contribution—Scheme Authorised by Act of Parliament—Voluntary Participation—“Sums payable by virtue of any Act of Parliament”—Sums “really and bona fide paid and borne by the party to be charged.”]—A municipal corporation under powers conferred by Act of Parliament prepared a scheme for the establishment of a thrift fund for the benefit of their officers. The scheme provided that persons entering the service of the corporation after a specified date should contribute, and that the corporation might deduct, a certain proportion of their salaries. The money so contributed was held upon certain trusts in favour of the contributors. Persons in the service of the corporation on the specified date might on their own application in writing be admitted to the benefit of the fund upon the same terms, provided that no persons so admitted should cease to contribute while in the service of the corporation. A person who was in the service of the corporation on the date specified applied to be admitted to the benefits of the fund, and another person who had entered the service after the date specified thereafter made payments to the fund in accordance with the

scheme:—*Held*, that these payments were not sums payable or chargeable on their salaries or wages "by virtue of any Act of Parliament" or sums really and *bona fide* paid and borne by the parties to be charged within the meaning of the Income Tax Act, 1842, s. 146, Schedule E, rule 1, and that these persons were rightly taxed in respect of them. *Beaumont v. Bowers* (69 L. J. Q.B. 600; [1900] 2 Q.B. 204) disapproved. *Hudson v. Gribble*, 72 L. J. K.B. 242; [1903] 1 K.B. 517; 88 L. T. 186; 51 W. R. 457; 67 J. P. 85; 1 L. G. R. 292—C.A.

(d) *Collection.*

Appointment of Collectors—Authority of Collectors to Distrain after Expiration of Year of Charge.—The collectors appointed in each year under the Taxes Management Act, 1880, to collect the duties payable for the year do not necessarily become *functi officio* at the expiration of the year of charge, nor does their authority to distrain by virtue of the warrant granted to them under the Act necessarily terminate at the expiration of the year. Their office is not at an end until their accounts for the year are closed in accordance with the provisions of the Act. *Elliott v. Yates*, 69 L. J. Q.B. 820; [1900] 2 Q.B. 370; 82 L. T. 812; 48 W. R. 610; 64 J. P. 564—C.A.

(e) *Costs.*

Taxation of—Case stated by Inland Revenue Commissioners—Party's Costs of Preparing Case before its Final Settlement.—"Necessary or proper for the attainment of justice."—Upon a taxation between party and party of the costs of a Case stated by the Inland Revenue Commissioners for the opinion of the High Court under section 59 of the Taxes Management Act, 1880, the Taxing Master has a discretion under Order LXV. rule 27 (29) to allow a party, to whom the Court has awarded costs, the costs of his solicitor and counsel in provisionally settling the draft Case proposed by the Commissioners before its final settlement. *Scottish Union and National Insurance Co. v. Smiles* (16 Ct. of Sess. Cas. (4th Ser.), 624) not adopted. *Manchester Corporation v. Sugden. Gresham Life Assurance Society v. Bishop*, 72 L. J. K.B. 746; [1903] 2 K.B. 171; 88 L. T. 679; 51 W. R. 627; 67 J. P. 317—C.A.

(f) *Appeal.*

Claim for Repayment of Income Tax.—Sections 57 to 59 of the Taxes Management Act, 1880, only provide for appeals against assessment, and do not apply to a claim for repayment of income tax. *Bruce v. Burton*, 85 L. T. 227; 65 J. P. 440—D.

(g) *Jurisdiction of Commissioners.*

Assessing English Company on Profits of Foreign Company carrying on Trade Abroad—Prohibition or Appeal.—An English company incorporated under the Companies Acts and having its registered office in London was assessed to the income tax under Schedule D

not only upon the profits and gains of its own trade, but upon the profits and gains of the trade of an American company incorporated and carrying on business in America. The English company were the holders of about 98 per cent. of the shares of the American company. Upon appeal to the General Commissioners of Taxes by the English company, who contended that they could not be assessed under Schedule D in respect of the profits and gains of a foreign corporation carrying on business wholly abroad, the Commissioners upon certain evidence before them proposed to find as facts that the business and profits of the American company were the business and profits of the English company, that the head and seat of the business was at the office of the English company in London, and that, even if the business in America and the profits made there were technically the business and profits of the American company, the American company were the agents of the English company, and the Commissioners proposed to confirm the assessment. Upon an application by the English company for a prohibition to the Commissioners,—*Held*, that the findings of fact by the Commissioners were not mere findings of facts preliminary to jurisdiction, but that the Commissioners had under the Income Tax Acts jurisdiction to ascertain what was in fact the trade carried on by the English company either wholly or partly in England, and consequently that prohibition would not lie, the remedy of the English company being by Special Case under the provisions of section 59 of the Taxes Management Act, 1880. *Re v. Income Tax Commissioners*, 70 L. J. K.B. 1010; [1901] 2 K.B. 879; 85 L. T. 503; 65 J. P. 724—C.A.

Loss in any Trade or Profession—Adjustment of Liability.—By section 23 of the Customs and Inland Revenue Act, 1890, "Where any person shall sustain a loss in any trade, manufacture, or concern, or profession, employment, or vocation . . . it shall be lawful for him . . . to apply to the Commissioners . . . for an adjustment of his liability by reference to the loss and to the aggregate amount of his income. . . ."—*Held*, that this does not apply to a particular loss in ascertaining the profits of a particular business which has occurred in the course of the business, but to a general loss resulting from the business—that is a loss as the total result of the business operations. The Commissioners under section 23 ought to consider the aggregate income of the person; then whether he has sustained a loss in any trade, manufacture, &c.; and if so, what is a proper adjustment of his liability to pay income tax by reference to that loss. *Re v. Income Tax Commissioners*, 91 L. T. 94—D.

Held, further, on the facts, that it was not shown that the Commissioners of Income Tax had acted outside their jurisdiction by considering a wrong question. If Commissioners of Income Tax purporting to act under section 23 of the Act of 1890 consider a wrong question altogether, then their decision can be dealt with by a writ of *certiorari*, but if they consider the right question the Court cannot interfere by *certiorari*, even although they may have gone wrong in point of fact or of law. *Ib.*

(h) *Other Matters.*

Debentures—Realisation of Security—Payment on Account of Principal and Interest.—See *Smith v. Law Guarantee and Trust Society, ante*, COMPANY, col. 422.

Distress—Costs.—See DISTRESS, col. 715.

Dividend—Maximum, whether Including Income Tax.—See GAS COMPANY, col. 910.

Evade Payment of — Intention to.—See COLONY, col. 269.

New Zealand.—See COLONY, col. 299.

Trustee — Duty to Deduct Tax — Breach of Trust.—See *Sharp, In re*; *Rickett v. Rickett*, post, TRUST.

7. INHABITED HOUSE DUTY.

Artisans' Dwellings — Separate Occupations — Exemption.—The owner of houses originally built or adapted for artisans' dwellings, and used for the sole purpose of separate dwellings, is entitled to the exemption from inhabited house duty conferred by section 26, sub-section 2 of the Customs and Inland Revenue Act, 1890, as amended by section 4 of the Customs and Inland Revenue Act, 1891, notwithstanding the existence of a common front door, entrance hall, and staircase to, and the absence of complete structural division of, each separate set of rooms; and notwithstanding that all the doors of each set of rooms open to the common entrance hall or landing, and that the tenants have the use of a common wash-house on certain specified days. *Seaman v. Lee*, 68 L. J. Q.B. 593; 63 J. P. 499—D.

— **"Separate dwellings" for the Working Classes.**—A building erected by the appellants for the purpose of providing accommodation for men of the working-classes contained separate sleeping-rooms or cubicles arranged on three landings round a central hall, and on the ground-floor reading and dining rooms, scullery, lavatories, baths, and wash-house, and catering departments, which were used by the occupants in common, and also quarters for the superintendent and staff. Each cubicle provided separate accommodation for one man, and a charge of sixpence a night was made for the room and the use of the other apartments:—*Held*, that the cubicles were not "separate dwellings," but merely sleeping-places, and that the house did not therefore come within the exemption from inhabited house duty, as "separate dwellings" for the working classes, contained in section 26, sub-section 2 of the Customs and Inland Revenue Act, 1890, and section 11, sub-section 1 of the Revenue Act, 1903. *London County Council v. Cook*, 75 L. J. K.B. 187; [1906] 1 K.B. 278; 93 L. T. 836; 54 W. R. 403; 70 J. P. 105; 4 L. G. R. 153; 22 T. L. R. 125—Walton, J.

Bank Premises—Floors Let to Solicitors—Residence of Manager—Internal Communication.—A banking company was the owner of a building the basement and ground floor of which

they themselves occupied for the purposes of a bank. The first and second floors they let to solicitors under a lease restricting to business purposes during business hours the use of the rooms so let. The third and fourth floors were occupied as residences by the bank manager and a caretaker employed by the company. There was a staircase having an entrance to the street, by which access was obtained to the first and upper floors. There was also a door leading from the part used as a bank on the ground floor to the staircase. This door was kept locked, but the manager was provided with a key so that at any time by day or night he could pass to and fro between his residence at the top and the bank premises without going outside the building:—*Held*, that the rooms let to solicitors did not come within the exemption of sub-section 1 of section 13 of the Customs and Inland Revenue Act, 1878, in favour of a house "divided into and let in different tenements." *Held* also, that, in view of the internal communication made for the use of the bank manager, the part of the house used for the purpose of a bank was not such a "tenement" within the meaning of sub-section 2 of the same section as to come within the exemption there created. *Held*, therefore, that the banking company were liable to be assessed to inhabited-house duty in respect of the whole building. *London and Westminster Bank v. Smith*, 87 L. T. 244; 67 J. P. 229—H.L. (E.)

Blocks of Shops—Buildings used Partly as Shops and Partly for Residence of Staff.—The appellants appealed against an assessment made upon certain blocks of buildings used by them partly as shops and partly for the residence of their staff:—*Held*, that the premises were assessable as a whole because the business part communicated with the residential part, and the fact that the communication was closed at night by iron doors made no difference. *Maple v. Wilson*, 85 L. T. 229; 49 W. R. 670; 65 J. P. 630—D.

Business Premises—"Profit"—"Solely occupied"—Mutual Insurance Society.—The Scottish Widows Fund and Life Assurance Society had no share capital and no shareholders. Its membership consisted exclusively of the holders of policies of life insurance effected with the society, and of the purchasers of annuities from it. The bulk of the members were the holders of "participating" policies—that is, members who were entitled to share in the surplus assets of the society as brought out at each septennial investigation of its affairs; but a small proportion of the policy-holders and all the annuity-holders (who also were proportionally few in number) had no such right of participating in the surplus assets. The society did not directly insure, or grant annuities to, persons who were not members of the society, but it re-insured the risks of other life insurance companies. Its accumulated funds, which were of very large amount, and from which it derived a large income, were invested in stocks, shares, and other securities, and it also to a small extent purchased reversions. The society having claimed exemption from inhabited-house duty in respect of premises which it occupied solely for the purposes of its business, the surveyor of taxes maintained that the exemption allowed by section 13, sub-

section 2 of the Customs and Inland Revenue Act, 1878, did not apply, inasmuch as the society, being a mutual insurance society, could make no trade or business profits, or at all events, if it did to some extent make trade or business profits, that it did not occupy the premises for the sole purpose of making such profits:—*Held*, that the premises fell within the exemption, as they were solely occupied by the society for the purposes of its business by which it sought to make a profit. The word “solely” in the sub-section qualifies the word “occupied” and not the words “any trade or business,” &c. *New York Insurance Co. v. Styles* (14 App. Cas. 381) distinguished. *Scottish Widows Fund v. Inland Revenue*, 3 F. 129—Ct. of Sess.

— **Residential Accommodation—Building—Exemption.**—Premises consisted of five floors and a basement. On the ground floor were four shops, A, B, C, and D, and a hall leading to the upper floors and basement, in which hall was a w.c. for the use of the tenants of the shops, of whom the tenants of B, C, and D had access to it internally through the hall. The tenant of A, however, could only reach it externally either through the street or the area. The basement contained a room under each shop, such room being let to the tenant of each shop, and two of the shops had rooms behind communicating with such shop. All the tenants of B, C, and D had keys of the front door leading into the hall, which hall gave access to the self-contained tenement dwellings let to separate tenants on the upper floor:—*Held*, on an assessment to inhabited-house duty, that these premises were not within section 13, sub-section 1 of the Act of 1878, as the whole of the house was not divided into different tenements—that is to say, tenements which were structurally separated—but that, so far as shop A was concerned, that was within section 13, sub-section 2 of that Act. *Held*, further, that neither section 4 of the Act of 1891 nor section 11 of the Act of 1903 applied. *Hillman v. Ankersen*, 95 L. T. 452—Walton, J.

Different Tenements Occupied Solely for Business.—A house of four storeys owned by a bank was occupied as follows: the first floor by a firm of writers to whom it was let, and the other three floors by the bank, the ground-floor being used as the offices of the bank, and the second floor as the official residence of the bank accountant. Access to all the floors from the street was by a door which opened into a vestibule. In the vestibule there was a door to the bank office, a front stair leading to the first floor, and a door to a passage leading to the bank agent's room and to a back stair, which was the access to the second floor. There was a door between the two stairs, which was kept locked. The first and second floors were each shut off from the staircase by outer doors on the landings. From the bank agent's house on the second floor there was a bolt in connection with the lock of the safe in the bank office. The whole house with the exception of the first floor having been assessed for inhabited-house duty, the bank appealed, and maintained that the ground-floor being occupied solely for the business of banking was entitled to exemption:—*Held*, that there were such means of internal communication and such structural connection

between the bank offices and the house of the agent, and also such identity of occupation, that the bank premises could not be regarded as a separate tenement within section 13 of the Customs and Inland Revenue Act, 1878. *Union Bank of Scotland v. Inland Revenue*, 3 F. 771; 65 J. P. 824—Ct. of Sess.

Dwelling-house Occupied by Stud Groom—Real or Sham Agreement of Tenancy—Whole Premises Occupied for Common Purpose.—The appellant was the owner of a dwelling-house, the rear of which abutted upon the wall of a yard on the sides of which were loose boxes, sheds, &c., the whole, with land attached, all belonging to the appellant, being used principally for the purpose of breeding and rearing thoroughbred horses for sale. For several years the dwelling-house had been occupied by S., who was in the appellant's service as stud groom at a weekly wage, his service being determinable by a week's notice on either side. Prior to February 1, 1904, S.'s wages were 40s. a week, but after February 1, 1904, they were raised by 8s. a week. The assessment to house duty upon the premises in and prior to 1903 was upon the appellant, but S. then dwelt in the dwelling-house referred to by reason of his employment under a verbal arrangement and rent free. The dwelling-house and stud boxes and buildings were at that time rated to the appellant, who paid all the rates in respect thereof. On February 1, 1904, an agreement in writing was entered into between the appellant and S., purporting to be for the tenancy of the dwelling-house at a yearly rent of 18l. By the agreement, which was determinable by either party giving three calendar months' notice in writing, the tenant was to pay all rates, taxes, &c. (except land tax and landlord's property tax), and do the internal repairs. Thereafter S. was entered upon the rate book and paid rates as the occupier of the dwelling-house. The appellant having been assessed to house tax as the occupier of the whole premises, including the dwelling-house, appealed to the Commissioners, who found—first, that the whole of the premises, including the dwelling-house, were occupied for one common purpose—namely, for the breeding and rearing of thoroughbred horses, and not for the purpose of husbandry only; and secondly, that the agreement was made for the purpose of evading the house tax, and that S. dwelt in the dwelling-house as the stud groom of the appellant, and not otherwise:—*Held*, that the fact that the agreement was made with a view of avoiding the payment of duty did not make it a sham agreement; that there was nothing to shew that it was other than a real agreement; that as S. had the exclusive occupation of the house he was the occupier thereof; and that the fact that the premises were all used for one common purpose was not inconsistent with this. *Cooper v. Rose*, 97 L. T. 337; 71 J. P. 492; 23 T. L. R. 707—Bray, J.

Dwelling-house and Offices—Communication by Doors on Ground Floor—Tenements Occupied Solely for Business Purposes—House “divided and let in different tenements”—Stables.—The appellant was the owner of a block of buildings, consisting of a house, offices, and stables, the offices being divided perpendicularly from the residential portion by a wall pierced by two

doorways on the ground floor. The appellant let the residential portion at a fixed annual rental to his sister, who, with her two servants, had the exclusive use of two separate entrances to the main street, but she did not use any portion of the offices. The part used as offices was verbally let to a firm of solicitors of which the appellant was a senior partner, and they had the exclusive use of a separate entrance from the main street by which the offices were entered, and the door of which was locked from the outside when all had left the offices. The stables in the yard at the rear were let to a separate tenant at a fixed annual rent, and they had a separate entrance from another street to which they fronted. The arrangement made between the appellant and the occupier of the residential portion was that the servants kept by her should clean the offices of the firm, and the servants were engaged to do that cleaning as well as their duties in the residential portion, and the firm paid to such occupier the wages of one of the servants. The only communication between the residential portion and the office portion was by two doors on the ground floor, and through these doors the servants passed and repassed to clean the offices. The occupier of the residential portion had the key of these doors, which she could lock and bolt from the inside, but not so as to prevent the servants from passing through to the offices, and she had the sole right to dismiss the servants, who lived and slept in the residential portion. The appellant himself did not occupy any part of the premises, which were separately rated to poor rate in the names of the three tenants:—*Held*, that the house was not separately “let in different tenements” within the meaning of section 13, sub-section 1 of the Customs and Inland Revenue Act, 1878; and that the building, consisting of the dwelling-house and the offices, formed one house chargeable in one *cumulo* sum to inhabited-house duty under the House Tax Act, 1808, but that the stables did not form part of the house and were exempt. *Knight v. Manley*, 92 L. T. 506; 21 T. L. R. 203—Phillimore, J.

Dwelling-house—Furnished and Habitable, but not Lived in.]—A dwelling-house furnished and ready for habitation is chargeable to inhabited-house duty under the House Tax Acts though no person has actually lived, dwelt, or slept in it during the year of assessment. *Smith v. Danney*, 73 L. J. K.B. 646; [1904] 2 K.B. 186; 90 L. T. 760; 53 W. R. 254; 20 T. L. R. 444—Channell, J.

Two Houses Connected so as to Form one Dwelling-house.]—A and B, two adjoining dwelling-houses belonging to different proprietors, were connected by an open doorway on the ground floor. The proprietor of A and his son, the tenant of B, occupied the two houses thus: The son, who was a physician, occupied the public rooms in B for his practice, one bedroom in B was occupied by himself, and another by a sister. The father and the other members of the family had bedrooms in A. The whole family took their meals in A. The only kitchen used was in A. There was only one servant:—*Held*, that there was such internal communication between the two houses that they could not be regarded as “different tenements” in the sense of Schedule B, rule 14

of the Inhabited-House Duty Act, 1808; that the two houses formed one dwelling-house in the joint occupation of father and son; and therefore that the father and son were jointly liable to inhabited-house duty for the whole premises. *Murdoch v. Inland Revenue*, 7 F. 111—Ct. of Sess.

Dwelling-house Partly Occupied by Solicitor's Office—Offices “therewith occupied.”—The respondent, a solicitor, occupied a dwelling-house fronting a street, and also a building in a yard at the back of the house used by him as an office for the purposes of his profession. There was a passage leading from the street to the yard. The front door into the house was in the passage, and at the end of the passage nearest the street was a door which was open all day, but which was locked at night, thereby shutting off all communication between the street and the whole of the premises, including the office. There was no internal communication between the office and the dwelling-house:—*Held*, that the office must be included in the valuation of the dwelling-house as being “therewith occupied” within the schedule to the House Tax Act, 1851, and not being so distinct and separate as to come within the exemption in section 13, sub-section 2 of the Customs and Inland Revenue Act, 1878, of a tenement “occupied solely for the purposes of . . . any profession . . . by which the occupier seeks a livelihood or profit.” *Nichols v. Malim*, 75 L. J. K.B. 140; [1906] 1 K.B. 272; 94 L. T. 161; 54 W. R. 404—Walton, J.

Business Premises on One Floor, Dwelling-House on Second Floor—Structural Separation.] Where of two floors in the same building one is occupied exclusively for business purposes and the other as a dwelling-house, and there is no internal communication, but there are separate entrances from the street, the business portion of the premises is, under the Customs and Inland Revenue Act, 1878, s. 13, sub-s. 2, entitled to exemption from inhabited house duty. *Att.-Gen. v. Mutual Tontine Westminster Chambers Association* (45 L. J. Ex. 886; 1 Ex. D. 469) considered. *Grant v. Langston*, 69 L. J. P.C. 66; [1900] A. C. 383; 82 L. T. 629; 64 J. P. 644—H.L. (Sc.)

Fire-station.]—A fire-station, owned and occupied by a town council, consisted of a fire-master's house, houses for firemen, engine-house, stables, gymnasium, duty-room, workshops, &c. There was intercommunication between the whole building:—*Held*, that the fire-station was subject to assessment for inhabited-house duty as a *unum quid*. *Inland Revenue v. Edinburgh Corporation*, 5 F. 875—Ct. of Sess.

A fire-station, owned and occupied by a town council, does not come under the exemption from inhabited-house duty of houses divided into and let in different tenements, and occupied solely for trade, contained in the Customs and Inland Revenue Act, 1878, s. 13. *Ib.*

Houses under 20l. of annual value provided for firemen in a fire-station, owned and occupied by a town council, do not come under the exemption from inhabited-house duty of houses under 20l. annual value contained in the

Customs and Inland Revenue Act, 1890, s. 26, sub-s. 2, as amended by the Customs and Inland Revenue Act, 1891, s. 4, sub-s. 1. *Id.*

"Hall or office"—Hall of Inn of Court.—The provision in rule 5 of Schedule B of the House Tax Act, 1808, by which every hall or office whatever that may be lawfully charged with the payment of parish rates shall be subject to the duties thereby made payable "as inhabited houses" is to be construed as meaning "as inhabited dwelling-houses," and, as the House Tax Act, 1851, re-enacts Schedule B of the House Tax Act, 1808, with respect to the duties thereby granted, the hall and offices of the Middle Temple, although not within the ordinary meaning of the word "dwelling-house," are liable to the duty imposed by the House Tax Act, 1851, on inhabited dwelling-houses. *Styles v. Middle Temple (Treasurer)*, 68 L. J. Q.B. 1046; 81 L. T. 426; 48 W. R. 164; 63 J. P. 725—C.A.

Library of Inn of Court.—The Middle Temple library is not liable to the duty, inasmuch as a library is essentially different from a "hall or office." A "hall or office" is generally used for some business purposes connected with the general objects of the society, company, or corporation which possesses it, whereas a library is a place devoted to books, reading, and study. *Styles v. Middle Temple (Treasurer)*, 68 L. J. Q.B. 157; 79 L. T. 700; 47 W. R. 383; 63 J. P. 213—D. *See* preceding case.

Library—Master's Dwelling in Part of Building—Intercommunication between Master's Dwelling and Library—Liability in Respect of Whole Premises.—The Liverpool Athenæum was an institution founded and maintained as a library and news-room. The proprietors were the whole body of members, shareholders only being eligible as members. It was not conducted for profit, and it was maintained by the subscriptions of its members. The premises were all contained between four walls, and at one end of the building was the dwelling-house of the master or librarian, in which he resided, but no person slept in the library, which the master locked up at night and opened in the morning. There was complete internal communication between the different parts of the premises, and the master by passing through doors and a passage had access from his dwelling to the various parts of the library. The master was appointed master and librarian at a salary, "with use of house, coals, and gas." He was provided in his dwelling with free lighting and coal, there being a common light and coal supply for the whole premises, and his employment could be terminated by a month's notice on either side. Upon an assessment of the premises to inhabited-house duty, *Held*, that the proprietors and not the master were in occupation of the master's dwelling, and that the whole premises constituted one subject-matter for assessment, and, part being inhabited, the proprietors were liable to inhabited-house duty in respect of the whole premises which were properly included in one assessment. *Foster v. Liverpool Athenæum*, 97 L. T. 692—Bray, J.

Public-house—"Tied house"—Rent of Premises as "Free house."—The "annual value"

according to which inhabited-house duty is made payable upon an inhabited dwelling-house by the House Tax Act, 1851, is the full and just yearly rent of the premises, and is not limited to their gross or rateable annual value as stated in the poor rate. *Walker v. Brisley*, 69 L. J. Q.B. 875; [1900] 2 Q.B. 735; 83 L. T. 347; 49 W. R. 23; 64 J. P. 709—D.

The owner of premises demised them to a firm of brewers for a term at a rent of 60*l.* a year, the brewers being bound to do all repairs. The brewers sublet the premises as a "tied house" to the appellant by an agreement which provided that the rent should be 14*l.* a year; that there should be a further rent of 10*l.* a year in any year in which the appellant should deal with any person other than the brewers for any beer, spirits, or aerated waters; that there should be a further rent of 10*l.* a year in any year in which the appellant should be indebted to the brewers in a sum exceeding 30*l.*; that all these rents should be paid without deduction except for land tax and landlord's property tax; and that the appellant should deal exclusively with the brewers for all beer, spirits, and aerated waters. The appellant occupied the premises under the agreement, and paid the rent of 14*l.* a year:—*Held*, that the annual value according to which duty was payable upon the premises under the above Act was the full and just yearly rent for which they could be let as a "free house"; that that rent was not necessarily so great as the rent of 60*l.* paid by the brewers to the owner; that it was greater than the rent of 14*l.* paid by the appellant to the brewers; and that on an appeal to the Commissioners of Inhabited House Duty against the assessment of the premises they were bound to receive evidence as to the amount of such full and just rent. *Id.*

School—Masters' Residences—School Buildings, &c.—Dividing Wall—Covered Passage.—A schoolmaster occupied certain land and buildings for the purposes of a school. The buildings consisted of the residences of the schoolmaster and assistant-masters and the dormitories and studies of the boys, and, separated from these by a wall but connected by a covered passage through a doorway and a door in the wall, five courts, changing-rooms, closets, a play-room with a gymnasium over it, class-rooms, a carpenter's shop with a store-room over it, and a room used as a chapel:—*Held*, that all these buildings should be valued together as one inhabited dwelling-house for the purposes of inhabited-house duty. *Broune v. Furtado*, 72 L. J. K.B. 296; [1903] 1 K.B. 723; 88 L. T. 309; 67 J. P. 161—C.A.

Stable Attached to Dwelling-house—Second Stable held under a Different Letting, and used by Occupier—Assessment of Second Stable.—An innkeeper was the occupier of and resided at licensed premises which, with the stables attached thereto, he rented from the owners at a yearly rent. These stables not being sufficient for the business of the inn, he also rented other stables under a different agreement and from a different owner, and both stables were occupied by him with the inn, and used solely for the business of the inn. The stables were separated from the inn by a private yard over which he had a right of way,

and were some twenty and fifty feet respectively from the private yard of the inn. The whole having been assessed to inhabited-house duty with the dwelling-house under rule 2 of Schedule B of 48 Geo. 3, c. 55, the innkeeper objected to the assessment of the second stables on the ground that they were not attached to the inn and were held under a separate agreement and from a different owner:—*Held*, that the second stables “belonged to and were occupied with” the dwelling-house, within the meaning of rule 2, as much as the first stables, and were properly included in the assessment. *Swain v. Fleming*, 81 L. T. 202—D.

Collection of—Authority to Distrain.]—See *Elliott v. Yates*, *supra*, INCOME TAX (COLLECTION), col. 2129.

S. LAND TAX.

Hospital—Exemption—Payment.]—Lands which, prior to March 25, 1693, belonged to the hospitals named in section 25 of the Land Tax Act, 1797, c. 5, are exempt from land tax whether they be in the occupation of the hospitals or in the hands of tenants, notwithstanding the circumstance that the lands have been assessed to the land tax, and the tax paid in accordance with such assessment from the year 1780, with the exception of one year, till the present time. *St. Thomas's Hospital v. Hudgell*, 70 L. J. K.B. 115; [1901] 1 K.B. 364; 83 L. T. 677; 65 J. P. 149—Wills, J.

Redemption—Yearly Sum Charged on Land for Benefit of Person Redeeming—“Rent”—Action for Yearly Sum.]—The yearly sum with which land becomes chargeable under section 123 of the Land Tax Redemption Act, 1802, for the benefit of a person having an estate or interest other than an estate of inheritance in the land, who redeems the land tax thereon, is “rent” within the meaning of section 1 of the Real Property Limitation Act, 1874, and an action to recover it can only be brought within the period of twelve years prescribed for the recovery of rent by the latter section. *Skene v. Cook*, 70 L. J. K.B. 556; [1901] 2 K.B. 7; 84 L. T. 684; 65 J. P. 533—D.

—Unopened Coal Mines under Redeemed Lands—Exemption.]—In a contract for the redemption of land tax the word “lands” is to be construed as having its natural meaning, and as including everything down to the centre of the earth, unless at the time of redemption there is in existence a separate and distinct hereditament liable to be separately assessed; and if there is such a separate hereditament, all the circumstances existing at the time of the redemption must be looked at in order to see whether the intention of the contract was that the surface only should be redeemed, or the land and everything beneath it. *Newton, Chambers & Co. v. Hall*, 76 L. J. K.B. 908; [1907] 2 K.B. 446; 96 L. T. 743; 71 J. P. 388; 23 T. L. R. 511—Bray, J.

Redemption of Land Tax by Lessee—Money Paid as Consideration—Annual Sum Payable by way of Interest—Sum of Money “charged upon” Land—“Rent.”]—A lessee for years of land under a lease which contained a covenant

by the lessee to pay the land tax during the term, in 1874 redeemed the land tax thereon, and the land thereupon became chargeable under section 123 of the Land Tax Redemption Act, 1802, with the amount of the money paid as the consideration for the redemption, and with the payment of a yearly sum by way of interest thereon equal in amount to the land tax redeemed, for the benefit of such person, his executors, administrators, and assigns. In 1900 an assignee of the benefits arising under the certificate of redemption sued an assignee of the lease of the land, in whom the lease became vested in 1885, for one yearly sum payable in accordance with the section. No payment or acknowledgment in respect of the tax had been made or given by the defendant to the plaintiff or his predecessors in title:—*Held*, that either the yearly sum payable by way of interest on the consideration money was “rent” within the meaning of section 1 of the Real Property Limitation Act, 1874, or the money paid as the consideration for the redemption of the tax was “charged upon” the land within the meaning of section 8 of that Act, and in either case the plaintiff's claim was barred. *Skene v. Cook*, 71 L. J. K.B. 446; [1902] 1 K.B. 682; 86 L. T. 319; 50 W. R. 503—C.A.

Public Conveniences Provided and Maintained by Sanitary Authority.]—Land tax is assessable in respect of public lavatories or sanitary conveniences under the public streets provided and maintained by a sanitary authority under the Public Health (London) Act, 1891. (*MATHEW, L.J.*, dissenting.) *Westminster City Council v. Johnson*. *Same v. Fuller*, 73 L. J. K.B. 774; [1904] 2 K.B. 737; 91 L. T. 334; 53 W. R. 4; 68 J. P. 549; 2 L. G. R. 1378; 20 T. L. R. 701—C.A.

Covenant by Lessor to Pay.]—See LANDLORD AND TENANT, cols. 1246-7.

9. STAMPS.

Statute.]—See 62 & 63 Vict. c. 9, Part II.

(i) *In what Cases Stamp Duty Payable.*

(a) *Agreement.*

Agreement Executed in England—Goodwill—Foreign Business—Property “situate locally out of the United Kingdom.”]—According to the true construction of the Stamp Act, 1891, an agreement is made in England if it is executed in England by a party thereto whose execution is required to make the instrument on the face of it complete and perfect. *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Lim.*, 70 L. J. K.B. 677; [1901] A.C. 217; 84 L. T. 729; 49 W. R. 603—H.L. (E.)

The goodwill of a business carried on abroad, all of whose customers are resident abroad, and on the sale whereof the vendor covenants not to trade in competition with it within a radius confined to foreign territory, is “property locally situate out of the United Kingdom,” and an agreement for the sale of such goodwill is not liable to *ad valorem* duty under section 59, sub-section 1 of the Stamp Act, 1891. *Id.*

“Property locally situate out of the United

Kingdom"—Agreement for Sale of Benefit of Contract to Provide Land Suitable for Factory Abroad.]—By an agreement in writing made in England between a syndicate and a limited company the syndicate agreed for valuable consideration to sell to the company the benefit of a contract which they had acquired, made between one V. of Bucharest and one F. of London, for the transfer by V. to F. of a plot of land suitable for the erection of a sugar factory and situate within a specified area in Roumania:—*Held*, that the agreement was for the sale of an estate or interest in property within the meaning of section 59, sub-section 1 of the Stamp Act, 1891, and was chargeable with *ad valorem* conveyance duty thereunder, the property agreed to be sold not being "locally situate out of the United Kingdom" within the meaning of the exception in the sub-section. *Danubian Sugar Factories v. Inland Revenue Commissioners*, 70 L. J. K.B. 211; [1901] 1 K.B. 245; 84 L. T. 101; 65 J. P. 212—C.A.

Agreement to Sell Book Debts—Guaranty of Payment before Completion—Consideration.]—A. Co., Lim., agreed to sell their entire undertaking, together with the book debts owing to them, to B. Co., Lim. By the agreement the book debts were to be taken as they were at the making up of the books of the A. Co. at the end of the preceding year, and the A. Co. gave a guaranty that they would be paid in full before the date fixed for the completion of the conveyance; and the A. Co. were to be taken as conducting the business as agents for the B. Co. since the end of the preceding year till completion. At the date of the agreement only a small part of the debts due at the end of the preceding year was still owing, and they were all in fact paid before completion of the conveyance:—*Held*, that the sale of book debts was a sale of property within section 59, sub-section 1 of the Stamp Act, 1891, and that consequently the B. Co. were liable to pay stamp duty on that part of the consideration appropriated as representing the consideration given for those debts. *Measures v. Inland Revenue Commissioners*, 82 L. T. 689—D.

Agreement between County Council and Urban Authority as to Maintenance, Repair, and Improvement of Main Roads—Agreement or Contract Pursuant to Highway Acts.]—An agreement between a county council and an urban authority relating to the cost of maintenance, repair, and reasonable improvement connected with the maintenance and repair of main roads, made under section 11, sub-section 3 of the Local Government Act, 1888, is not an "agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways," within Schedule I. of the Stamp Act, 1891, and not being otherwise specifically dealt with in that Act it requires a 10s. stamp. *Cumberland County Council v. Inland Revenue Commissioners*, 78 L. T. 679; 62 J. P. 407—D.

Agreement by County Council with District Council to Maintain Main Roads—Agreement made "pursuant to the Highway Acts"—"Deed of any kind not described in schedule."]—When a county council make an agreement under seal with a district council under section 11, sub-section 4 of the Local Government

Act, 1888, for the repairing, maintaining, and keeping in repair main roads in their district, such an agreement is not an agreement "made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways," within the meaning of the Schedule to the Stamp Act, 1891, which would require a 6d. stamp, but comes within the heading in that schedule, "Deed of any kind whatsoever not described in this schedule," and therefore requires a 10s. stamp. *Southampton County Council v. Inland Revenue Commissioners*, 92 L. T. 864; 69 J. P. 105; 3 L. G. R. 1060; 21 T. L. R. 199—Phillimore, J.

Agreement for Sale of Lands—Lands Situate out of the United Kingdom—Equitable Estate in Lands—Equity of Redemption in Lands in New South Wales.]—An equity of redemption of lands in New South Wales is an equitable estate or interest within the meaning of the Stamp Act, 1891, s. 59, notwithstanding the provisions of section 25 of the New South Wales Trust Property Act, 1862, which enacts, in effect, that all mortgages shall be deemed pledges of the property thereby mortgaged, and that nothing in any such mortgage shall prevent the title of any mortgagor from being deemed a good title in law as against all persons other than the mortgagee. *Farmer v. Inland Revenue Commissioners*, 67 L. J. Q.B. 775; [1898] 2 Q.B. 141; 79 L. T. 32—D.

An agreement for the sale of an equitable interest in lands situate out of the United Kingdom is liable to *ad valorem* duty under section 59 of the Act of 1891. *Ib.*

(b) *Bill of Exchange and Promissory Note.*

Promissory Note—Payable at Sight.]—A promissory note of any kind, even although payable on demand or at sight, requires to be stamped with an *ad valorem* stamp under the First Schedule of the Stamp Act, 1891. *Oettinger v. Cohn*, 77 L. J. K.B. 299; [1903] 1 K.B. 532—Channell, J.

The plaintiffs, who were resident in Germany, received from the defendant a promissory note made by him and one B. in the following terms: "We, the undersigned, severally and collectively promise to pay to H. N. O. & Co., or order, at sight, the sum of two hundred and fifty pounds sterling, value received." The document, which was written by the defendant in England, had a penny stamp impressed upon it before being sent to the plaintiffs in Germany:—*Held*, that the document required to be stamped with an *ad valorem* stamp as a promissory note. *Ib.*

Quare, whether a promissory note payable on demand or at sight does not require to be stamped with a penny stamp under section 32 of the Stamp Act as a bill of exchange as well as to be stamped with the *ad valorem* stamp as a promissory note. *Ib.*

"Promissory note" or Agreement.]—The appellant sold a lease of a public-house to the respondent. The respondent having failed to obtain an order of Justices for a transfer to him of the licence, it was verbally agreed between

the parties that the appellant should carry on the business under the licence till the next transfer day, and that the respondent should pay him 25*l.* for doing so. The appellant consented to allow payment of that sum to stand over till the transfer day if the respondent would give him an agreement in writing. The respondent thereupon signed the following document and handed it to the appellant: "On the day of the transfer of the licence I agree to pay you the sum of Twenty-five pounds":—*Held*, that this document was liable to stamp duty, not as an agreement, but as a promissory note within section 33 of the Stamp Act, 1891. *Smith v. Dean*, 69 L. J. Q.B. 331; 81 L. T. 755—D.

(c) *Bond, Covenant, or Instrument.*

Annuity Charged on Real Property—Will.]—A testator bequeathed to his trustee during the life of his wife an annuity of 1,200*l.* upon trust for his said wife, and he charged same on his real and leasehold property and residuary personal estate, and subject thereto he gave and devised all his real and personal estate to J. M. K. absolutely. Subsequently, by an indenture between the said J. M. K. and the trustee, certain property forming part of the testator's estate was released from the annuity and certain other property charged with the annuity in its place:—*Held*, that the indenture was a bond, covenant, or instrument within the First Schedule to the Stamp Act, 1891, for securing an annuity, and that a will was not an instrument creating a security. *Kennedy v. Inland Revenue Commissioners*, 65 J. P. 9—D.

Agreement for Hire of Telephone Wire and Apparatus—"Bond covenant or instrument of any kind whatsoever"—"Only or principal or primary security for any annuity" for Indefinite Period.]—An agreement with a telephone company under which a person rents a private wire and telephonic apparatus for a specified yearly sum to be paid in advance, and which is terminable by either party on three months' notice, is within the words "Bond covenant or instrument of any kind whatsoever," "being the only or principal or primary security for any annuity" for an "indefinite period" in the first schedule of the Stamp Act, 1891, and chargeable with the *ad valorem* duty therein stated. *National Telephone Co. v. Inland Revenue Commissioners*, 69 L. J. Q.B. 43; [1900] A.C. 1; 81 L. T. 546; 48 W. R. 210; 64 J. P. 420—H.L. (E.)

Bond of Foreign Company—"Issue" "Offered for subscription" in United Kingdom.]—A scheme for the reorganisation of an American railway company was prepared, by which it was proposed that an executive committee should be formed in America to carry out the scheme, that a new company should be formed in America to take over the undertaking of the old company, and that the new company should issue new bonds in order to take the bonds of the old company and provide further capital for the new company. The English holders of bonds of the old company were invited by circular to accept the scheme and to deposit their bonds with named depositaries in London, in exchange for which they would

subsequently receive bonds of the proposed new company. The scheme was carried out. The new company executed and delivered to the appointed trustee in America the stipulated number of new bearer bonds, which were duly certified by the trustee and then handed to the executive committee. The executive committee had full power to deal with any of the new bonds, by sale, pledge, or otherwise, for the purposes of the scheme and for the uses of the new company, in its discretion and without accountability to the new company. The new bonds in question were forwarded by the executive committee to the depositaries in London, by whom they were handed to the persons who had deposited bonds of the old company:—*Held*, that the new bonds given to the holders of old bonds in England were neither "issued" nor "offered for subscription" in England within the meaning of section 82, sub-section 1 (b) (i.) (ii.) of the Stamp Act, 1891. *Brown v. Inland Revenue Commissioners*, 84 L. T. 71—C.A.

(d) *Capital, Issue of.*

Consolidation and Conversion of Stocks—"Increase of the amount of nominal share capital"—"No Increase of Working Capital.]—Where a railway company under the provisions of a special Act extinguish various classes of stock, preferential and ordinary, and in lieu thereof issue other stocks of higher nominal value, but bearing a lower rate of interest, although nothing is added to the working capital of the company, yet there is an "increase of the amount of the nominal share capital" within the meaning of the Stamp Act, 1891, s. 118, and the *ad valorem* duty thereby imposed is payable on such increase. *Midland Railway v. Att.-Gen.*, 71 L. J. K.B. 315; 86 L. T. 206; 50 W. R. 433—H.L. (E.)

Loan Capital—Date of Issue.]—By section 8, sub-section 1 of the Finance Act, 1899, "Where any . . . corporation . . . propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue." And by sub-section 2 every such statement is to be charged with an *ad valorem* stamp duty. The Act received the Royal assent on June 20, 1899. A corporation, under powers conferred upon them by certain local Acts, resolved to create corporation stock, and a prospectus was issued inviting tenders for the same and specifying the mode of payment. The date for payment of the final instalment was June 21, 1899. Tenders were received for the whole of the stock, and the full amount was allotted. When the amounts payable on allotment were paid, provisional receipts were issued to the respective allottees which were exchanged for scrip certificates to bearer prior to June 20, 1899. The certificates were dated April 24, 1899, but were not in fact issued till May 2, 1899:—*Held*, that there was an issue of the loan capital at all events when the scrip certificates were issued, and that as that took place before June 20, 1899, the Finance Act of 1899 had no application, and the corporation were not bound to deliver a stamped statement under the provisions of section 8. *Att.-Gen. v. Liverpool Corporation*, 71 L. J. K.B. 195; [1902] 1 K.B.

411; 86 L. T. 300; 50 W. R. 328; 66 J. P. 391—*Phillimore, J.*

"Issue of loan capital"—Existing Debenture Stock—Amalgamation—Rights of Holders of Existing Stock Modified and Altered—Liability of Issue of New Stock to Duty.—A company, incorporated by special Act, had from time to time issued certain debenture stock, bearing interest at 4 per cent. By an amalgamation Act, which provided for a change of the name of the company, for the dissolution of the company and the transfer of its undertaking to the new company, it was provided that on and from the date of the amalgamation the then existing debenture stock was to be divided into debenture stock of two classes, the A and B debenture stock, each bearing interest at 3 per cent., and the amount of the A and B debenture stock was to be 61 per cent. and 39 per cent. respectively of the total amount of the then existing debenture stock. The rights of each holder of existing debenture stock were to be modified so that his holding was to consist of 61 per cent. of A debenture stock and 39 per cent. of B debenture stock, bearing interest at 3 per cent., and each holder was to be entitled to a further amount of B debenture stock equal to one-third of the amount of existing debenture stock held by him. There was no provision in the Act that the existing debenture stock was to be cancelled or extinguished, but each holder of existing stock was to deliver up the certificates of the stock held by him and was to receive proper certificates in exchange, and he was to be no longer entitled to register the existing stock. The operation carried out under the Act did not involve the raising or obtaining from the public any additional capital. The Crown claimed that the company were bound under section 8 of the Finance Act, 1899, to deliver a duly stamped statement of the aggregate amount of the A and B debenture stock:—*Held* (on the authority of *Att.-Gen. v. Regent's Canal and Dock Co.*, 73 L. J. K.B. 50; [1904] 1 K.B. 263), that under the operation carried out by the amalgamation Act the issue of the A and B debenture stock was an "issue of loan capital" within the meaning of section 8, sub-section 1 of the Finance Act, 1899, and that the company were bound, under sub-section 2, to deliver a duly stamped statement of the total aggregate of such A and B debenture stock. *Att.-Gen. v. London and India Docks Co.*, 95 L. T. 536—*Walton, J.* And see DEBENTURE, *infra*, col. 2152.

(e) *Conveyance on Sale.*

Agreement for Sale of Equitable Interest—Leasehold Premises—In the Event of Landlord's Consent not being Obtained, Seller, at Purchaser's Option, to Execute Declaration of Trust—"Property except lands"—Goodwill of Public-house.—A contract for the sale of leasehold premises contained a proviso that in the event of the consent of the landlord to the assignment of the lease not being obtained the vendor should, at the option of the purchaser, execute a declaration of trust of the lease in his favour. Two days afterwards a declaration of trust was executed, by which the equitable interest in the premises vested in the purchaser:—*Held* (*Rigby, L.J.*, dissenting), that the contract

being one for the sale of a legal estate, and there being no obligation on the purchaser to accept a declaration of trust, it was not a contract for the sale of an equitable estate or interest in property within the meaning of section 59, sub-section 1 of the Stamp Act, 1891. *West London Syndicate v. Inland Revenue Commissioners*, 67 L. J. Q.B. 956; [1898] 2 Q.B. 507; 79 L. T. 289; 47 W. R. 125—*C.A.*

Per Rigby, L.J.—The true inference from the documents and facts outside the documents was that the real bargain between the parties was for the sale of an equitable interest only. *Ib.*

The goodwill of a public-house is not necessarily a mere enhancement of the value of the licensed premises, and so attached to the possession of the premises as to constitute "land" within the meaning of section 59, sub-section 1 of the Stamp Act, 1891. It may, therefore, be "property except lands" within the meaning of the section; and upon an agreement for the sale of the lease and goodwill of a public-house the instrument may be chargeable with *ad valorem* duty:—*So held* (*Vaughan Williams, L.J.*, dissenting), reversing the judgment of the Queen's Bench Division. *Ib.*

Sale by one Company to Another—Consideration—Annual Payments out of Profits—Amount Varying with Paid-up Capital—"Money payable periodically"—Contingency—Ad Valorem Duty.—By a conveyance on sale a company sold its undertaking to another company. Part of the consideration for the sale consisted of annual sums payable by the purchasing company out of its annual profits. These annual sums were to be equal to 3 per cent. on the amount for the time being paid up on so much of the ordinary share capital of the purchasing company as should for the time being have been issued by it, and were only payable after a dividend of 5 per cent. upon the same amount had been paid to the shareholders of the purchasing company. At the date of the conveyance the whole of the purchasing company's share capital had been issued, and a certain amount had been paid up thereon:—*Held*, that *ad valorem* stamp duty was payable on the conveyance under section 56, sub-section 2 of the Stamp Act, 1891, inasmuch as—first, there was an ascertained amount—namely, that paid up on the ordinary share capital of the purchasing company at the date of the conveyance—upon which the dividend of 3 per cent., when earned, would have to be paid, which was thus a basis for assessing the duty; and secondly, the words "money payable" in sub-section 2 include money payable contingently. *Underground Electric Railways Co. v. Inland Revenue Commissioners*, 74 L. J. K.B. 200; [1905] 1 K.B. 174; 92 L. T. 6; 53 W. R. 325; 21 T. L. R. 109—*C.A.*

Transfer of Property Situate Abroad—Instrument Executed Abroad—Consideration—Issue and Delivery of Shares in England—"Thing done or to be done in the United Kingdom."—By an instrument in French called an "*acte d'apport*," executed in France, an English company transferred certain property in France to another English company in consideration of the allotment by the latter to the former of a certain number of its shares in the former:—*Held*, that

the instrument related to "property situate" and to a "matter or thing done or to be done" in the United Kingdom within the meaning of section 14, sub-section 4 of the Stamp Act, 1891, and was a "conveyance on sale" within section 54 of that Act. *Inland Revenue Commissioners v. Maple & Co.*, 77 L. J. K.B. 55; 24 T. L. R. 140; [1908] A.C. 22; 14 Manson, 302; 24 T. L. R. 140—H.L. (E.) Reversing, [1906] 2 K.B. 334; 95 L. T. 687; 22 T. L. R. 829—C.A.

Undertaking by Mine Owner to Leave Coal Unworked under Railway in Consideration of Compensation—Sale—Estate or Interest in Property—Right not before in Existence.—By section 1 and Schedule I. of the Stamp Act, 1891, a conveyance on sale of any property, where the amount of the consideration exceeds 300*l.*, is chargeable with a stamp duty of 5*s.* for every 50*l.*; and a release or renunciation of any right or interest in property upon a sale is chargeable with the same duty. By section 54 conveyance on sale includes any instrument whereby any property or any estate or interest in property, upon the sale thereof, is transferred to or vested in a purchaser. . . . By section 60, where upon the sale of any right not before in existence such right is secured by bond . . . covenant, contract, or otherwise, the bond or other instrument is to be charged with the same duty as a conveyance. An instrument was executed by a limited company, who were mine owners, acknowledging the receipt of a sum of money payable under section 78 of the Railways Clauses Act, 1845, by a railway company, as compensation to the mine owners for leaving mines unworked, and containing an undertaking by the mine owners to leave such mines unworked.—*Held*, that the instrument was not an instrument securing a right not before in existence within section 60 of the Stamp Act, 1891. *Held*, also, *per* COLLINS, L.J., and STIRLING, L.J.,—first, that no estate or interest in property was vested in a purchaser, and therefore the instrument was not a conveyance on sale within section 54 of the Act; and secondly, that the restriction placed on the mine owners was not the subject of a grant, and that there was therefore no sale within the meaning of section 60, or of section 54, or section 1, Schedule I. of the Act. *Great Northern Railway v. Inland Revenue Commissioners*, 70 L. J. K.B. 336; [1901] 1 K.B. 416; 84 L. T. 188; 49 W. R. 261; 65 J. P. 275—C.A.

Exchange of Shares—Agreement to Hold Shares in Trust—Contract for Sale of "equitable interest."—By an agreement made between seven persons, described as members of a certain brewery company (thereinafter called the "old company"), and the appellant company, it was agreed that the seven members of the old company should exchange their shares in that company for such number of fully paid-up ordinary and preference shares and debenture stock in the appellant company as were respectively set opposite their names in the schedule, and that the appellant company should also pay to each of the seven persons 100*l.* in cash. It was further agreed that when the agreement had been filed pursuant to section 25 of the Companies Act, 1867, the appellant company should allot to each of the seven persons the shares and debenture stock to which they respectively were to be entitled, and that thence-

forth those persons should hold their respective shares in the old company "in trust for the new company":—*Held*, that the transaction was in substance a sale to the new company of an equitable interest in the shares of the old company, and that the instrument was therefore chargeable with conveyance duty under the provisions of section 54 and section 59, sub-section 1 of the Stamp Act, 1891. *Chesterfield Brewery Co. v. Inland Revenue Commissioners*, 68 L. J. Q.B. 204; [1899] 2 Q.B. 7; 79 L. T. 559; 47 W. R. 320—D.

Purchase of Property under Authority of Statute—Conveyance—Property Including both Realty and Chattels—Duty on Personal Property.—The *ad valorem* duty imposed by section 12 of the Finance Act, 1895, on "any property" purchased under statutory authority of which a duly stamped instrument of conveyance is required, is payable in respect of the whole property, personal as well as real, and is not confined to property which can only be transferred in writing. *Eastbourne Corporation v. At.-Gen.*, 73 L. J. K.B. 259; [1904] A.C. 155; 90 L. T. 99; 52 W. R. 577; 68 J. P. 393; 2 L. G. R. 789; 20 T. L. R. 252—H.L. (E.)

Extract of Decree.—An extract of decree under section 8 of the Heritable Securities (Scotland) Act, 1894, whereby the lands of a debtor become vested irredeemably in the creditor, is a "conveyance on sale" within the meaning of section 54 of the Stamp Act, 1891, and chargeable with *ad valorem* duty. *Inland Revenue Commissioners v. Tod*, 67 L. J. P.C. 42; [1898] A.C. 399; 78 L. T. 571—H.L. (Sc.)

Conveyance in Consideration of Debt—Bad Debt.—Under an agreement confirmed by Act of Parliament the North British Railway Co. acquired the undertaking of the Bo'ness Harbour Commissioners. The agreement set forth that "as the consideration for such sale and transfer the Company shall undertake as from the date of entry, and shall free and relieve the Harbour Commissioners of the whole debts, liabilities, contracts and obligations and engagements of the Harbour Commissioners. . . ." Prior to the date of entry the company had become creditors of the Commissioners in terms of a guarantee, under which they had made large advances, amounting to 303,376*l.* 1*s.*, for a series of years, to meet the interest due on the harbour debentures. This debt was set forth in the preamble of the special Act as one of the debts due by the Harbour Commissioners at the date of the transfer:—*Held*, first, that the debt due to the company was included in the debts from which the company undertook to free and relieve the Harbour Commissioners as part of the consideration for the transfer of the undertaking; and secondly, that *ad valorem* conveyance duty was chargeable on its whole amount, irrespective of whether it was or was not a bad debt which could not have been recovered from the Harbour Commissioners. *Inland Revenue Commissioners v. North British Railway*, 4 F. 27—Ct. of Sess.

Gas Company Dissolved and Reconstituted by Statute—Property of Old Company Vested in New Company—"Vested by way of sale."—A special Act of Parliament provided that a certain gas company should be dissolved and re-incor-

porated with further powers, that all the property of the old company should be vested in the new company, that the new company should assume all the liabilities of the old company, and that the preference and ordinary stock of the old company should form part of the capital of the new company, the holders of stock in the old company becoming holders of stock in the new company to a like amount:—*Held*, that the copy of the Act was chargeable, under section 12 of the Finance Act, 1895, with *ad valorem* duty as on a conveyance on sale on the amount of the liabilities of the old company assumed by the new company, and on the value at the date of the passing of the Act of the stock of the new company issued in exchange to the holders of stock in the old company. *Att.-Gen. v. Felixstowe Gas Light Co.*, 76 L. J. K.B. 1107; [1907] 2 K.B. 984; 97 L. T. 340; 14 Manson, 291—Bray, J.

The fact that the two companies did not co-exist at the same time did not prevent the duty being payable, as under the Act of Parliament the transfer was treated as if it were a transfer from one company to the other, and duty is payable on transfers "by way of sale." *Ib.*

Assent of Executor to Devise of Real Estate.]

—An assent in writing under the hand, but not under the seal, of an executor to a devise of real estate made in pursuance of section 3 of the Land Transfer Act, 1897, is not an "instrument whereby any property . . . is transferred to or vested in any person" within the meaning of section 62 of the Stamp Act, 1891, and need not therefore be stamped as a conveyance or transfer. *Kemp v. Inland Revenue Commissioners*, 74 L. J. K.B. 112; [1905] 1 K.B. 581; 92 L. T. 92; 53 W. R. 479; 21 T. L. R. 168—Phillimore, J.

The words "every instrument, and every decree or order of any Court . . . whereby any property . . . is transferred to or vested in any person" are to be construed *reddendo singula singulis*. *Ib.*

Transfer of Stock by Executor to Legatee.]

Where a legatee under a will agrees with the executor to take payment or part payment of the legacy in stock or securities of the testator, the transfer deed executed in pursuance of the agreement is a "conveyance or transfer on sale" within the meaning of the Stamp Act, 1891, and is chargeable with *ad valorem* duty to be assessed in accordance with the provisions of that Act. *Dawson v. Inland Revenue Commissioners*, [1905] 2 Ir. R. 69—K.B. D.

Agreement Stamp.]—On June 13, 1904, M. verbally agreed to sell an ice-cream business to F. for 150*l.*, and F. thereupon entered into possession of the shop and business. M. having begun another ice-cream business in the same town, F. sued him for 150*l.*, alleging that the defender had, as part of the agreement, undertaken not to compete with the pursuer in business in the same town under a penalty of 150*l.* The pursuer produced a document, dated August 26, 1904, signed by the parties, which the pursuer alleged set forth the terms of the agreement. This document bore a six-penny agreement stamp. The defender pleaded

that the document, being a conveyance on sale within section 54 of the Stamp Act, 1891, required an *ad valorem* stamp:—*Held*, that, having regard to the fact that there was a prior verbal agreement to sell, followed by possession, the document was not so clearly a conveyance on sale as to make it the duty of the Court under section 14 of the Stamp Act, 1891, to require the document to be stamped with an *ad valorem* stamp before allowing it to be admitted in evidence. *Don Francesco v. De Meo*, [1908] S.C. 7—Ct. of Sess.

Family Arrangement—Liability to Duty.]

The appellant, who was absolutely entitled to certain freeholds and copyholds subject to a mortgage, and also to certain personal chattels, executed three deeds embodying a family arrangement with H. The first exonerated the appellant from payment of the mortgage debt and contained a covenant by H. with the mortgagees for payment. The second was a conveyance by the appellant of his unsettled estates to H. subject to the mortgage. The third deed was a conveyance by the appellant to H. of the chattels, and contained a family arrangement as to the estates, a debt of 123,800*l.* from the appellant to H. being extinguished and power given to the parties to cancel the arrangement by a deed signed by both of them:—*Held*, that the second and third deeds were "conveyance on sale" and were chargeable with *ad valorem* duty under the Stamp Act, 1891. *Bristol (Marquess) v. Inland Revenue Commissioners*, 70 L. J. K.B. 759; [1901] 2 K.B. 336; 84 L. T. 659; 49 W. R. 718; 65 J. P. 360—D.

Part of Consideration Payable on Contingency.]

—Where part of the consideration on a sale consists of money payable periodically on a contingency for a term exceeding twenty years, or in perpetuity, or for an indefinite period, *ad valorem* stamp duty must under section 56, sub-section 2 of the Stamp Act, 1891, be paid on twenty years' purchase of such annual payment. *Underground Electric Railways Co. v. Inland Revenue Commissioners*, 75 L. J. K.B. 117; [1906] A.C. 21; 93 L. T. 819; 54 W. R. 381; 22 T. L. R. 160—H.L. (E.)

Release or Renunciation of Property or of Right or Interest in Property—Undertaking by Mine-owner to Leave Coal under Railway Unworked and Abandon Claims thereto in Consideration of Compensation—"Release"—"Renunciation"—Release "upon a sale."]—An instrument by which a colliery company acknowledges receipt of a sum paid as compensation by a railway company in respect of coal which the latter company has, pursuant to section 78 of the Railways Clauses Consolidation Act, 1845, required to be left unworked, and in consideration thereof undertakes to leave the coal unworked and to do all things necessary for vesting the same in the latter company whenever required, and acknowledges that the sum includes compensation for all claims, which, but for the instrument, might have been maintained against the latter company in respect of the coal, does not come within the words in the First Schedule to the Stamp Act, 1891—"Release . . . of any property or of any right or interest in any property—Upon a sale," and consequently is not chargeable with *ad valorem* stamp duty as a convey-

ance on sale, but comes within the words "Release . . . of any property or of any right or interest in any property—In any other case," and consequently is chargeable with a stamp duty of 10s. *Great Northern Railway v. Inland Revenue Commissioners*, 68 L. J. Q.B. 978; [1899] 2 Q.B. 652; 81 L. T. 385; 48 W. R. 170; 64 J. P. 21—D.

The word "renunciation" occurring in the schedule in connection with these words is a term not of English but of Scots law. *Ib.*

Partnership—Dissolution—Transfer of Property—Record of Transfer—"Conveyance on sale"—"Release on renunciation."—J. F. G. and J. W. G. being in partnership, the same was determined under the articles by notice. Two instruments were executed to give effect to the dissolution, by the first of which the real estate of the partnership was released by J. F. G. and transferred to the appellant, J. W. G. That deed was stamped with an *ad valorem* duty, and no question arose thereon. By the other deed, after reciting that 41,752l. 4s. 7d. was the amount standing to the credit of J. F. G., and that by the above indenture the real estate had been conveyed to J. W. G., and that the chattel property of the partnership was in the possession of the appellant, J. W. G., and that the appellant had given J. F. G. his promissory note for 41,752l. 4s. 7d., both J. F. G. and J. W. G. declared the partnership dissolved, and J. F. G. declared that the delivery of the note to him was accepted by him in full discharge of all claims against J. W. G. in respect of the share of him, J. F. G., in the partnership, and he further covenanted with J. W. G. that he would not carry on business in the firm name, and entered into other covenants:—*Held*, that this deed also was liable to *ad valorem* duty under the Stamp Act, 1891. *Garnett v. Inland Revenue Commissioners*, 81 L. T. 633; 48 W. R. 303—D.

Land Sold for Lump Sum and Annual Payment—Annual Payment made by Purchaser in Consideration of Vendor Paying Tithe—Whether Annual Payment is "part of the consideration for conveyance on sale."—The owners in fee-simple of a certain piece of land offered the land for sale in lots as a building estate, and by an indenture which recited that the vendors had agreed with the purchaser for the sale to him of a certain lot or piece of the land for the sum of 50l., the vendors granted the lot to the purchaser in fee-simple in consideration of the sum of 50l. then paid by the purchaser (amongst other conditions), subject to and charged with the payment to the vendors and their assigns of the annual sum of 1s., in accordance with a stipulation providing that the piece of land thereby conveyed was in consideration of the vendors paying the whole of the tithe in respect of the land of which the plot formed part, subjected to and charged with the payment to the vendors of the perpetual sum of 1s. per annum; and the purchaser for himself and his assigns covenanted to make this annual payment of 1s. to the vendors and to perform the other stipulations of the agreement. The payment of the 1s. was in consideration of the vendors paying the whole of the tithe. In assessing the stamp duty upon the indenture,—*Held*, that the annual payment

of 1s. per annum was part of the consideration for the sale; that the consideration for the sale was therefore the 50l. plus the annual sum of 1s., and that, having regard to section 56, subsection 2 of the Stamp Act, 1891, the whole consideration for the sale was 50l. plus 1s. multiplied by twenty—namely, 51l.—and that the indenture was to be stamped as a conveyance on sale for a consideration of 51l.—namely, with a stamp of 7s. 6d.; but that even if the annual payment was not part of the consideration, the stipulation to pay it would be a separate collateral covenant which would require to be stamped as such. *Martin v. Inland Revenue Commissioners*, 91 L. T. 453—Channell, J.

(f) *Debenture.*

Covenant to Redeem after Happening of Contingency.—Where by a debenture which is a "marketable security" within the meaning of the first schedule of the Stamp Act, 1891, the obligor covenants that when the debenture becomes payable, in accordance with the conditions indorsed thereon, he will pay to the registered holder a specified sum, and by a condition indorsed on the debenture the obligor may at any time after a specified date redeem the debenture at a higher price than the specified sum, on giving a specified notice to the registered holder, and "upon the expiration of such notice" the higher price "shall become payable as if the same was the amount of the principal moneys hereby secured, and shall thereupon cease to carry interest," the debenture is liable to stamp duty not upon the higher, but only on the lower price, inasmuch as such lower price is the "money thereby secured" by a "marketable security" not transferable by delivery within the meaning of the schedule. *Knights Deep v. Inland Revenue Commissioners*, 69 L. J. Q.B. 66; [1900] 1 Q.B. 217; 81 L. T. 625; 48 W. R. 198—C.A.

Cancellation of Existing Debenture Stock—Creation of New Debenture Stock—Substitution of New Stock for Stock Extinguished—"Issue" of Loan Capital.—The defendants, under powers conferred upon them by a special Act of Parliament, issued certain debenture stocks at different rates of interest. By a subsequent Act those stocks were cancelled, and it was provided that there should be, by virtue of the Act, created, in lieu of the stocks so extinguished, certain new debenture stock, at a uniform rate of interest, and that every holder of the existing stock should be entitled to receive such nominal amount of the new stock as would yield to the holder in cash the same amount of interest previously received by him in respect of the existing stock, and that the new stock was to be held upon the same terms as those upon which the existing stock was held immediately before the substitution:—*Held*, that, the existing debenture stocks having been extinguished by the special Act, and new stock substituted therefor, whereby the indebtedness of the company was largely increased, the new stock was loan capital, and the defendants had proposed "to issue any loan capital" within the meaning of section 8, subsection 1 of the Finance Act, 1899, and were therefore bound to deliver to the Inland Revenue Commissioners, for the purposes of stamp duty,

a statement of the amount proposed to be secured by the new debenture stock. *Att.-Gen. v. Regent's Canal and Dock Co.*, 73 L. J. K.B. 50; [1904] 1 K.B. 263; 89 L. T. 599; 52 W. R. 211; 68 J. P. 105; 20 T. L. R. 92—C.A.

Mortgage to Secure Debentures—Substituted Security.—By a trust deed made between a joint-stock company and trustees for the debenture-holders, the former, stipulating that they might redeem the debenture stock after giving certain notice, covenanted that after giving such notice they would redeem at nominal value, plus 10 per cent. By further clauses of the deed certain freeholds and leaseholds were assured to the trustees to secure payment of all principal moneys, bonuses, and interest which might become payable in respect of the debenture stock, and a floating charge on all the company's property was created for the same purpose. There was a clause giving the company power to withdraw any of the freeholds or leaseholds assured to the trustees and substitute other property of equal value. By a subsequent indenture a small part of the leaseholds so assured was withdrawn and other leaseholds belonging to the company assured to the trustees to be held on the trusts of the earlier indenture. This second indenture contained no covenant for payment of the debenture principal money or interest, and no express declaration of the trusts on which the property assured was to be held:—*Held*, that the second indenture was a "mortgage" within section 86, sub-section 1 of the Stamp Act, 1871, and a "substituted security" within schedule 1 and heading "Mortgage, Bond, Debenture, Covenant" of that Act, and that therefore the Commissioners were right in holding that the stamp duty was to be calculated at the rate of sixpence per 100*l.* on the whole principal money of the debenture stock. *Gartside's Brookside Brewery v. Inland Revenue Commissioners*, 82 L. T. 686—D.

Supplemental Deeds to carry out Provisions of Trust Deed—"Collateral or auxiliary or additional or substituted security."—To carry out the provisions of a trust deed (by which a joint-stock company secured 750,000*l.* debenture stock and interest) sixteen deeds were executed by the company conveying different parts of the property of the company to the trustees for the debenture-holders:—*Held*, that each of these sixteen deeds was liable to stamp duty at the rate of sixpence per 100*l.* on the whole principal money of the debenture stock—namely, 750,000*l.* *Gartside's Brookside Brewery v. Inland Revenue Commissioners* (82 L. T. 686) followed. *British Oil and Cake Mills v. Inland Revenue Commissioners*, 66 J. P. 438—Phillimore, J. Affirmed C.A. 72 L. J. K.B. 312; [1903] 1 K.B. 689; 88 L. T. 526. *But see now Revenue Act, 1903, s. 7.*

Conversion of Stock of Company—Creation of New Preference Stock—Liability of New Stock to Stamp Duty—Increase of "nominal share capital."—By a special Act passed in 1897 certain stock of the defendant company was extinguished, and new stock, preferred and deferred, of greater face value was created by way of substitution. There was, however, no increase of dividend by reason of the re-arrangement:—*Held*, that the creation of the new stock was an increase of the amount of the

"nominal share capital" within the meaning of section 113 of the Stamp Act, 1891, and that the defendants were therefore bound to deliver a statement of the amount of such increase to the Inland Revenue Commissioners in accordance with that section. *Att.-Gen. v. Midland Railway*, 69 L. J. Q.B. 669; [1900] 2 Q.B. 353; 82 L. T. 716; 49 W. R. 138—D. *And see MARKETABLE SECURITY, infra.*

(g) *Lease.*

Rents—Covenants Relating to Matter of Lease.—By a lease the corporation of C. demised to the appellants the right of user of certain tramways at a certain yearly rent. The lease also contained a provision that the appellants should pay, as from the date when a Board of Trade certificate authorising electric traction should be obtained, the sum of 100*l.* per annum per mile of road along which the tramways were laid in lieu of maintaining roads and repairing tramways, which sum amounted altogether to 900*l.* per annum; and a further provision that the appellants should, as from the date of such Board of Trade certificate, pay to the corporation an amount in respect of electric energy supplied, such sum to be of the minimum amount yearly of 4,000*l.*:—*Held*, by KENNEDY, J. (PHILLIMORE, J., dissenting), that the provisions as to the payment of 900*l.* and 4,000*l.* were covenants relating to the matter of the lease, and were not chargeable with *ad valorem* duty as additional rents. *British Electric Traction Co. v. Inland Revenue Commissioners*, 64 J. P. 805—D.

Lease of Tramways—Lessors to Maintain Roads—Annual Payment by Lessees in Lieu of Repairing—Purchase of Electrical Energy from Lessors by Lessees—"Covenant relating to the matter of the lease"—Rent—"Lease or tack"—"Bond, covenant or other instrument."—By a lease made pursuant to the Tramways Act, 1870, a corporation demised certain tramways to a company at a rent of 3,250*l.* By clause 4 of the lease the lessees were required to pay a certain additional sum per annum, not less than 900*l.*, to the lessors in lieu of repairing and maintaining the roads along which the tramways were laid. By clause 27 the lessees were obliged to purchase all electrical energy for working the tramways from the lessors, and by clause 30 a minimum sum of 4,000*l.* was payable in respect of this. The lease gave the lessors a right to distrain for all sums payable under the lease except the sum payable for the supply of electrical energy:—*Held*, first, that the sum of 900*l.* payable under clause 4 was rent, and consequently stamp duty was payable in respect of it on that footing; and secondly, that the covenant to purchase electrical energy was a "covenant relating to the matter of the lease" within section 77, sub-section 2 of the Stamp Act, 1891, and that therefore no stamp duty was assessable in respect of the 4,000*l.* payable under clause 30. *British Electric Traction Co. v. Inland Revenue Commissioners*, 71 L. J. K.B. 92; [1902] 1 K.B. 441; 85 L. T. 663; 50 W. R. 280; 66 J. P. 83—C.A.

Assignment of Leaseholds—Consideration—Premium—Apportioned Rent to be Paid by Assignee.—By an indenture of assignment the

assignor assigned and conveyed to the assignee leasehold premises held by the assignor under a prior indenture of lease for the residue of the assignor's term in consideration of 503*l.* and subject to the payment by the assignee of an apportioned yearly rent, part of the yearly rent reserved by the prior indenture. The assignee covenanted to pay such apportioned yearly rent, and the assignor covenanted to pay the balance of the rent:—*Held*, that the indenture was not a conveyance to the assignee of property subject to the payment of money within the meaning of section 57 of the Stamp Act, 1891, and that the apportioned yearly rent was not therefore to be deemed part of the consideration in respect whereof the instrument was chargeable with *ad valorem* duty. *Swayne v. Inland Revenue Commissioners*, 69 L. J. Q.B. 63; [1900] 1 Q.B. 172; 81 L. T. 623; 48 W. R. 197—C.A.

(h) Marketable Security.

Bonds of Foreign Company—“Made or issued in the United Kingdom.”—Bonds of a foreign company which for the first time acquired validity on the doing of certain acts, which acts were done in the United Kingdom, held to be “marketable securities . . . made or issued in the United Kingdom” within the meaning of section 82, sub-section 1 (b) of the Stamp Act, 1891. *Revelstoke (Lord) v. Inland Revenue Commissioners*, 67 L. J. Q.B. 855; [1898] A.C. 565; 79 L. T. 227; 47 W. R. 210; 62 J. P. 740—H.L. (E.)

Note of Foreign Government—“Promissory note”—“Marketable security.”—Where an instrument is liable to duty under two or more categories of taxation, the Crown has an option to decide under which category it is to be assessed. *Speyer v. Inland Revenue Commissioners*, 77 L. J. K.B. 302—H.L. (E.)

A gold Coupon Treasury note of a foreign Government, in which there was an acknowledgment of indebtedness for the sum mentioned therein and a promise to pay the same to bearer on the date specified, or before that date on notice given, together with interest thereon,—*Held*, to be not only a promissory note, but also a marketable security within the meaning of the Stamp Act, 1891, and liable therefore to the higher rate of duty payable on a marketable security. *Ib.*

Debenture given by English Company—Foreign Company—“Given in substitution for a like security.”—An Australian company purchased and assumed the undertaking and liabilities, including the liability to its debenture-holders, of an English Company. In pursuance of an agreement in that behalf, the holders of debentures in the English company surrendered their debentures and accepted in lieu of them debentures to an equivalent amount in the Australian company:—*Held*, that the debentures so accepted were not “given in substitution for a like security” within the meaning of Schedule I. tit. “Marketable Security” (4) of the Stamp Act, 1891. *Mount Lyell Mining Co. v. Inland Revenue Commissioners*, 74 L. J. K.B. 4; [1905] 1 K.B. 161; 92 L. T. 134; 53 W. R. 225; 21 T. L. R. 112—C.A.

“Instrument to bearer . . . by means of which stock” is transferred.]—A certificate for 4 per cent. debenture stock of a foreign railway certified that the appellant was the owner of a certain amount of such stock, and there was indorsed on such certificate a form of transfer signed by the appellant, the name of the transferee being left in blank. It was admitted that such certificates with the transfer in blank therein were by usage treated as sufficient for the purpose of effecting the sale in the stock markets of the United Kingdom of the stock referred to therein; but such stock was really transferable only in the books of the railway company upon production of such certificate. The debenture stock was share capital of the railway company, enabling the holder to vote at the election of directors, but it was secured or preferred under a trust deed which enabled the holders of the debenture stock, if the interest on their stock was not duly paid, to take the management of the railway out of the hands of the directors, and vest it in a finance committee elected by themselves:—*Held*, that the certificate as indorsed was a marketable security within section 4 (1) of the Finance Act, 1899. *Noakes v. Inland Revenue Commissioners*, 83 L. T. 714—D.

(i) Mortgage.

Legal Mortgage—Foreclosure Order before 1898—Ad Valorem Duty—Retrospective Character of Legislation.—An order for foreclosure absolute of a legal mortgage made after the Stamp Act, 1891, but before the Finance Act, 1898, came into force, must be stamped with *ad valorem* duty as being an order of the Court whereby an estate or interest in property “upon the sale thereof is transferred to or vested in a purchaser.” *Lovell and Collard's Contract, In re*, 76 L. J. Ch. 246; [1897] 1 Ch. 249; 96 L. T. 382—Swinfen Eady, J.

The provisions of section 6 of the Finance Act, 1898, are retrospective, and the construction provided by that section must be read into section 54 of the Stamp Act, 1891. *Att.-Gen. v. Theobald* (24 Q.B. D. 557) followed. *Harling v. Commissioners of Stamps for Queensland* (67 L. J. P.C. 144; [1898] A.C. 769) distinguished. *Ib.*

Semble that, upon the construction of the Stamp Act, 1891, s. 54, apart from the Finance Act, 1898, *ad valorem* duty was payable on an order foreclosing a legal mortgage. *Ib.*

Substituted Security—Trust Deed for Securing Debentures—Redemption of Old Debenture Stock by Further Issue of Debenture Stock.—A limited company, who had issued Four per Cent. Debenture Stock for 500,000*l.* constituted and secured by a deed made between themselves and two trustees, being desirous of issuing further debenture stock to be called Irredeemable Three and a-Half per Cent. Debenture Stock ranking after the former issue, executed a deed made between themselves and the trustees of the former deed, by which the company acknowledged themselves indebted to the trustees in the sum of 300,000*l.* carrying interest at 3½ per cent. per annum, and it was provided that the stock to be issued in the first

instance was limited to 300,000*l.* The deed also provided that the company were to be at liberty to issue further Irredeemable Three and a-Half per Cent. Debenture Stock not exceeding 540,000*l.*, making with the 300,000*l.* stock a total of 840,000*l.*, but such further stock was only to be issued for the purpose of paying off the Four per Cent. Debenture Stock of 500,000*l.* on the basis of 108*l.* of the new stock for every 100*l.* of the old; and it was provided that before such further stock was issued or offered for subscription the company must execute an acknowledgment of indebtedness to the trustees for the amount of the further proposed issue. By the deed certain freehold and leasehold properties were conveyed by way of mortgage to the trustees subject to the Four per Cent. Debenture Stock, and subject to a proviso for reconveyance in certain specified events contained in the deed; and the company gave the trustees a charge upon their assets present and future for the payment of all moneys for the time being owing on the security of the deed. None of the proposed further issue of 540,000*l.* Four per Cent. Debenture Stock was issued, nor was any acknowledgment of indebtedness in respect thereof executed by the company:—*Held*, that by virtue of section 88, sub-section 1 of the Stamp Act, 1891, the deed was chargeable with stamp duty under the Act upon the total amount of 840,000*l.* *Per* A. L. SMITH, L.J., and COLLINS, L.J. (RIGBY, L.J., doubting), on the ground that the deed was a "mortgage" within the meaning of section 86, sub-section 1 of the Act. *Per* RIGBY, L.J., on the ground that the deed was a "debenture" within Schedule I. of the Act, heading "Mortgage, Bond, Debenture, &c." *City of London Brewery Co. v. Inland Revenue Commissioners*, 68 L. J. Q.B. 62; [1899] 1 Q.B. 121; 79 L. T. 648; 47 W. R. 216—C.A.

Held, further, that as regards the proposed issue of new stock the deed was not, as to 500,000*l.* thereof, a "substituted security" within the meaning of clause 2, but was the only or principal or primary security within clause 1 of Schedule I. of the Act, heading "Mortgage, Bond, Debenture, &c.," and therefore was chargeable with the full duty of 2*s.* 6*d.*, and not the reduced duty of 6*d.*, for every 100*l.* *Ib.*

Held, also, that the deed was not "a transfer of a duly stamped security" or "a security by way of further charge" within section 87, sub-section 3 of the Act. *Ib.*

Mortgage given by Company—Debenture Stock—Trust Deed—Supplemental Deed—"Collateral or auxiliary security"—"Security by way of further assurance."—By a trust deed a company, after acknowledging its indebtedness in a sum of 750,000*l.* to certain trustees for debenture stockholders, charged certain property, and covenanted to convey other property to and in favour of the trustees. The deed contained provisions for redemption of the stock by the company at a premium of 10 per cent. after notice to the stockholders, powers to the trustees to enforce the security, and a covenant by them to reconvey the property on repayment of the debt. In pursuance of this deed the company by a supplemental deed conveyed the other property to the trustees upon the terms of the

trust deed. The trust deed had been stamped as a mortgage or primary security under section 86 and schedule 1 (tit. "Mortgage, Bond," &c.), sub-section 1 of the Stamp Act, 1891:—*Held*, that, the trust deed being rightly stamped as a mortgage or primary security, the supplemental deed was liable to be stamped as a collateral or auxiliary security or as a security by way of further assurance under schedule 1, sub-section 2, to the same Act. *British Oil and Cake Mills v. Inland Revenue Commissioners*, 72 L. J. K.B. 312; [1903] 1 K.B. 689; 88 L. T. 526; 51 W. R. 388; 67 J. P. 145—C.A.; but see now Revenue Act, 1903, s. 7.

Instrument Creating Present Charge—"Mortgage"—"Covenant."—By an instrument under seal, in consideration of a sum of money advanced by a building society to a firm of contractors, the latter agreed, whenever called upon by the society, to execute a mortgage or charge of all their interest in certain premises in such form as the society should request, to secure the repayment of the sum advanced and interest, and a receiver of the rents and profits of the premises was appointed for so long as any money should remain due to the society, with a proviso that he should not enter into possession of such rents and profits until default should have been made in payment of the principal and interest for fourteen days after the same should have been demanded. At the date of the execution of the instrument there were two mortgages upon the property—one legal and the other equitable—and the title-deeds of the property were held by the first mortgagee:—*Held*, that the instrument was chargeable with stamp duty under the heading "Mortgage, Bond, Debenture, Covenant," in Schedule I. of the Stamp Act, 1891—*per* WILLS, J., on the ground that the instrument was intended to give a present charge, and came therefore under the description both of "mortgage" and of "covenant"; and *per* BRUCE, J., on the ground that the instrument was a "covenant," being a security for the repayment of money. *United Realisation Co. v. Inland Revenue Commissioners*, 68 L. J. Q.B. 218; [1899] 1 Q.B. 361; 79 L. T. 556; 47 W. R. 381—D.

Part of Mortgage Debt Paid Off—Assignment or Transfer of Balance Due on Mortgage—Release.—By an indenture—after reciting an indenture of mortgage whereby certain land was mortgaged to secure a sum of 1,100*l.* with interest thereon, and that 100*l.* part of the 1,100*l.* had been paid off by the mortgagor, and that 1,000*l.* and no more then remained due on the mortgage—the balance of 1,000*l.* then remaining due on the mortgage was, at the request of the mortgagor and in pursuance of an agreement for that purpose, assigned by the mortgagees to certain transferees, the consideration for such assignment being the payment by the transferees of the 1,000*l.* to the mortgagees; and the mortgagees and mortgagor thereby assigned the mortgaged property to such transferees free from all right or equity of redemption in the original indenture of mortgage, and with a new proviso of redemption substituted therefor. The Commissioners of Inland Revenue having assessed the indenture to the double stamp duty on the 1,100*l.* transferred, and also on the 1,100*l.*, the amount

of the original mortgage debt, as being a "release" of that amount.—*Held*, on the authority of *Wale v. Inland Revenue Commissioners* (4 Ex. D. 270), that the indenture was a "transfer" of the mortgage debt for 1,000*l.* within the meaning of the schedule to the Stamp Act, 1891, and was liable only to the duty on such transfer, but was not a "release" of the 1,100*l.*, the amount secured by the original mortgage, and was therefore not liable to the second duty assessed upon it as such release. *Humphreys v. Inland Revenue Commissioners*, 81 L. T. 199—D.

(j) *Policy.*

"Policy of life insurance"—Contract to Pay Fixed Sum if Assured Attains Certain Age, and Smaller Sum if he should Die before that Age—"Mortgage, Bond, Debenture, Covenant."—An instrument by which an insurance company, in consideration of a premium, agrees to pay a certain sum in the event of the assured attaining a certain age—the intention being to make provision for old age—and a smaller sum in the event of his dying before reaching that age, is a "policy of life insurance" within the meaning of section 93, sub-section 1 of the Stamp Act, 1891. Accordingly, such an instrument is chargeable with stamp duty as a policy of life insurance, and not under the heading, "Mortgage, Bond, Debenture, Covenant." *Prudential Assurance Co. v. Inland Revenue Commissioners*, 73 L. J. K.B. 734; [1904] 2 K.B. 658; 91 L. T. 520; 53 W. R. 103; 20 T. L. R. 621—Channell, J.

Employers' Liability Policy—Agreement to Pay Sum Employer Liable to Pay—Indemnity.]

—An insurance company by an instrument under seal called an "Employers' Liability Policy" agreed to pay, "for and on behalf of the employer," such sums as the employer should become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law, in respect of personal injury caused in the business to any workman in the employ of the employer:—*Held*, that the instrument was not "a policy or insurance against accident" within the meaning of section 93 of the Stamp Act, 1891, but was a contract of indemnity and therefore liable to duty as a deed. *Lancashire Insurance Co. v. Inland Revenue Commissioners*, 68 L. J. Q.B. 143; [1899] 1 Q.B. 353; 79 L. T. 731; 47 W. R. 396; 63 J. P. 21—D.

Policy of Insurance against Accident and Illness—Stipulation for Return of Premiums on Death or Attainment of Certain Age.]—A policy of insurance which stated that in respect of the payment by the assured of 2*s.* 6*d.* per month the company issuing the policy would pay to the assured or to his representatives a monthly allowance of 4*l.* in the event of his illness, a monthly allowance of 4*l.* in the event of accident, and 100*l.* in the event of death, or loss of limbs or sight by accident, contained a stipulation for the return to the assured or his representatives of half of all the premiums paid under the policy, as soon as the assured reached the age of 65, or in the event of his previous death, if the policy remained in force:

—*Held*, first, that the instrument was in its nature primarily a policy of insurance against accident; secondly, that the stipulation for the return of half the premiums in the event of the death of the assured or on his reaching a certain age was merely incidental, and would be meaningless as a contract of life insurance if it were read apart from the other provisions of the policy; and accordingly, thirdly, that the instrument fell to be assessed and charged only as an accident insurance policy. *General Accident Assurance Corporation v. Inland Revenue Commissioners*, 8 F. 477—Ct. of Sess.

Re-insurance Contract—Slip, Covering Note, or Open-cover Slip—Policy.]—The plaintiffs, a marine insurance company, sued the defendant, an underwriter, on an open cover or slip issued at Lloyd's for the re-insurance of excess of insurance on goods over certain amounts by certain lines of steamships. The sum of 4,000*l.* was specified as being the limit of excess taken on any ship. And the sum of 400*l.* was initialled by the defendant as being his proportion of that limit:—*Held*, that the plaintiffs could not maintain an action on such document; for it was a contract of sea insurance, and therefore was not valid unless it was in the form of a policy; and it was not a valid policy, because it did not specify the sum or sums insured, as required by section 93, sub-section 3 of the Stamp Act, 1891. *Home Marine Insurance Co. v. Smith*, 67 L. J. Q.B. 777; [1898] 2 Q.B. 351; 78 L. T. 734; 46 W. R. 661; 8 Asp. M.C. 408—C.A.

(k) *Promissory Note.*

See BILL OF EXCHANGE AND PROMISSORY NOTE.

(l) *Receipt.*

Counsel's Signature to Fee—"Receipt."]—Counsel's initials or signature placed against the fee marked on a brief or statement of fees, and thus indicating payment thereof by the solicitor instructing him, makes these documents liable to stamp duty as receipts within the meaning of the Stamp Act, 1891. *General Council of the Bar v. Inland Revenue Commissioners*, 76 L. J. K.B. 212; [1907] 1 K.B. 462; 96 L. T. 267; 71 J. P. 117; 23 T. L. R. 192—Bray, J.

Receipt on Scrip Certificate for Instalment Due Thereon.]—A receipt upon a duly stamped scrip certificate for a sum of stock acknowledging an instalment due thereon is within exemption (11) under tit. "Receipt" in the First Schedule to the Stamp Act, 1891, and is therefore not liable to stamp duty. *London and Westminster Bank v. Inland Revenue Commissioners*, 69 L. J. Q.B. 102; [1900] 1 Q.B. 166; 81 L. T. 630; 48 W. R. 195—C.A.

Discharge—Company—Debenture Stock—Redemption—Acknowledgment by Trustees Indorsed on Debenture Deed.]—Upon the redemption of certain debenture stock in a company the trustees for the debenture-holders indorsed upon the debenture trust deed an acknowledgment under their hands that all the debenture stock secured by the deed and all

interest thereon had been redeemed, paid off, and satisfied:—*Held*, that this acknowledgment was not a “discharge” within the meaning of sub-heading (5) of the heading “Mortgage” in Schedule I. to the Stamp Act, 1891, but was a “receipt” within the meaning of section 101 of the Act. *Firth v. Inland Revenue Commissioners*, 73 L. J. K.B. 632; [1904] 2 K.B. 205; 91 L. T. 138; 52 W. R. 622; 20 T. L. R. 447—Channell, J.

Building Society—Reconveyance—Stamp—Exemption.—A reconveyance by a building society executed by trustees appointed for a special purpose under an instrument of dissolution of the society, indorsed upon a mortgage, is under section 41 of the Building Societies Act, 1874, exempt from stamp duty in the same way that the statutory form of receipt provided by section 42 is exempt under section 41. *Old Battersea Building Society v. Inland Revenue Commissioners*, 67 L. J. Q.B. 696; [1893] 2 Q.B. 294; 78 L. T. 746—D.

Partnership—Memorandum as to Money Paid by One Partner to Another on Document belonging to Both.—William Day and Andrew Glaister entered into a contract with a county council for the construction of waterworks. The contract was joint, but Day executed part of the work, and Glaister the remainder. The instalments of the contract price were paid by the county council to Glaister, who granted stamped receipts therefor to the council, and paid over to Day his share of each instalment. Neither Day nor Glaister kept any business books setting forth this division of the instalments, but on the back of a copy of the specification for the contract there were writings in the following form: “Received to account the sum of” an amount specified and always over 2*l.*, with a date and the signature “William Day” or “Andrew Glaister” as the case might be. These indorsements were not stamped. This copy of the specification was sometimes in the possession of Day, and sometimes of Glaister:—*Held*, that such indorsements were not receipts within the meaning of section 101 of the Stamp Act, 1891, and therefore were admissible in evidence, although not stamped, in an action in respect of the contract by Day against Glaister. *Day v. Glaister*, 2 F. 963—Ct. of Sess.

Release or Renunciation of Property or of Right or Interest in Property—Undertaking by Mine-owner to Leave Coal under Railway Unworked and Abandon Claims thereto in Consideration of Compensation—“Release”—“Renunciation”—Release “upon a sale.”—An instrument by which a colliery company acknowledges receipt of a sum paid as compensation by a railway company in respect of coal which the latter company has, pursuant to section 78 of the Railways Clauses Consolidation Act, 1845, required to be left unworked, and in consideration thereof undertakes to leave the coal unworked and to do all things necessary for vesting the same in the latter company whenever required, and acknowledges that the sum includes compensation for all claims which, but for the instrument, might have been maintained against the latter company in respect of the coal, does not come within the words in the First Schedule to the

Stamp Act, 1891—“Release . . . of any property or of any right or interest in any property—Upon a sale,” and consequently is not chargeable with *ad valorem* stamp duty as a conveyance on sale, but comes within the words “Release . . . of any property or of any right or interest in any property—In any other case,” and consequently is chargeable with a stamp duty of 10*s.* *Great Northern Railway v. Inland Revenue Commissioners*, 68 L. J. Q.B. 978; [1899] 2 Q.B. 652; 81 L. T. 385; 48 W. R. 170; 64 J. P. 21—D.

The word “renunciation” occurring in the schedule in connection with these words is a term not of English but of Scots law. *Ib.*

Discharge of Agent by Principal for Amounts Received.—By an agreement in writing the defendants appointed their solicitor to be an officer of the bank at a fixed salary, to recover debts due to the bank and to advise them. When he received moneys on account of the bank he paid them over to the secretary or to the cashier of the bank, who initialled the amount paid over in a book kept by the solicitor for that purpose. In some cases the word “received” or “settled” was added:—*Held*, that each of these entries constituted an acquittance or discharge to the solicitor as against the defendants in respect of the moneys so paid over, and that the entries were therefore “receipts” within the meaning of section 101 of the Stamp Act, 1891, and required to be stamped. *Att.-Gen. v. Carlton Bank*, 68 L. J. Q.B. 788; [1899] 2 Q.B. 158; 81 L. T. 115; 47 W. R. 650; 63 J. P. 629—Lord Russell of Killowen, C.J.

(m) Separation Deed.

Agreement in Consideration of Fixed Weekly Payments.—A deed of separation entered into by the appellant and his wife contained a clause to the effect that the appellant would and should during the joint lives of himself and his wife, if his wife should continue to perform and observe the stipulations therein contained and on her part to be performed and observed, pay to his wife “the clear weekly sum of 1*l.*,” and in the event of the wife surviving the appellant, and not having forfeited payment during his lifetime, the sum should continue to be paid to her by her husband’s representatives:—*Held*, that the agreement was a security for an indefinite period for a sum of money at weekly periods, and not for an annuity or yearly sum payable by weekly instalments, and was therefore only liable to *ad valorem* duty upon the sum agreed to be paid weekly, and not upon the total amount of such weekly payments for a year. *Clifford v. Inland Revenue Commissioners* (65 L. J. Q.B. 582; [1896] 2 Q.B. 187) followed. *Jackson v. Inland Revenue Commissioners*, 87 L. T. 269; 50 W. R. 666; 66 J. P. 630—Phillimore, J.

Annuity Payable Quarterly—“Bond, covenant, or instrument.”—A deed of separation between a husband and wife under which the former covenants to pay to the latter during her life, if she shall so long observe the stipulations therein contained, a sum of 62*5*l.** every three months by quarterly payments on the usual quarter-

days in every year, creates an annuity of 2,500*l.* for the term of life or other indefinite period, to which the provision as to "bond, covenant, or instrument" in Schedule I. of the Stamp Act, 1891, applies, so that *ad valorem* duty is payable at the rate of 2*s.* 6*d.* for every 5*l.* of such 2,500*l.* *Lewis v. Inland Revenue Commissioners*, 67 L. J. Q.B. 694; [1898] 2 Q.B. 290; 78 L. T. 745—D.

(n) *Settlement.*

Several Instruments—Instrument of Appointment—Exemption.—By a settlement made in 1895 certain funds were transferred to trustees on trust for the settlor's children, and power was given to the trustees at the request of any of the children either in contemplation of marriage or subsequently to marriage to revoke the trusts thereby declared concerning such child's share, and by way of re-settlement to declare new trusts concerning the same in favour of a class of persons thereby specially described. By a deed of revocation and re-settlement executed in 1899 at the request of one of the children in view of his intended marriage, it was declared that from and after the marriage his share of the settled funds should be held upon trust to pay the income thereof to him during his life, and after his decease to transfer the capital to the trustees of the marriage settlement, which was described as being then engrossed and bearing even date, upon trusts which were within the power of re-settlement conferred by the settlement of 1895. The trustees of the settlement of 1895 were not parties to the marriage settlement. The settlement of 1895 was stamped with *ad valorem* duty in accordance with the Stamp Act, 1891, First Schedule, "Settlement." Upon appeal from the opinion of the Inland Revenue Commissioners as to the duty chargeable upon the marriage settlement of 1899,—*Held*, that the marriage settlement was not exempt from being stamped with *ad valorem* duty as a "settlement" under the Stamp Act, 1891, First Schedule, as being, within the exemption there, an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment." *Hamilton-Russell v. Inland Revenue Commissioners*, 71 L. J. K.B. 201; [1902] 1 K.B. 142; 85 L. T. 738; 50 W. R. 193; 66 J. P. 228—C.A.

Held, also, that the case did not fall within section 106, sub-section 1 of the Act, which provides that "where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds 10*s.*, one only of the instruments is to be charged with the *ad valorem* duty." *Ib.*

(o) *Transfer.*

Instrument by which Shares or Stocks are "assigned, transferred, or in any manner negotiated."—For carrying out the reconstruction of an American railway company and for the convenience of shareholders therein, the certificates for shares in the reconstructed company were given to and registered in the name of the London agents of the company, or their nominees, by whom they were trans-

ferred to those beneficially entitled to them on request. On obtaining such a certificate a shareholder could dispose of it upon the market, and by filling in his name as transferee and the name of some agent in America as his attorney he could obtain registration of the shares in his own name.—*Held*, that the assignment by such agents or their nominees of the legal title to the shares and appropriation of same to the various beneficial owners was an assignment or transfer of same within the meaning of section 4, sub-section 2 of the Finance Act, 1899, and that consequently the stamp duty imposed on such assignments or transfers by that sub-section was payable in respect of the transaction in question. *Speyer v. Inland Revenue Commissioners*, 66 J. P. 551—Phillimore, J.

(p) *Trustee, Appointment of New.*

Sale of Lands Included in the Settlement—Reinvestment of Proceeds in Stock.—A portion of certain lands, subject to the trusts of a marriage settlement executed in 1870, was, in exercise of a power contained in the settlement, sold and the proceeds invested in the purchase of stock.—*Held*, that a deed appointing a new trustee of the settlement, and vesting in the new and continuing trustee the property, subject to the trusts of the settlement, including therein the stock above mentioned, is not a "settlement" within the meaning of the word in the schedule to the Stamp Act, 1891. *Masereene (Viscount) v. Inland Revenue Commissioners*, [1900] 2 Ir. R. 138—Q.B. D.

(q) *Other Matters.*

Marine Policy, on.]—*See* INSURANCE, col. 1039.

Medicine, on Sale of.]—*See* MEDICINE, col. 1604.

Refusal of Directors to Register Transfer of Shares—Insufficient Stamp.]—*See* COMPANY (SHARES), cols. 394-5.

Undertaking by Solicitor to Stamp Document.] *See* SOLICITOR.

Unstamped Document—Admissibility as Evidence.]—*See* EVIDENCE, cols. 814-5.

(ii.) *Cancellation.*

Cancellation of Stamps—Validity of Proxies.]—An adhesive stamp used on a letter or power of attorney for appointing a proxy to vote at a meeting is sufficiently cancelled within the meaning of section 8, sub-section 1 of the Stamp Act, 1891, by the writing across it of part of the name of the person cancelling it, or the date of cancellation alone, or other marks of a defacing nature. *M'Mullen v. "Sir Alfred Hickman" Steamship, Lim.*, 71 L. J. Ch. 766—Joyce, J.

10. ENFORCING PAYMENT.

Right to Costs—Summary Jurisdiction—Revenue—Information on Behalf of Crown.]—Section 53 of the Summary Jurisdiction Act, 1879, gives power to a Court of summary jurisdiction to make an order for the payment of costs

in a proceeding under any statute relating to the revenue of the Crown under the control of the Commissioners of Inland Revenue or Customs to which the Crown or some one on behalf of the Crown is a party. *Thomas v. Pritchard*, 72 L. J. K.B. 23; [1903] 1 K.B. 209; 87 L. T. 688; 51 W. R. 58; 67 J. P. 71; 20 Cox C.C. 376—D.

REVERSION.

Covenants Running with.]—See col. 1249.

Leases, on.]—See LANDLORD AND TENANT.

REVISING BARRISTER.

See col. 779.

RIOT.

Injury to Property—Compensation—"Persons riotously and tumultuously assembled together."—In order to constitute a riot the following elements must be present—first, a number of persons, three at least; secondly, a common purpose; thirdly, the execution or inception of the common purpose; fourthly, an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; and fifthly, force or violence not merely used in demolishing a building, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. If any of these elements are absent, compensation cannot be recovered under the Riot (Damages) Act, 1886, for injury done to property by a number of persons. *Field v. Receiver for the Metropolitan Police District*, 76 L. J. K.B. 1015; [1907] 2 K.B. 853; 71 J. P. 494; 5 L. G. R. 1121; 23 T. L. R. 736—D.

RIPARIAN PROPRIETOR.

See WATER.

RIVER.

See WATER.

ROADS.

See LOCAL GOVERNMENT; METROPOLIS; WAY.

ROBBERY.

See CRIMINAL LAW.

SAILOR.

See SHIP AND SHIPPING.

SALE OF GOODS.

1. *Generally*, 2166.

2. *The Contract*, 2167.

(a) *Parties not ad idem*, 2167.

(b) *Note or Memorandum in Writing*, 2167.

(c) *Construction*, 2168.

(d) *Trade Custom*, 2169.

(e) *Time for Completion*, 2170.

(f) *Condition*, 2170.

(g) *Sale by Description*, 2173.

(h) *Sale by Sample*, 2173.

(i) *Misrepresentation*, 2174.

3. *Performance—Delivery and Payment*, 2174.

4. *Charges on Goods*, 2180.

5. *Breach of Contract and Measure of Damages*, 2181.

6. *Fitness and Merchantable Quality—Warranties*, 2184.

7. *Stoppage in Transitu*, 2189.

8. *Goods Stolen or Pawned*, 2190.

9. *Sale of Bread*, 2191.

10. *Sale by Auction*, 2193.

11. *Other Matters*, 2195.

1. GENERALLY.

See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

Sale or Security.—The tenants of premises used for wood-turning granted a receipt to their landlord for 79l., which stated that it was the price "of the plant purchased by him from us, and let on hire by him to us," "as per minute of agreement between him and us at this date." By the agreement the tenants acknowledged that the landlord had purchased from them the turning plant belonging to them in the premises, and that they had hired it thereafter from him for a yearly sum (which amounted to 4½ per cent. on 79l.); and they bound themselves to take over the plant when required by the landlord at the price of 79l., in addition to such hire as might still be owing, at the same time reserving to themselves the right at any time to take it over on the same terms. Throughout the transaction the tenants remained in possession of the premises and the plant, and no form of delivery of the latter to the landlord was gone through. For two years subsequently the tenants made half-yearly payments in terms of the agreement, and the landlord granted receipts therefor bearing to be "for half-year's interest on loan at 4½ per cent." The tenants having thereafter granted a trust deed for behoof of creditors, the trustee sued the landlord for declarator that the plant in the premises belonged to him as trustee. The landlord maintained that by the agreement the tenant had validly sold it to him. From the evidence it appeared that the landlord's object in the transaction was to obtain security for an advance of 79l. to the tenants. He maintained that as the plant was on his premises there was constructive delivery to him:—*Held* (LORD YOUNG dissenting), that the terms of the deeds and the whole circumstances shewed that the parties intended the transaction to operate as a security in the sense of section 61, sub-section 4 of the Sale of Goods Act, 1893, and not as a sale; that there had been no

delivery, and consequently that the property in the plant did not pass to the landlord, nor was any valid security constituted over it, and that therefore the trustee's claim must be sustained. *Rennet v. Mathieson*, 5 F. 591—Ct. of Sess.

Sale or Hire.—The pursuers, a firm of piano dealers, were in the practice of disposing of their pianos in one of three ways—first, in sales for cash; secondly, in hire-purchase agreements; and thirdly, in letting them on hire. They made a verbal offer to the defender of a piano “at the value of 26*l.*, payable 15*s.* per month.” The defender accepted the offer and paid certain instalments, but having subsequently failed to continue these payments the pursuers sued him for re-delivery of the piano, alleging that it had been let on hire:—*Held*, that the defender was entitled from the terms of the pursuers’ offer to understand, and that he did in fact understand, that the transaction was an immediate sale for a price payable by instalments, and that a contract of sale had been completed by the defender’s acceptance of the piano. *Muirhead & Turnbull v. Dickson*, 7 F. 686—Ct. of Sess.

2. THE CONTRACT.

(a) Parties not *ad idem*.

Sale of Hermaphrodite Animal—Fraud.—The defendant sent three head of cattle to a fair for sale—a bullock, a heifer, and an animal which from one point of view appeared to be a bullock, and from another a heifer, and which was, in fact, a hermaphrodite. The three animals were bought at 10*l.* 5*s.* each by the plaintiff, a cattle dealer. No warranty was given, and nothing was said as to the sex of the animals; but the plaintiff bought under the belief that he was buying either a bullock and two heifers or a heifer and two bullocks. The defendant knew of the malformation of the hermaphrodite, and knew that the plaintiff would not have purchased it had he known of the malformation. By a careful and skilled examination the defect could have been discovered by the plaintiff; but in fact it was not discovered by him until after the sale. The animal afterwards died, the death being the direct consequence of the malformation:—*Held*, that the case came within the principles laid down by Blackburn, J., and Hannen, J., in *Smith v. Hughes* (40 L. J. Q.B. 221; L. R. 6 Q.B. 597), that there was no binding contract for the sale of the animals in question, the parties never having been *ad idem*, and that the plaintiff was entitled to recover the price paid. *Held* also (MADDERN, J., *dissentiente*), that there was evidence of misrepresentation sufficient to sustain an action. *Gill v. McDowell*, [1903] 2 Ir. R. 463—K.B. D.

(b) Note or Memorandum in Writing.

Applicability to Arbitrations.—On September 21 H. & Co. offered verbally to C. & Co. 3,000 bales of jute, and on the same day C. & Co. accepted the offer verbally and agreed to buy. On September 22 two documents purporting to

be contracts, one for 1,000 bales and the other for 2,000 bales, were sent by H. & Co. to C. & Co. They bore the words “Bought for account of C. & Co. of Messrs. S. Brothers,” and they were signed “H. & Co. per C. P.” C. & Co. objected to these contracts by reason of the words importing that S. Brothers were the sellers, and they returned them mutilated. C. & Co. then sent H. & Co. other contracts omitting all reference to S. Brothers, which were returned with the words “Sellers Messrs. S. Brothers” on the attached receipts. C. & Co. refused to accept these:—*Held*, that there was no sufficient memorandum to satisfy section 4 of the Sale of Goods Act, 1893, and that the statute applied to an arbitration. *Cox v. Hoare*, 95 L. T. 121—Bray, J. Affirmed, 96 L. T. 719—C.A.

Acceptance of Goods.—Where, after receiving the goods, the buyer tries to re-sell them, using for the purpose a sample obtained from the sellers, and keeps the goods for a month, there is an acceptance by him of the goods within the meaning of section 4, sub-section 3 of the Sale of Goods Act, 1893, although he does not inspect the goods or take a sample from the bulk. *Taylor v. Smith* (61 L. J. Q.B. 331; [1893] 2 Q.B. 65) declares no principle of law, and is of no general application. *Taylor v. Great Eastern Railway*, 70 L. J. K.B. 499; [1901] 1 K.B. 774—Bigham, J.

Absence of Memorandum in Writing.—*Semble*, the absence of a memorandum in writing and of the other conditions mentioned in section 4, sub-section 1 of the Sale of Goods Act, 1893, does not make the contract void or voidable. The only effect is that it is unenforceable. The contract being good, all the legal consequences of a contract follow, so that if the contract is for the sale of specific goods the property in them passes to the buyer. If the buyer after making the purchase refuses to fulfil any of the statutory conditions, the seller may call upon the buyer to pay for the goods, and if he fails to comply may treat the contract as rescinded. *Nicholson v. Bower* (28 L. J. Q.B. 97; 1 E. & E. 172) seems to have been decided upon the ground that the vendor and vendee had rescinded the contract, so that the property had re-vested in the former. *Ib.*

Part Payment—Value above Ten Pounds—Agreement to Appropriate Sum in Hands of Seller.—By an oral contract for the sale of goods for a price of upwards of ten pounds the buyer agreed that the seller should appropriate a sum of money in his hands belonging to the buyer in part payment of the price. In an action to recover the price of the goods,—*Held*, that there was no “part payment” to satisfy section 4 of the Sale of Goods Act, 1893. *Walker v. Nussey* (16 L. J. Ex. 120; 16 M. & W. 302) followed. *Norton v. Davison*, 68 L. J. Q.B. 265; [1899] 1 Q.B. 401; 80 L. T. 189; 47 W. R. 275—C.A.

(c) Construction.

Sale of Wheat for Shipment in United States—“Clearance not later than May 31”—Certificate of Clearance given before Completion of Loading—Meaning of “Clearance.”—Wheat

was sold for shipment at Galveston in the United States, by a specified vessel for Havre, "clearance" to be not later than May 31. A certificate of clearance was obtained on May 28. Part only of the cargo was then on board, the rest being alongside ready to be loaded. The loading was not completed until June 2, when the vessel sailed. By the statute of the United States the master must furnish a manifest of the cargo "on board, whereupon the collector shall grant a clearance." It was, however, customary to grant a clearance before the completion of loading, and such a clearance was valid and effective for all purposes, and entitled the vessel to sail immediately:—*Held*, that the vessel had obtained a "clearance" within the meaning of the contract, when the certificate of clearance was granted. *Thalman v. Texas Star Flour Mills*, 82 L. T. 833; 5 Com. Cas. 321; 9 Asp. M.C. 87—C.A.

Sale of "about" Specified Weight of Coal—Coal to be delivered in Monthly Instalments—Short Delivery—Option to Vendor up to 5 per cent. in either Direction—Custom.]—The defendants sold to the plaintiffs "about" 18,500 tons of Northumberland coal under two contracts, deliveries to be in as nearly equal monthly instalments as possible over a given period. The defendants having so far made the deliveries in approximately equal quantities, delivered as their last monthly instalment a shipment of 455 tons short. In an action by the purchasers for damages for short delivery,—*Held*, affirming the decision of *MATHEW, J.*, that there is a custom of the Newcastle coal trade that the word "about" gives to the vendors an option up to 5 per cent. in either direction, and that, the custom being proved, the defendants had made no default in fulfilling their contracts, inasmuch as the word "about" referred to the total amounts to be delivered under each contract respectively, and not merely to the "last instalment." *Société Anonyme l'Industrielle Russo-Belge v. Scholefield*, 7 Com. Cas. 114—C.A.

(d) *Trade Custom.*

Goods Delivered on Memorandum or Approval—Liability for Loss of Goods by Burglary.]—There is a custom in the fur trade that a party ordering goods to be delivered on memorandum or approval is liable to the party of whom he orders them for any loss of or injury occurring to the same while in the hands of the party so ordering them before he may have signified his approval of the same. *Semble*, the price stated in the invoice fixes the measure of liability. *Bevington v. Dale*, 7 Com. Cas. 112—Kennedy, J.

Sale by Sample—Variation between Sample and Bulk—Variation only Affecting Price—Custom not to Reject—Validity.]—A trade custom which imports into a contract for the sale of goods by sample, containing an arbitration clause, a term that the purchaser shall not be entitled to reject the goods on account of variation between the sample and the bulk, provided the variation is such that it can reasonably be remedied by an abatement of the price, and does not affect the purpose for which the goods were purchased,—*Held*, a good

custom. *Walkers v. Shaw*, 73 L. J. K.B. 325; [1904] 2 K.B. 152; 90 L. T. 454; 53 W. R. 79; 9 Com. Cas. 174; 20 T. L. R. 274—Channell, J.

(e) *Time for Completion.*

Agreement to Build a Steamship—Allowance for Delay—"Circumstances beyond builders' control"—Delay due to Non-completion of another Vessel.]—A contract dated July 6, 1898, provided for the building of a steamship by shipbuilders, to be delivered to a shipowner not later than June 30, 1899, due allowance being made for delays through certain specified causes "or other circumstances beyond builders' control." A suitable berth for the building of the steamship at the shipbuilders' yard did not become vacant, and the work was not begun, until March, 1899, up to which time the berth in question was occupied by another vessel in course of building at the date of the contract, the completion of which was delayed by causes of the same nature as those specified in the contract. The delivery of the steamship was delayed beyond the contract date. An arbitrator having found that the parties contemplated that the steamship was to be built at the shipbuilders' yard as soon as a suitable berth became vacant, and that the berth in question was the first suitable vacant berth,—*Held*, that in fixing the time for the completion of the steamer allowance must be made for delays during the building of the previous vessel. *Lockie and Craggs, In re*, 86 L. T. 388; 9 Asp. M.C. 296; 7 Com. Cas. 7—Wright, J.

Contract to Make and Deliver Chattel by Certain Date—Buyer to Provide Ship to Receive—Concurrent Obligations—Delay in Making Chattel—Obligation of Buyer to Provide Ship.]—The plaintiffs agreed to construct and deliver, f.o.b. at the Port of London, for the defendants, a steam-launch by a fixed date. The launch was not in fact ready to be delivered until three months after the agreed date; but the defendants did not during that time notify to the plaintiffs that there was any vessel at the Port of London on board of which they required the launch to be delivered:—*Held*, that, as the defendants were not ready and willing to take delivery before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery. *Forrest v. Aramayo*, 83 L. T. 335; 9 Asp. M.C. 134—C.A.

(f) *Condition.*

Condition Precedent in Contract—Specification to be given "in the beginning of May"—Effect of Delay—Repudiation of Contract.]—In determining whether a stipulation in a contract is a condition precedent, the non-performance of which by one party entitles the other to repudiate the contract, the Court must ascertain the intention of the parties to be collected from the instrument, and the circumstances legally admissible in evidence with reference to which it is to be construed. The defendants, who were manufacturers, agreed to deliver to the plaintiffs 1,000 tons of a certain description of iron on the following terms con-

tained in the sale note: "Delivered . . . cost and freight Japan, direct port specification to be given in the beginning of May. Time of shipping May and June from Antwerp." The plaintiffs and defendants knew that the specification had to be sent from Japan to Antwerp. The whole quantity of iron could be produced by the defendants at their works in less than eight days, and the opportunities of shipment from Antwerp to Japan during the months of May and June were known to be frequent:—*Held*, that the stipulation that the specification was to be given "in the beginning of May" was not a condition precedent, the non-fulfilment of which entitled the defendants to declare the contract at an end. *Semble*, a delivery of the specification in several parts between May 12 and 15 was a compliance with the stipulation that the specification should be given "in the beginning of May." *Kidston v. Monceau Iron-works*, 86 L. T. 556; 7 Com. Cas. 82—Kennedy, J.

Tender of Documents of Title—Erasures and Alterations.]—A contract for the sale of wheat to be shipped from New Orleans to Hamburg provided that payment should be net cash against surrender of documents, which were to consist of the bill of lading, certificate of inspection, and policy of insurance. On September 3, 1898, the sellers appropriated to the sale a quantity of wheat on board a certain vessel, and on September 8 tendered to the purchasers the three documents, two of which were altered and one of which was unaltered. The purchasers refused to accept and pay for the documents by reason of the erasures and alterations therein, and, on a formal tender being made on September 12, they again refused to accept them. As tendered, the bill of lading contained a marginal note reading "stored in holds 3 and 4." The figures 3 and 4 had been substituted for the figures 2 and 3, which had been erased; the certificate of inspection stated that the wheat was in holds 3 and 4; the figures "and 4" had been added after the figure 3, and the figure "2 and," which had been in the certificate before the figure 3, were struck through; and the certificate of insurance was unaltered and stated the wheat to be in holds 3 and 4, which was the fact, so that as tendered all three documents agreed and were in accordance with the facts. The mistake arose through an error, and, having been discovered, was corrected as above described in the bill of lading and the certificate of inspection before those documents were executed. The certificate of insurance was correct from the first and was unaltered. The ship arrived in Hamburg on September 14, and on September 16 the documents were again tendered, together with two confirmatory documents shewing that the alterations were made before the execution of the documents, and were proper alterations as agreeing with the facts:—*Held*, that the tenders on September 8 and 12 were good tenders of the documents, and ought to have been accepted by the purchasers, as, upon such tenders, the purchasers were put upon enquiry and were bound to look at all the documents, and, as one of the documents was unaltered and the altered documents agreed with the unaltered one, they ought to have come to the conclusion that the altered documents were altered before execution, and were perfect documents in the sense that they absolutely agreed with the

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facts. *Salomon and Naudszus, In re*, 81 L. T. 325; 8 Asp. M.C. 599—D.

Contract of Manufacturers with Wholesale Dealers—Minimum Retail Prices—Successive Purchasers—No Contractual Privity—Invalid Restriction.]—The plaintiffs, who were tobacco manufacturers, sold their tobaccos subject to certain printed conditions which were inclosed in every box of tobacco and appeared in their price lists and catalogues, and which provided (*inter alia*) that the tobaccos were sold upon the express condition that retail dealers should not sell the tobacco below certain fixed minimum prices, and that in case of a purchase by a retail dealer through a wholesale dealer the latter should be deemed the agent of the manufacturer. The defendants, who were retail tobacconists, bought some of the plaintiffs' tobaccos from a wholesale dealer who had purchased it from the plaintiffs and re-sold it for his own profit. In an action by the plaintiffs to restrain the defendants from retailing the tobaccos at less than the minimum retail price fixed by the manufacturers,—*Held*, that the wholesale dealer was in no sense an agent for sale of the plaintiffs so as to create any contract between the plaintiffs and defendants; and further, that the condition against retailing under a certain price did not run with the goods at law, and could not be imposed upon chattels so as to bind successive purchasers. *Taddy v. Sterious*, 73 L. J. Ch. 191; [1904] 1 Ch. 354; 89 L. T. 628; 52 W. R. 152; 20 T. L. R. 102—Swinfen Eady, J.

Minimum Retail Prices Imposed—Successive Purchasers—Privity.]—Conditions cannot be imposed on a sale of goods so as to run with the goods and be enforceable against subsequent purchasers by the original vendor, even though the subsequent purchasers had notice of them at the time of their purchase. *McGruther v. Pitcher*, 73 L. J. Ch. 653; [1904] 2 Ch. 306; 91 L. T. 673; 53 W. R. 138; 20 T. L. R. 652—C.A.

The plaintiffs, who were manufacturers of rubber heel pads, sold them in boxes inside the lids of which were fixed certain printed conditions providing that the pads were not to be retailed at less than certain minimum prices, or re-sold except subject to the conditions as a term of the sale; and that the acceptance of the goods by any purchaser would be deemed to be an acknowledgment that they were sold to him on those conditions, and that he agreed with the vendors as agents of the plaintiffs in that respect to be bound by them. The defendant bought some of these pads from H., one of the plaintiffs' factors, and was re-selling them, as the plaintiffs alleged, at less than the minimum prices:—*Held*, that the defendant had entered into no contract with the plaintiffs, and the plaintiffs had no cause of action against him. *Taddy v. Sterious* (73 L. J. Ch. 191; [1904] 1 Ch. 354) approved and followed. *Id.*

Sale Subject to Inspection and Approval—Bona Fide Exercise of Judgment—Reasonableness of Ground of Disapproval.]—An agreement for the sale of a steamer provided that the price should be "paid as follows: 10 per cent. on approval of the steamer as far as can be seen without opening up . . .," and on the pur-

chaser so approving and paying deposit, "the vendors agree to open up engines, boilers, water-ballast tanks for purchaser's inspection and approval. . . . If steamer not approved of deposit to be returned immediately." On approval of engines, boilers, etc., the vendors were to dry-dock the vessel for inspection of ship's bottom, etc. The purchaser's inspectors inspected that portion of the vessel which did not require opening up, paid the deposit, and subsequently inspected the opened-up portions and disapproved of her:—*Held*, that a *bona fide* exercise of judgment on inspection entitled the purchaser to disapprove, and that the deposit was recoverable back by him, whether the disapproval of his inspectors was based upon reasonable grounds or not. *Haegerstrand v. Anne Thomas Steamship Co.*, 10 Com. Cas. 67—C.A.

Purchase—"All our requirements estimated at"—Breach.—H., being about to erect a factory for the purpose of carrying on the business of manufacturing explosives under the name of the defendant company, appointed a manager to have sole charge of the business. The manager's office was used as the office of the company. The manager, without express authority from H., entered into a contract for the purchase by the company from the plaintiffs of all the company's "requirements" of nitric and sulphuric acid, estimated at 500 and 750 tons respectively, during twelve months from the date of the contract. Subsequently the manager gave notice to the plaintiffs to deliver fifteen tons under the contract. The company never started business, and the undertaking was abandoned by H. within the twelve months. The acceptance of the fifteen tons was refused. In an action by the plaintiffs against the company for breach of contract to purchase 500 and 750 tons,—*Held*, that the manager had been held out by H. as having authority to enter into the contract, and that the contract was binding on H., but that by the contract the company had only agreed to buy such acid as might be required, and that, none having been in fact required, there had been no breach, except as to the fifteen tons, for which H. was liable to pay. *Berk v. International Explosives Co.*, 7 Com. Cas. 20—Walton, J.

(g) *Sale by Description.*

Specific Goods not Seen by Buyer.—Where there is a contract for the sale of specific or ascertained goods which the buyer has not seen, and he relies upon the description given to him of them by the seller, the contract is one for the sale of goods by description within the meaning of section 13 of the Sale of Goods Act, 1893, and there is an implied condition that the goods shall correspond with the description. *Varley v. Whipp*, 69 L. J. Q.B. 333; [1900] 1 Q.B. 513; 48 W. R. 363—D.

(h) *Sale by Sample.*

Payment to be made in Cash on Arrival against Shipping or Railway Documents—Obligation of Buyer—Right to Inspect and Reject Goods.—Upon a sale of goods by sample, "payment to

be made in cash in London on the arrival of the" goods "against shipping or railway documents," the buyer is not entitled to insist on the provisions of section 15, sub-section 2 (b) of the Sale of Goods Act, 1893, and to have an opportunity of comparing the bulk with the sample before paying the price. The right to reject if the goods do not correspond with the sample is not impaired by the payment being made. *Polenghi v. Dried Milk Co.*, 92 L. T. 64; 53 W. R. 318; 10 Com. Cas. 42; 21 T. L. R. 118—Kennedy, J.

(i) *Misrepresentation.*

By Advertisement.—Misrepresentation which does not itself, and is merely incidental to some lawful act which does, cause damage, is not actionable. *Ajello v. Worsley*, 67 L. J. Ch. 172; [1898] 1 Ch. 274; 77 L. T. 783; 46 W. R. 245—Stirling, J.

Where a trader, acting *bona fide*, causes injury to the trade of another by advertising or otherwise offering for sale, at less than the ordinary retail price, goods of the other's manufacture, not having in stock at the time the goods so advertised, but only an expectation of acquiring them, the misrepresentation of fact implied in the advertisement—that is, that he has the goods in stock—is not such a misrepresentation, to which the damage to the other's trade can be attributed, as will support an action by the other for an injunction to restrain the issue of the advertisement, and damages. *Richardson v. Silvester* (43 L. J. Q.B. 1; L. R. 9 Q.B. 34) and *Radcliffe v. Evans* (61 L. J. Q.B. 535; [1892] 2 Q.B. 524) distinguished. *Ib.* And see FRAUD AND MISREPRESENTATION.

3. PERFORMANCE—DELIVERY AND PAYMENT.

Delivery "on sale or return"—"On sale for cash only or return"—Passing of Property.—The plaintiff, the manufacturer and owner of goods, delivered them to a retail dealer on the terms of a special approbation note which had the following printed heading: "On approbation. On sale for cash only or return. . . . Goods had on approbation or on sale or return remain the property of" the plaintiff "until such goods are settled for or charged." The retail dealer delivered the goods to a second dealer on terms that the latter should pay cash or return the goods in a day or two. The second dealer fraudulently pledged the goods with the defendants, who took without notice of any defect in his title:—*Held*, that the goods had not been delivered by the plaintiff "on sale or return" or other similar terms "within the meaning of section 18 of the Sale of Goods Act, 1893; that the intention of the parties was that no property in the goods should pass till the goods were either paid for or the plaintiff agreed to debit the retail dealer with their price; and that, as the retail dealer had not satisfied either one or other of these conditions, the property in the goods had not passed from the plaintiff, who was therefore entitled to recover them from the defendants. *Weimer v. Gill*; *Weimer v. Smith*, 75 L. J. K.B. 916; [1906] 2 K.B. 574; 95 L. T. 438; 11 Com. Cas. 240; 22 T. L. R. 699—C.A.

Contract for Delivery in Instalments—Payment on Due Date—Condition Precedent—Default in Payment—Right to Cancel Contract.]—By a contract for the sale of steel tinplate bars to be delivered over a period of three months, payment to be made in cash in fourteen days after delivery, it was provided that all payments should be made on due date as a condition precedent to future deliveries. The purchasers having made default in payment on due date, —*Held*, that the vendors were justified in unconditionally refusing to make any further deliveries. *Ebbw Vale Steel, Iron, and Coal Co. v. Blaenau Iron Co.*, 6 Com. Cas. 33—C.A.

“Sale for cash only or return”—Approbation Note—Property in Goods—Estoppel—Pawn-brokers.]—The plaintiff handed goods to H. under the following terms of an approbation note: “On sale for cash only or return. . . Goods had on approbation or on sale or return remain the property of W. [the plaintiff] until such goods are settled for or charged.” H. had the option of buying at a fixed price. H. handed the goods to L. on the terms that he should pay immediate cash or return the goods in a day or two. L. obtained the goods by representing that he had a particular customer who wished to buy them. Such representation was false. L. pledged the goods with the defendants (pawnbrokers), the latter believing that L. was acting in good faith:—*Held*, that the plaintiff could recover the goods from the defendants. The property had not passed from the plaintiff, and there was no such conduct as to estop the plaintiff from saying that the property had not passed. Mere parting with possession is not sufficient to amount to an estoppel. *Weiner v. Smith*, 74 L. J. K.B. 845; [1905] 2 K.B. 172; 92 L. T. 843; 53 W. R. 553; 10 Com. Cas. 213; 21 T. L. R. 478—Bray, J.

Condition—Tender of Documents of Title—Erasures and Alterations.]—A contract for the sale of wheat to be shipped from New Orleans to Hamburg provided that payment should be net cash against surrender of documents, which were to consist of the bill of lading, certificate of inspection, and policy of insurance. On September 3, 1898, the sellers appropriated to the sale a quantity of wheat on board a certain vessel, and on September 8 tendered to the purchasers the three documents, two of which were altered and one of which was unaltered. The purchasers refused to accept and pay for the documents by reason of the erasures and alterations therein, and, on a formal tender being made on September 12, they again refused to accept them. As tendered, the bill of lading contained a marginal note reading “stored in holds 3 and 4.” The figures 3 and 4 had been substituted for the figures 2 and 3, which had been erased; the certificate of inspection stated that the wheat was in holds 3 and 4; the figures “and 4” had been added after the figure 3, and the figures “2 and,” which had been in the certificate before the figure 3, were struck through; and the certificate of insurance was unaltered and stated the wheat to be in holds 3 and 4, which was the fact, so that as tendered all three documents agreed and were in accordance with the facts. The mistake arose through an error, and, having been discovered, was corrected as above described in the bill of lading and the certificate

of inspection before those documents were executed. The certificate of insurance was correct from the first and was unaltered. The ship arrived in Hamburg on September 14, and on September 16 the documents were again tendered, together with two confirmatory documents shewing that the alterations were made before the execution of the documents, and were proper alterations as agreeing with the facts:—*Held*, that the tenders on September 8 and 12 were good tenders of the documents and ought to have been accepted by the purchasers, as, upon such tenders, the purchasers were put upon enquiry and were bound to look at all the documents, and, as one of the documents was unaltered and the altered documents agreed with the unaltered one, they ought to have come to the conclusion that the altered documents were altered before execution, and were perfect documents in the sense that they absolutely agreed with the facts. *Salomon and Naudszus, In re*, 81 L. T. 325—D.

Passing of Property—Goods of “about the specification stated below”—Provision for Reference to Arbitration of any Dispute Arising under Contract—Right of Rejection by Buyer of Goods not within Specification.]—Where a contract of sale of goods of “about the specification stated below” contains provisions that the property in the goods is to be deemed to have passed when the goods are put on board a ship provided by the buyer, and that if any dispute arises under the contract the buyer is not to reject the goods, but the dispute is to be referred to arbitrators, the provisions do not operate so as to pass on shipment the property in goods neither within nor about the specification nor commercially within its meaning, nor can the buyer be compelled to take them; and the receipt of the goods by the captain of the ship is not an acceptance of them as a delivery under the contract. The captain is an agent to receive the goods for the purpose of carriage, not to accept delivery of them. *Tigers v. Sanderson*, 70 L. J. K.B. 383; [1901] 1 K.B. 608; 84 L. T. 464; 49 W. R. 411; 6 Com. Cas. 99—Bigham, J.

—Appropriation of Goods to Contract—Bankruptcy of Manufacturer—Right of Trustee to Articles in Course of Manufacture—Ship.]—A firm of shipbuilders contracted to build a ship for a firm of shipowners, to be classed 100 A1 at Lloyd's and to be constructed under the superintendence of the shipowners. The contract contained this clause: “(4.) The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money.” Before the ship was completed the shipbuilders became bankrupt. At the date of the bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the shipbuilders. These plates were claimed by the trustee in the shipbuilders' sequestration, and also by the shipowners. The plates had been passed by Lloyd's surveyor at the makers' works, and they were

each numbered by the makers with the number of the vessel and with marks shewing the position which each plate was to occupy in the vessel:—*Held*, that the contract was for the purchase of a "complete ship," and the materials in question could not be regarded as appropriated to the contract or sold under the Sale of Goods Act. *Seath v. Moore* (55 L. J. P.C. 54; 11 App. Cas. 350) followed. *Reid v. Macbeth*, 73 L. J. P.C. 57; [1904] A.C. 223; 90 L. T. 422; 20 T. L. R. 316—H.L. (Sc.)

— **Consignment—Alleged Specific Appropriation—Claim for Lien—Bills Drawn against Particular Shipments—Contemporaneous Letter of Advice—Non-acceptance of Bills.**—The defendants carried on business in London, and their practice was to sell in their own names goods shipped to them by P. & Co., who carried on business abroad. P. & Co. used to specify in advising drafts against what particular shipments the same were drawn, so as to enable the defendants to tell whether the particular shipments consigned to them did in fact cover the then outstanding drafts, but not to affect their right to treat all shipping documents as cover for the whole account between them and P. & Co. P. & Co. used likewise to draw upon the plaintiffs, who also carried on business in London, against shipments of goods, bills which the plaintiffs accepted, P. & Co. afterwards forwarding to them, as security, before the bills reached maturity, bills drawn by P. & Co. on first-class firms (among them being the defendants), accompanied by the shipping documents of the goods shipped by them to such firms, and on such firms accepting the bills the plaintiffs would hand over to them the shipping documents which otherwise would have been retained. The defendants having received instructions from P. & Co. to sell certain goods at a specified price, entered into contracts for the sale thereof. Subsequently P. & Co. wrote to the defendants that they had drawn upon them against the goods, and the bills were specified. The bills were drawn to the order of the plaintiffs by P. & Co. upon the defendants for various sums, and were together intended to provide for part of the credit or advances made by the plaintiffs to P. & Co. Bills of lading for the goods, indorsed in favour of the defendants, were afterwards forwarded to them by P. & Co. The defendants took possession of the bills of lading, and applied them in satisfying, so far as they would go, the contracts into which they had entered; but becoming doubtful as to the financial position of P. & Co.'s firm, they declined to accept the bills of exchange, and claimed to treat the proceeds of sale of the goods as available for payment of the general balance of account between themselves and P. & Co.:—*Held*, that there was no specific appropriation of the goods in favour of the plaintiffs; that the defendants were not compellable to accept the bills; and that nothing had been done to defeat the primary right of the defendants, in whose custody the goods were, to deal with them for their own purposes and irrespective of any rights of the plaintiffs. *König v. Brandt*, 84 L. T. 748; 9 Asp. M.C. 199—C.A.

— **Ship in Building—Trial.**—Where it appears to be the intention of the parties to a contract for the building of a ship that the

vessel is not to be delivered and finally accepted until after an official trial off a foreign coast, and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity, &c., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction. *Laing v. Barclay*, [1908] A.C. 35; 97 L. T. 816—H.L. (Sc.)

— **Possession of Bill of Lading with Seller's Consent.**—Where the seller of goods transmits to the person who has agreed to buy them the bill of lading, together with a bill of exchange for the price, and the latter, without accepting or intending to accept the bill of exchange, indorses the bill of lading, he is not in possession of the bill of lading with the consent of the seller within the meaning of section 25, subsection 2 of the Sale of Goods Act, 1893, and cannot give to the indorsee of the bill of lading a good title to the goods as against the seller. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, 67 L. J. Q.B. 625; [1898] 2 Q.B. 61; 79 L. T. 55—Mathew, J.

C.i.f. Contract—Shipping Documents—Sufficiency of Tender.—A parcel of meal was sold to a London firm at 5l. 8s. 9d. per ton c.i.f., London, under a contract which provided for dispatch of the meal from the mills in the interior of America to an American port, thence to be shipped per steamer; "all other conditions as per the American maize germ meal contract." The meal was forwarded from a town in Illinois under two through bills of lading issued in the customary form by the Illinois Central Railway Co., which provided that the meal should be carried to the port of New Orleans and thence by Leyland Line to London, and further that the property covered by them was subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment. The Leyland Line is a well-known line trading between New Orleans to London, having a regular form of bill of lading upon which all goods by that line are shipped. By that form of bill of lading the Leyland Line reserved liberty to proceed to the port stated in the bill of lading, "via any other port or ports in any order or rotation, outwards or forwards, whether in or out of or in a contrary direction to or beyond the customary or advertised route," and likewise reserved power to tranship the goods at any port into any other steamer or sailing vessel. Under the American maize germ meal contract the sellers were to give policies and (or) certificates of insurance in respect of the meal in question, and certificates in the customary form were in fact given which took the place of a policy which was duly issued and which contained the following clause: "In event of deviation or of change of voyage held covered at a premium to be fixed by insurers." The steamship in which the meal was carried having deviated to Bremen before reaching London, thus causing delay, the buyers refused to accept delivery, and the question as to their right to do so was submitted to the trade tribunal, which decided against them, finding that all the documents relating to the carriage of the meal were usual and

customary and were in forms well known in the trade, and constantly received, and hitherto without objection, in fulfilment of similar contracts for sale:—*Held*, upon these findings of fact, that the adoption by the sellers under the through bills of lading of the method of sea carriage in question was not necessarily inconsistent with the terms of the contract of sale, and therefore that the buyers were not justified in refusing to accept delivery. *Held*, further, that, as the certificate of insurance was in the usual form and covered deviation, it satisfied the requirements of the c.i.f. contract. *Burstall v. Grimsdale*, 11 Com. Cas. 280—Kennedy, J.

Ship to be Constructed—Property in Materials intended for Ship—Bankruptcy of Shipbuilders.]

—A contract for the building of a ship, which was to be constructed under the superintendence of the shipowners, contained this clause: "The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the shipbuilding yard, workshop, river, or elsewhere, shall, immediately, as the same proceeds, become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders; but the builders shall at all times have a lien thereon for their unpaid purchase money." The contract further provided that in the event of the shipbuilders making default in delivery, it should be competent for the shipowners to take possession of the vessel and of all materials intended for her, and to complete the vessel. No delivery was to be considered complete until after a trial by the shipowners' surveyors. During the construction of the vessel the shipbuilders became bankrupt. At the date of the bankruptcy there was in the shipbuilding yard a quantity of steel plates which the shipbuilders intended to use in the construction of the vessel. These plates were claimed by the trustee in bankruptcy, and also by the shipowners. The plates had been passed by Lloyd's surveyor at the maker's works, and they were each marked by the makers (in accordance with the shipbuilders' instructions) with the number of the vessel and with marks showing the position which each plate was to occupy in the vessel. Members of the shipowner's firm had from time to time visited the shipbuilding yard and had seen the plates so marked, but they had not inspected them with a view to determine whether they were conformable to contract. By agreement the shipowners got possession of the plates in order to complete the vessel. The trustee in bankruptcy then sued the shipowners for payment of a sum agreed on as the value of the plates. It was admitted that the shipbuilders were liable to the defenders for a sum exceeding the value of the plates as damages for breach of contract in failing to complete the vessel:—*Held*, that the defenders were entitled to judgment on the ground (*per* the LORD JUSTICE-CLERK and LORD TRAYNER) that the property in the plates had passed to the defenders in respect that they were ascertained goods within the meaning of section 17, sub-section 1 of the Sale of Goods Act, 1893, and that it was the intention of the parties that the property should so pass; (*per* LORD YOUNG) that under the above quoted clause of the contract the defenders had a right of property in the materials as a security against any breach of contract by the ship-

builders, and were entitled to retain the materials in satisfaction *pro tanto* of the damages due to them; and (*per* LORD MONCREIFF) that the property in the plates had passed to the defenders as being within the meaning of section 18, rule 5 (1) of the Sale of Goods Act, 1893, "unascertained goods" which had been unconditionally appropriated to the contract with the assent of both parties thereto. *Carmichael, Maclean & Co.'s Trustee v. Macbeth & Gray*, 4 F. 345—Ct. of Sess.

Payment—Agreement for Credit—Agreement to give Bills—Refusal to give Bills—Action for Price of Goods.]—If there is an agreement on the sale of goods that credit should be given, and as a security an agreement by the purchaser to give an acceptance, even although the purchaser refuses to give such acceptance, the period of credit still stands. *Semble*, there may be an action for refusing to accept the bill if damage can be proved. *Rabe v. Otto*, 89 L. T. 562; 20 T. L. R. 27—Kennedy, J.

Payment to be made in Cash against Shipping Documents — Perishable Articles — Re-sale of Goods in Default of Payment.]—Where by a contract for the sale of perishable articles it is provided that payment is to be made "by cash . . . in exchange for" shipping documents, the buyer is under an obligation to pay within a reasonable time after the shipping documents are tendered to him, and if he does not do so the seller is entitled to sell the goods against him, and to claim the loss which he has suffered. *Ryan v. Ridley*, 8 Com. Cas. 105—Kennedy, J.

Payment after Inspection immediately on Arrival — Failure to Inspect — Goods not in Accordance with Contract—Right of Buyer to Damages.]—Where goods are sold "Payment net cash after inspections of goods immediately on arrival of steamer," the buyer has a right to claim damages if the goods are not in accordance with the contract, even though he does not inspect the goods, or, by mistake, does not on inspection discover the defect in them. *Khan v. Duché*, 10 Com. Cas. 87—Bigham, J.

Bankruptcy of Seller before Performance—Right of Buyer to Rescind.]—A mere declaration of insolvency by one party to a contract does not entitle the other party to put an end to the contract; but if the declaration is made in such circumstances as to shew that the insolvent either cannot, or does not intend to, carry out the contract, it is open to the solvent contractor to rescind the contract. *Mess v. Diffus*, 6 Com. Cas. 165—Bigham, J.

4. CHARGES ON GOODS.

Coal to be Delivered f.o.b.—Coal for Export—Export Duty.]—Under a contract for the sale of coal it was provided that the coal was to be delivered free on board at certain Scottish ports and "that the quantity of coal herein named is for *bona fide* exportation by the purchaser, and not for sale to other export merchants." After the contract had been entered into, but before the coal had been delivered, the Finance Act, 1901, came into operation:—*Held* (Lord Young *dissentiente*), that the export duty on coal imposed by that statute fell to be paid

by the seller. *Bowhill Coal Co. v. Tobias*, 5 F. 262—Ct. of Sess.

Export Duty on Coal—Sale f.o.b.—Contract made Before April 19, 1901—Coal not Applied by Purchaser for Fulfilling a Contract for Sale at a Specified Price—Liability of Seller to Pay Duty in First Instance.]—PHILLIMORE, J., having expressed the opinion (22 T. L. R. 844) that where coal is sold to a purchaser free on board for export in pursuance of a contract made before April 19, 1901, and the coal is not applied by the purchaser for the purpose of fulfilling a contract made by him before the above date for its sale at a specified price, the seller is liable in the first instance under the f.o.b. contract to pay the export coal duty imposed by section 3 of the Finance Act, 1901, and in the absence of an agreement to the contrary he can recover it back from the purchaser—gave judgment for the seller. The COURT OF APPEAL affirmed the judgment. *Insole v. Gueret*, 23 T. L. R. 294—C.A.

"Cost, freight, and insurance to buyers' wharf"—Obligation of Seller to Deliver at Buyers' Wharf—Payment of London Charges.]—Goods were sold "cost, freight, and insurance to buyers' wharf, Victoria Docks, London." The goods were discharged in London elsewhere than at buyers' wharf, and under the "London clause" in the bill of lading certain charges were paid:—*Held*, that these London charges fell upon the seller, and not upon the buyer. *Acme Wood-flooring Co. v. Sutherland Innes Co.*, 9 Com. Cas. 170—Bruce, J.

5. BREACH OF CONTRACT—MEASURE OF DAMAGES.

Delivery by Instalments—Wrongful Repudiation of Contract by Buyer—Subsequent Tender of Instalments—Refusal on same Wrongful Ground—Action by Seller for Breach—Plea that Instalment not according to Contract—Validity of Plea—Measure of Damages.]—The defendants contracted to buy from the plaintiff a quantity of Honduras rosewood to be shipped by instalments, cash against bills of lading. The plaintiff shipped the wood in two consignments, and while the first consignment was on the voyage the defendants repudiated all obligation to take any wood under the contract upon a ground which was afterwards found to be wrongful. Upon the arrival of the bill of lading of the first consignment it was tendered to and refused by the defendants upon the same ground, and the plaintiff at once sold the wood in the market at the best price obtainable. Upon the arrival of the bill of lading of the second consignment it was tendered and refused on the same ground, and the plaintiff at once sold the wood in the same way. In an action for breach of the contract the defendants, having discovered that a considerable percentage of the first consignment did not conform to the conditions of the contract, pleaded (*inter alia*) that they were entitled to repudiate the contract with respect to that consignment upon the ground that the wood was materially different from that which the plaintiff had contracted to deliver:—*Held*, that the defendants by the repudiation of the contract, which the plaintiff accepted by at once

selling the first consignment, absolved the plaintiff from the performance of the conditions precedent to the enforcement of the contract against them, and therefore could not rely upon the defence pleaded, and that the true measure of damages was upon the footing that the first consignment was in accordance with the conditions of the contract. *Braithwaite v. Foreign Hardwood Co.*, 74 L. J. K.B. 688; [1905] 2 K.B. 543; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M.C. 52; 21 T. L. R. 413—C.A.

Contract to Make and Lading with Steel by Certain Date—Buyer to Goods to Receive—Concurrent Obligation to buy the taking Chattel—Obligation of Buyer to supply exclusive.]—The plaintiffs agreed to co-^{quantity} deliver, f.o.b. at the Port of London, for the defendants, a steam launch by a fixed date. The launch was not in fact ready to be delivered until three months after the agreed ^{provide} date. The defendants did not during that time ^{and} ^{date} the plaintiffs that there was any vessel at the Port of London on board of which they ^{and} the launch to be delivered:—*Held*, that, as the defendants were not ready and willing to take delivery before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery. *Forrest v. Aramayo*, 83 L. T. 335—C.A.

Contract for Sale of Cattle on c.i.f. Terms—Insurance to be against "all risks"—Policy Containing f.c. and s. Clause—Cattle not Landed in Consequence of Government Prohibition.]—The plaintiffs purchased cattle from the defendant on c.i.f. terms, the terms as to insurance in the contract being that it was to be "against all risks." The defendant delivered to the plaintiffs a policy which had clauses attached, headed "All Risks' Live Stock Clauses," containing the following: "To cover mortality, jettison, washing overboard, and risks of every kind from time of arrival at wharf and until delivered to consignees, but free of all claim for particular average and depreciation in respect of animals which walk ashore," &c. The policy contained the clause "warranted free of capture, seizure, and detention, and the consequences thereof":—*Held*, that as the policy contained the free of capture, seizure, and detention clause (although as between an insurance broker and underwriters its insertion was usual in an "all risks" policy), it did not comply with the terms of the contract of sale, which entitled the plaintiffs to be covered against so obvious a risk as that of the cattle being prevented from being landed owing to a Government prohibition, and therefore that the defendant was liable for loss occurring to the plaintiffs in consequence of the cattle not being allowed to be landed by reason of such a prohibition. *Yuill v. Scott-Robson*, 76 L. J. K.B. 469; [1907] 1 K.B. 685; 96 L. T. 842; 12 Com. Cas. 196; 23 T. L. R. 247—Channell, J. Affirmed in C.A., 77 L. J. K.B. 259; [1908] 1 K.B. 270; 24 T. L. R. 180.

Sale by Description—Breach of Implied Condition—Agreement to Supply Pure Commercial Sulphuric Acid—Supply of Poisonous Acid—Loss of other Goods by Mixing—Loss of Business—Damages Claimed by Third Persons.]—The

defendants, who were under a contract to supply the plaintiffs with pure commercial sulphuric acid, in breach of the contract supplied them with sulphuric acid containing arsenic. The plaintiffs, in ignorance of this, used the acid for making invert and glucose, which they supplied to brewers for making beer, with the result that a number of persons who consumed the beer became ill, and some of them died. The plaintiffs were in consequence unable to carry on their business, and brought an action against the defendants for negligently and wrongfully supplying them with sulphuric acid containing arsenic and not in accordance with the contract:—*Held*, that the damages which the plaintiffs were entitled to recover included—first, the price paid by them for the impure acid; and secondly, the value of the goods spoiled by being mixed with the acid. But *held*, that the plaintiffs could not recover damages in respect of the loss of the goodwill of their business, as it was not a loss directly and naturally resulting from the breach of warranty, and that they were also not entitled to recover the sums which the brewers to whom they sold the glucose and invert made from the poisonous acid were entitled to recover against them. *Bostock v. Nicholson*, 73 L. J. K.B. 524; [1904] 1 K.B. 725; 91 L. T. 626; 53 W. R. 155; 9 Com. Cas. 200; 20 T. L. R. 342—Bruce, J.

“Cost, freight, insurance”—Shipment of Less than Stipulated Quantity—Breach—Insurance by Vendor for more than Invoice Price—Right of Purchaser to Surplus.]—By a “c.f.i.” contract the defendants sold to the plaintiffs 500 loads of timber for shipment at Quebec for Belfast. The defendants shipped 470 loads instead of 500. The ship and cargo were lost on the voyage. The defendants had a floating policy open with underwriters under which they were entitled to declare 92 per cent. of their risks (being their own insurers as to 8 per cent.), and a further 20 per cent. for “profit.” They declared under the policy the invoice price of the shipment as the value, and 20 per cent. of that for the “profit.”—*Held*, that the shipment of 470 loads was not a fulfilment of the contract, and that the plaintiffs were entitled to damages for breach of contract. *Semble*, if there had been a fulfilment of the contract the plaintiffs could only have recovered the amount of the insurance of the invoice price and not of the “profit.” *Harland and Wolff v. Burstall*, 84 L. T. 324; 6 Com. Cas. 113; 9 Asp. M.C. 184—Biglam, J.

Measure of Damages—Contract to Supply Sugar for Brewing—Sugar Contaminated with Poisonous Matter—Beer Destroyed.]—The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed:—*Held*, therefore, that, although the plaintiffs were brewers, they were entitled to recover the full selling value of the beer in their cellars which had by the fault of the defendants to be thrown away, and not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it. *Holden v. Bostock*, 50 W. R. 323—C.A.

—Sale of Orchid—Breach of Warranty.]—The plaintiff purchased an orchid from the defendant at an auction for twenty guineas with the warranty that it was “*Cattleya Acklandiae alba*, only known plant.” After two years it flowered, and produced not a white but a purple flower. The value of such a plant is 7s. 6d. In an action for breach of warranty the County Court Judge found as a fact that if the orchid had been an actual *alba*, it was at the time of sale worth 50l.; but that until it shewed its real nature there was no probability that an orchid grower would give more than twenty guineas for it:—*Held*, upon this finding, that judgment must be entered for the plaintiff for 50l. *Ashworth v. Wells*, 78 L. T. 136—C.A.

6. FITNESS AND MERCHANTABLE QUALITY—WARRANTIES.

Disconformity to Contract—Right to Reject—Rejection in Time.]—In November, 1900, a firm of printers ordered from a firm of engineers a Marinoni printing machine. By the contract the sellers undertook to fit the machine in the buyers’ works, and leave it in thorough good working condition. The machine was fitted in March, 1901, and, by instalments in the following April and August, the price, with the exception of 1l., was paid. The buyers used the machine until July, 1902, when they intimated rejection of it. During the period from March, 1901, to July, 1902, they had frequently intimated their dissatisfaction with the working of the machine, and requested the sellers to put it into proper working order, which the latter had unsuccessfully attempted to do. The buyers had made some unimportant alterations in the machine before rejecting it. In an action by the buyers against the sellers, concluding for warrant to remove the machine from their premises, and for repayment of the price so far as paid by them, it was proved that the machine had failed to work properly, and that this was due to its inherent defects, and not to any negligence on the part of the buyers or their workmen:—*Held*, that the sellers had failed to fulfil their contract, and that the buyers had timeously exercised their right of rejection. *Aird & Coghill v. Pullan & Adams*, 7 F. 258—Ct. of Sess.

Disclaimer of Responsibility for Bad Workmanship—Costs of Action by Sub-Vendee against Purchaser Reasonably Defended—Damages, Measure of.]—The plaintiffs having undertaken the repairs of a steamship for the owners, employed the defendants, an engineering company, to construct a new crank shaft. The defendants agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them. In an action by the plaintiffs against the shipowners to recover the price of the shaft which had been supplied by the defendants, the shipowners counterclaimed for damages for breach of contract in consequence of the shaft having broken down on a voyage. The plaintiffs, after communicating with the defendants, who thereupon repudiated all responsibility, defended the counterclaim. The shipowners succeeded on their counterclaim, the shaft being found to have been of faulty workmanship. In an action by the plaintiffs

to recover from the defendants the cost of the shipowners' counterclaim, as damages resulting from the defendants' breach of contract.—*Held*, that the terms on which the defendants had supplied the shaft did not relieve them from paying these costs; and that the plaintiffs were entitled to recover the costs of the counterclaim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft. *Prince of Wales Dry Dock Co. v. Fownes Forge and Engineering Co.*, 90 L. T. 527; 9 Asp. M.C. 555—C.A.

Right to Reject—Stipulation against Rejection.—A contract for the sale of teak logs to be shipped and to be of "fair merchantable quality, conversion and condition," provided that if any dispute arose under the contract the buyers were nevertheless to take delivery and pay the price, but the dispute was to be referred to arbitration. On arrival of the shipment the buyers refused to take delivery or pay the price on the ground that the logs were not of "fair merchantable quality, conversion and condition":—*Held*, that the buyers were bound to pay the price, reserving all claims competent to them in respect of the goods in the arbitration. *Leary v. Briggs*, 6 F. 857—Ct. of Sess.

Express Warranty—Advertisement—Implied Warranty—Article Sold under Patent or Trade Name.—In March, 1897, the plaintiffs, who were the sole licensees and makers of an apparatus known in the trade as "Patterson's Smoke-Prevention Suction Draught for Land and Marine Boilers," wrote to the defendant corporation's engineer calling his attention to their apparatus as a means of both increasing boiler capacity and largely reducing or entirely preventing smoke; and also enclosing a circular, in which it was stated that "the smoke-prevention is absolute, and is attained by a proper arrangement of," &c. In March, 1898, the defendants, by letter, accepted a written offer by the plaintiffs to instal their apparatus at a price stated. Neither the offer nor the acceptance contained any reference to the circular. The apparatus having been erected, and the defendants having thereafter rejected it as not conforming to the contract, the plaintiffs sued for the price:—*Held*—first, that the defendants were not entitled to reply upon the circular as containing an express warranty, as it was not referred to in the contract; and secondly, that in view of the proviso in section 14, sub-section 1 of the Sale of Goods Act, 1893, there was no implied warranty, the apparatus in question being a specified article sold under its trade name. *Paul v. Glasgow Corporation*, 3 F. 119—Ct. of Sess.

Food Sold with Warranty of Soundness Condemned in Hands of Purchaser—Purchaser's Rights against Vendor—Measure of Damages—Fine and Costs on Prosecution.—The plaintiff bought of the defendants certain tins of fish warranted to be sound, but in fact unsound. He had no knowledge of their unsoundness. The fish was seized, condemned, and destroyed under the Public Health (London) Act, 1891, and the plaintiff was convicted under section 47 of that Act as the person on whose premises the fish was found, and fined 20*l.* and ten guineas costs, and he paid seven guineas costs in his defence at the police Court:—*Held*, that he

was entitled to recover from the defendants as damages, in addition to the full value of the fish, the ten guineas costs imposed by the magistrate and the seven guineas paid in his defence, as these two payments flowed from the defendants' breach of warranty; but that the fine of 20*l.* could not be recovered in the absence of anything to shew what considerations influenced the magistrate when he imposed it. *Crage v. Fry*, 67 J. P. 240; 1 L. G. R. 253—Kennedy, J.

Implied Warranty—Sale by Description—Beer in Tied House—Latent Defect.—In an action to recover damages for breach of an implied warranty upon the sale of beer, it was proved that the plaintiff had suffered damage from illness caused by arsenical poisoning by beer purchased and drunk by him at a beerhouse kept by the defendant. The plaintiff's custom was to go to the house and ask for ale, with which he was served in the usual way, but he knew that the house was a tied house, at which all the beer sold came from the brewery of the owners of the house, and he went to the house because he preferred their beer:—*Held*, that the beer was bought by description from a seller who dealt in goods of that description within the meaning of section 14, sub-section 2 of the Sale of Goods Act, 1893, and that under that section an implied condition arose upon the sale that the goods should be of merchantable quality, for the breach of which the plaintiff was entitled to recover. *Wren v. Holt*, 72 L. J. K.B. 340; [1903] 1 K.B. 610; 88 L. T. 282; 51 W. R. 435; 67 J. P. 191—C.A.

— Fitness for Particular Purpose—Supply of Milk for Family Use—Latent Defect.—"So as to show that the buyer relies on the seller's skill."—A company, whose business it was to sell milk, supplied milk to a householder for his family consumption by delivery at his house in the ordinary way. The pass-book supplied to him by the company for the purpose of keeping the milk account contained numerous advertisements of the precautions taken by the company to insure by inspection and analysis that only pure milk, free from all germs of disease, was supplied. In an action by the householder against the company to recover damages sustained by him by reason of the death of his wife by typhoid fever contracted from milk supplied by the company, —*Held*, that in these circumstances the plaintiff had made known to the company that the milk was required for the particular purpose of household consumption so as to show that the plaintiff relied on the company's skill and judgment, and that thereupon an implied warranty arose under section 14, sub-section 1 of the Sale of Goods Act, 1893, that the milk was fit for household consumption; and that the fact that it is impossible to test milk intended for household consumption for typhoid germs, by reason of the length of time necessary for the process, afforded no defence, since the warranty was not limited so as not to apply to latent undiscoverable defects. *Frost v. Aylesbury Dairy Co.*, 74 L. J. K.B. 386; [1905] 1 K.B. 608; 92 L. T. 527; 53 W. R. 354; 21 T. L. R. 300—C.A.

— — — Crabs—Reliance on Seller's Skill or Judgment.—The plaintiff asked the defendant, a fishmonger, for "two nice fresh crabs which

she wanted for her tea." The defendant said he had no live crabs, but that he could give her boiled ones. He then selected for her two crabs which he said were nice and fresh. The plaintiff pointed to another crab and asked if he did not think it better, but the defendant on feeling it said it was by the weight one should judge and not by the size, and put it away. The plaintiff took and paid for the two crabs selected by the defendant, who *bona fide* believed that they were fresh and fit for human food:—*Held*, that the crabs were bought for a particular purpose, made known to the seller, within section 14, sub-section 1 of the Sale of Goods Act, 1893, so as to shew that the buyer relied on the seller's skill and judgment, and that the defendant was liable in damages to the plaintiff, who became seriously ill through eating the crabs, which were not in fact fresh and reasonably fit for human food. *Wallis v. Russell*, [1902] 2 Ir. R. 585—C.A.

— "Makes known to the seller the particular purpose"—Sale of Article by Ordinary Description.]—Where an article which is *prima facie* applicable to one purpose only is sold by its ordinary recognised description, then, inasmuch as there is a sale for a particular purpose which is understood by both the buyer and the seller, the fact that the buyer does not make known to the seller the particular purpose for which the article is required, otherwise than by the ordinary description of the article, does not exclude the contract of sale from the operation of section 14, sub-section 1 of the Sale of Goods Act, 1893, and prevent the implication of a warranty that the article is reasonably fit for the purpose in question. *Freist v. Last*, 72 L. J. K.B. 657; [1903] 2 K.B. 145; 89 L. T. 33; 51 W. R. 678—C.A.

A draper who had no special knowledge of hot-water bottles went to the shop of a chemist in the course of whose business it was to sell them, and asked for a hot-water bottle, the circumstances shewing that as a fact he relied on the skill and judgment of the seller. An article having been sold to him as a hot-water bottle,—*Held*, that the case came within section 14, sub-section 1 of the Sale of Goods Act, 1893, and that it was an implied condition of the contract of sale that the seller should supply a bottle reasonably fit for the particular purpose of holding hot water in circumstances in which hot-water bottles are ordinarily used. *Ib.*

— Condenser Tubes—Implied Condition that Goods of Merchantable Quality.]—The pursuer, the owner of a Clyde steamer which required new condenser-tubes, was shewn by the defenders, who were contractors for ship machinery, a specimen of a new kind of brass condenser-tube, manufactured by the B. Copper Co. The defenders told the pursuer that these tubes were in use on certain Clyde tug-steamers. Afterwards the defenders wrote to the pursuer offering to supply the tubes at a specified price, inclosing a copy of a report by the B. Copper Co., in which the tubes were referred to as "giving good results in the Clyde tug-steamers." The pursuer ordered from the defenders 750 of "your special condenser-tubes" for this steamer. The B. Copper Co.'s tubes were supplied by the defenders to

the pursuer, and were fitted into his steamer. After four months' use they were found to be useless from corrosion, and had to be replaced by others:—*Held* (LORD TRAYNER *dissentiente*), that the defenders were liable in damages for breach of contract on the ground (*per* the LORD JUSTICE-CLERK) that under section 14, sub-section 2 of the Sale of Goods Act, 1893, it was an implied condition of the contract that the tubes should be of merchantable quality, and that they were not of such quality, and on the ground (*per* LORD YOUNG and LORD KINCARNEY) that the buyer had made known to the seller the particular purpose for which the tubes were required, and had shewn that he relied on the seller's skill as a trader in such goods, and therefore that under section 14, sub-section 1 of the Sale of Goods Act, 1893, it was an implied condition that the tubes should be reasonably fit for such purpose, and that they were not reasonably fit for that purpose in fact. *Williamson v. Macpherson & Co.*, 6 F. 863—Ct. of Sess.

— Limestone—Iron-smelting.]—The plaintiffs, who were the owners of limestone quarries, had for some years before December, 1881, supplied limestone to the defendants, who owned iron-smelting works, from a certain quarry. This quarry was known to be a second-grade quarry in which were beds of limestone of varying quality. In December, 1881, the defendants agreed to obtain from the said quarry, and from no other place, so long as the plaintiffs should supply the same, all the limestone they should from time to time require for the smelting and other purposes of their works, and the plaintiffs agreed to supply from the said quarry all the limestone so required by the defendants:—*Held*, that the plaintiffs were bound to supply limestone reasonably fit for use in the defendants' works, which were known to be iron-smelting works, and that in determining what was reasonable fitness the fact that the limestone was to come from a particular quarry, which was known to be a second-grade quarry, and from which the defendants had for some years before the date of the contract taken limestone, must be taken into consideration. *Strongitharm v. North Lonsdale Iron and Steel Co.*, 21 T. L. R. 357—C.A.

Dangerous Goods—Danger not Obvious to Buyer Known to Seller—Duty of Seller to Warn Buyer—Negligence—Sale for Particular Purpose—Condition that no Warranty Given—Implied Warranty of Fitness.]—Independently of any warranty, there arises out of a sale of goods possessing a dangerous quality, which the seller knows and the buyer presumably does not know, a relation between the seller and the buyer which imposes on the seller the duty of warning the buyer of that dangerous quality. *Clarke v. Army and Navy Co-operative Society*, 72 L. J. K.B. 153; [1903] 1 K.B. 155; 88 L. T. 1—C.A.

A co-operative society sold to a purchaser a tin of chlorinated lime from a consignment, of which other tins had to the knowledge of the manager of the society caused injury to the persons opening them. No warning was given to the purchaser, who on opening the tin was injured by the lime flying into her eyes:—*Held*, that as the danger was one of which it was not

to be expected that the purchaser would be aware, there was, independently of any warranty, a duty upon the society to warn the purchaser of the danger, and that the society was liable in respect of the injury resulting from that breach of duty. *Ib.*

Semble, that a rule of the society that "no warranties are given with the goods sold by the society, except on the written authority of one of the managing directors or the assistant manager," did not exclude from the contract of sale the implied warranty arising under section 14, sub-section 1 of the Sale of Goods Act, 1893, that goods sold for a particular purpose are reasonably fit for such purpose. *Ib.*

Receipt on Pictures—"By" Certain Artist.]—*Semble*, receipts given by a seller for the price of pictures in which the pictures are described as "by" certain artists named, do not by themselves amount to a warranty that the pictures were the work of these artists. *Hyslop v. Shir-law*, 7 F. 875—Ct. of Sess.

6. STOPPAGE IN TRANSITU.

Right of.]—Where an agreement has been arrived at between the buyer of goods consigned by carrier to await his orders and the carrier, that the goods are to remain in the possession of the carrier as warehouse-keeper for the buyer, the seller is not entitled to stop the goods as still being *in transitu*. *Taylor v. Great Eastern Railway*, 70 L. J. K.B. 499; [1901] 1 K.B. 774; 84 L. T. 770; 49 W. R. 431; 6 Com. Cas. 121—Bigham, J.

Duration of Transit—Port of Delivery.]—By a c.i.f. contract J. B. S. & Co., of Miramichi, New Brunswick, sold a quantity of timber to a firm in Glasgow, at certain prices "including freight and insurance to Glasgow." The contract stated, "The goods are deliverable in the usual and customary manner at Miramichi with all reasonable despatch, according to the season of the year, and agreeably to the custom of the port during the shipping season, 1903," and "Should the vessel or vessels fixed for this contract be lost previous to loading, and after the name being declared to the buyer then sellers to have the option of substituting another vessel or vessels, or cancelling the contract." The timber was shipped at Miramichi by the sellers, and the bill of lading taken in their own name. The bill of lading bore that the cargo was to be delivered in Glasgow to their order or assigns. On the ship's arrival at Glasgow the sellers stopped the goods *in transitu*:—*Held*, that the port of delivery was Glasgow and not Miramichi, and that the goods were *in transitu* when stopped. *M'Dowall and Neilson's Trustee v. Snowball Co.*, 7 F. 35—Ct. of Sess.

Payment by "approved acceptance."]—A contract of sale provided for payment by "approved acceptance." The seller on September 18 took the buyer's acceptance. On September 25 the seller stopped the goods *in transitu*. The buyer was insolvent on October 1:—*Held*, that the acceptance did not operate as payment so as to deprive the seller of his right to stop the goods *in transitu*. *Ib.*

Agent to Take Delivery.]—The plaintiff sold to the defendants, who carried on business at Hamburg, ten tons of waggon brass ex-York stores, to be forwarded to the Co-operative Wholesale Society at Goole. The defendants at the same time wrote to the Co-operative Society, who were shipping agents, informing them that they would receive the brass, and directing them to forward it by steamer to Hamburg. The plaintiff, who knew that the goods were going to be forwarded by steamer, but had received no instructions where they were to be sent after arrival at Goole, forwarded them to the Co-operative Society at Goole, who received them and sent them on to Hamburg. When the brass arrived at Hamburg the plaintiff, who had not been paid, telegraphed to the Co-operative Society's branch there not to deliver it:—*Held*, that, as the plaintiff had only received instructions to send the goods to the Co-operative Society at Goole, the goods were received there by the society as agents in that behalf for the defendants, and fresh instructions to the society as to the further destination of the goods were necessary; that therefore the transit was at an end at Goole, and the notice to stop was too late. *Jobson v. Eppenheim*, 21 T. L. R. 468—Channell, J.

Document of Title, Possession of—Consent of Seller—Draft, Failure to Accept—Transfer of Bill of Lading to Sub-Vendee.]—In fulfilment of a contract for the sale of a certain quantity of copper, the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendants' ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, and delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had previously to obtaining possession of the bill of lading made for the sale to them of the copper. The plaintiffs took the bill of lading in good faith and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper *in transitu*. In an action by the plaintiffs against the defendants for non-delivery of the copper,—*Held*, that the buyer, having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under section 25, sub-section 2 of the Sale of Goods Act, 1893, and that the sellers had no right to stop it *in transitu*. *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, 68 L. J. Q.B. 515; [1899] 1 Q.B. 643; 80 L. T. 269; 47 W. R. 422; 8 Asp. M.C. 516—C.A.

8. GOODS STOLEN OR PAWNED.

Goods Stolen by Servant—Title of Purchaser—Conduct of Master Alleged as Cause of Fraud—Estoppel.]—The appellants gave a written authority to a dock company to honour transfer or delivery orders of timber signed by their confidential clerk. The clerk assumed a false name, took an office, and obtained transfers of timber to himself under the assumed name. This timber he sold to the respondents, representing himself as the agent of another firm. In an action by the appellants for the value of the timber,—*Held*, that as the timber was stolen the respondents had no better title than

the thief from whom they bought, and the appellants were not estopped from recovering the value on the ground that the clerk was invested with the powers of an owner, as there had been no representation made to the respondents by or on behalf of the appellants, the respondents never having dealt with the clerk in his own name and having no knowledge of the appellants' connection with the transactions. *Farquharson v. King*, 71 L. J. K.B. 667; [1902] A.C. 325; 86 L. T. 810; 51 W. R. 94—H.L. (E.)

— **Goods Pawned by Retail Dealer—Sale on Appropriation—Title of Pawnbroker—Loss Arising by Fraud on Two Innocent Parties.**—*Ehrmann*, a wholesale jeweller, was in the habit of sending goods to Anderson, a retail jeweller, with the wholesale prices marked, with power to sell and deliver on his own account and for his own profit any articles he might sell, Anderson being liable only for the wholesale price. At the same time Ehrmann sent a printed notice headed "Appropriation note," stating that the goods were to remain the property of the sender till invoiced by him to Anderson. Anderson having retained a diamond necklace for several months, Ehrmann in April, 1903, urged Anderson to purchase the necklace himself, and offered to take bills for the price. Anderson agreed to do so, and the necklace was invoiced to him, and the bills were granted by him. Anderson having subsequently become bankrupt, Bryce, a pawnbroker, with whom Anderson had in December, 1902, without Ehrmann's knowledge, pledged the necklace, raised an action of multiple poinding to determine the right thereto. Claims were lodged by Ehrmann, by Bryce, and by Anderson's trustee, but the claim by the last was not insisted in:—*Held*—first, that as in December, 1902, Anderson had been put by Ehrmann in a position to give a good title to a purchaser, he could validly pledge the necklace, and had validly pledged it to Bryce; secondly, that as Anderson's trustee did not insist upon his claim Ehrmann was entitled to delivery of the necklace after satisfying Bryce's claim. *Bryce v. Ehrmann*, 7 F. 5—Ct. of Sess.

9. SALE OF BREAD.

Exercise of Ordinary Calling on the Lord's Day—Prosecution—Consent of Justices.—By the Sunday Observance Act, 1677, s. 1: No tradesman shall exercise any worldly labour of his ordinary calling upon the Lord's Day (works of necessity and charity only excepted). By the Sunday Observation Prosecution Act, 1871, s. 1: No proceeding shall be instituted against any person for any offence committed under the Sunday Observance Act, 1677, except with the consent in writing of the authorities named in the later Act. By the Bread Act, 1822, s. 16: No master or other person exercised or employed in the business of a baker shall on the Lord's Day . . . exercise the trade or calling of a baker save as therein excepted:—*Held*, that in order to institute a prosecution under the last mentioned Act it is not necessary to obtain the consent in writing of the authorities named in the Sunday Observation Prosecution Act, 1871. *Rea v. Mead*, 71 L. J. K.B. 871; [1902] 2 K.B. 212; 87 L. T. 136; 50 W. R. 589; 66 J. P. 676; 20 Cox C.C. 337—D.

Sale of Bread otherwise than by Weight.—It is no answer to a charge under section 4 of 3 Geo. 4, c. cvi., of selling bread otherwise than by weight, that the purchaser asked for a loaf at a specified price, and not for one of any particular weight. *London County Council v. Read*, 69 L. J. Q.B. 39; [1900] 1 Q.B. 288; 81 L. T. 452; 48 W. R. 393; 63 J. P. 775; 19 Cox C.C. 415—D.

The respondent, a baker, sold a loaf of bread, of the size and appearance of a 2-lb. loaf, to a purchaser, for 3d. When weighed the loaf was found to be half an ounce short of 2 lbs. in weight. It was the practice of the respondent to weigh loaves, after baking them, three at a time, and it was proved that the loaf in question had been weighed that morning with two others, and that the three together had weighed 6 lb.; but that the loaf had not been weighed separately:—*Held*, that the respondent had sold bread otherwise than by weight within the meaning of section 4 of the Bread Act, 1836. *Welch v. Cutler*, 92 L. T. 239; 69 J. P. 149; 3 L. G. R. 282; 20 Cox C.C. 809—D.

— **Weight of Bread not Ascertained.**—In order that the requirements of section 4 of the London Bread Act, 1822 (which imposes upon sellers of bread the obligation of selling the same by weight), may be complied with, the weight of the bread sold must be ascertained. *Cox v. Bleines*, 71 L. J. K.B. 437; [1902] 1 K.B. 670; 86 L. T. 563; 50 W. R. 392; 66 J. P. 407; 20 Cox C.C. 188—D.

A person entered a baker's shop and asked to be supplied with a half-quarter loaf. Such a loaf ought to weigh two pounds. The respondent's shopwoman placed a loaf and two rolls in one pan of the shop scales—a two-pound weight being in the other pan—but the loaf and rolls did not move the beam of the scales, and when they were handed to the customer their weight had not been ascertained, except that it was evident that they weighed less than two pounds. It was subsequently found that they weighed five ounces less than two pounds:—*Held*, that the bread had not been sold by weight as required by the section. *Id.*

— **Ascertainment of Weight.**—It is a sufficient compliance with the requirements of the London Bread Act, 1822, to ascertain by weighing that the weight of the loaf sold is above the weight professed to be sold without ascertaining its exact weight in pounds, ounces, and grains. *Bridge v. Passman*, 68 J. P. 129—D.

— **Weighing.**—To satisfy the requirements of the Bread Act (which requires bread, with certain exceptions, to be sold by weight only) the bread must be actually weighed as bread before or at the time of sale. It is not sufficient to shew that the dough was cut by a machine into pieces calculated, when baked, to weigh a certain number of pounds. *Slater v. Brewsters*, [1905] 2 Ir. R. 258—K.B. D.

Bakehouses—Liability for Repair.—See *Goldstein v. Hollingsworth* and *Morris v. Beal*, LANDLORD AND TENANT, cols. 1232-3.

— **Liability of Master to Servant.**—See MASTER AND SERVANT, col. 1518, and *Evans v. Gallon*, col. 1466.

10. SALE BY AUCTION.

Personal Liability of Auctioneer—Implied Authority to Sell without Reserve—Limitation of Authority not Communicated to Buyer—Liability of Principal.]—The defendant, an auctioneer, was instructed by the owner of a pony to sell it at a public auction with a reserve price of 25*l*. When the pony was put up at the sale the name of the vendor was disclosed; but the defendant inadvertently stated that the sale was without reserve. The pony was knocked down to the plaintiff for fifteen guineas. The defendant immediately afterwards discovered his error, and thereupon put the pony up for sale again, when it was bought in for seventeen guineas. No note or memorandum of the sale to the plaintiff was made. The plaintiff brought an action against the defendant claiming—first, delivery of the pony, or damages for its detention; secondly, alternatively, damages for breach of warranty of authority by the defendant:—*Held*, as to (1), that the action failed by reason of the absence of a written memorandum of the sale. *Held*, as to (2), that an auctioneer has an implied authority to sell without reserve, and, if he does so, the vendor cannot set up as against the buyer a limitation of that authority not made known to the buyer. There was, therefore, in the circumstances a contract binding on the vendor on which he could (but for the absence of a written memorandum) have been successfully sued by the plaintiff; and there had been no breach of warranty of authority by the defendant. *Warlow v. Harrison* (29 L. J. Q.B. 14; 1 E. & E. 309) distinguished. *Rainbow v. Howkins*, 73 L. J. K.B. 641; [1904] 2 K.B. 322; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508—D.

Quære, whether the plaintiff had a cause of action against the defendant for failing to make a written memorandum of the sale. *Ib*.

Woolfe v. Horne (46 L. J. Q.B. 534; 2 Q.B. D. 355) is an authority that an action for wrongful refusal to deliver a chattel sold at public auction may in some circumstances be brought against the auctioneer, although the principal's name has been disclosed to the buyer at the time of the sale. *Ib*.

— **Sale Subject to Reserve Price—Acceptance of Bid Less than Reserve Price—Action by Bidder—Breach of Duty—Breach of Warranty of Authority.]**—At an auction, where by the conditions of sale each lot was to be offered subject to a reserve price, the plaintiff bid for a lot a sum which was less than the reserve price. The auctioneer, thinking by mistake that the reserve price had been reached, knocked down the lot to the plaintiff. He immediately discovered his mistake and withdrew the lot, and refused, though requested by the plaintiff, to make and sign a memorandum of contract of sale:—*Held*, that inasmuch as both the bid and the acceptance of the bid at the auction were conditional on the reserve price being reached or exceeded, the plaintiff was not entitled to maintain an action against the auctioneer either for breach of duty or for breach of warranty of authority. *McManus v. Fortescue*, 76 L. J.

K.B. 393; [1907] 2 K.B. 1; 96 L. T. 444; 23 T. L. R. 292—C.A.

Sale of Horse—Horse Entered in Catalogue and Sold as Owned by Particular Person—Sale by Private Treaty before Auction—Statement by Auctioneer that Horse was put up "as described in the catalogue"—Auctioneer Acting as Owner's Agent—Estoppel—Rescission of Contract on Ground of Misrepresentation.]—A horse was sent to be sold, and was entered in the catalogue as the property of a particular person. Before the sale the owner sold the horse by private treaty, and the auctioneer was informed of this, but was requested to go on with the sale by auction, the original owner acquiescing in this being done, and the sale by auction did take place in his presence, the auctioneer putting up the horse "as described in the catalogue." There was evidence that the fact of the horse being entered in the catalogue as the property of the person there named, who was well known, might fetch a higher price than a horse sold by a person who was not known. The purchaser at the sale by auction having learned of the previous sale by private treaty brought an action against the original owner of the horse for the rescission of the contract:—*Held*, that the statement in the catalogue was a material representation as it was to a certain extent a guarantee as to the character of the sale, that the defendant had held out the auctioneer as being his agent and allowed the plaintiff to act on the faith of it, and that the plaintiff was entitled to rescind the contract. *Whurr v. Devenish*, 20 T. L. R. 385—Lord Alverstone, C.J.

Right of Exposer to Withdraw Subject.]—As section 53, sub-section 2 of the Sale of Goods Act, 1893, entitles a bidder to withdraw his bid at any time before the fall of the hammer, the exposer must be held to be equally free to withdraw his offer to sell. *Fenwick v. Macdonald, Fraser & Co.*, 6 F. 550—Ct. of Sess.

Auctioneer Acting for Disclosed Seller—Agent and Principal.]—*PER LORD KYLLACHY*: An auctioneer, acting for a disclosed exposer, and in accordance with his instructions, incurs no liability to a person claiming to be a purchaser for implement and damages. *Ib*.

Cheque—Payment to Vendor—Representations Falsely made by Vendor—Right of Auctioneer to Recover on Cheque.]—The defendant purchased at auction certain pictures, the property of B., which were represented by B. to be examples by or attributed to several well-known artists. The jury found that such representation by B. was fraudulently made. After the auction on June 26 the defendant gave his cheque for the amount of the purchases to the plaintiff, the auctioneer, and on June 28 the plaintiff paid B., at that time having no intimation that there was anything wrong. Subsequently the defendant stopped the cheque. The jury found that the representations had not been fraudulently made by the plaintiff:—*Held*, that the defendant was liable to the plaintiff on the cheque. *Hindle v. Brown*, 98 L. T. 44—Pickford, J.

Fees—Recovery of.]—See *Hannaford v. Syms*, 79 L. T. 30, *post*, SOLICITOR.

Licence.]—See REVENUE.

Mistake.—See SPECIFIC PERFORMANCE and VENDOR AND PURCHASER; also cols. 1689-1692.

11. OTHER MATTERS.

Formation of Contract.—See CONTRACT.

Impossibility of Performance.—See CONTRACT.

Sale on Credit—Fraudulent Intention—Right to Disaffirm Contract.—See BANKRUPTCY.

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SCHOOL.

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1. STATUTES.

Board of Education.—62 & 63 Vict. c. 33 is the *Board of Education Act*, 1899.

Defective and Epileptic Children.—62 & 63 Vict. c. 32 is the *Elementary Education (Defective and Epileptic Children) Act*, 1899.

Education.—1 Edw. 7 c. 11 is the *Education Act*, 1901.

— 2 Edw. 7 c. 19 is the *Education Act*, 1901 (*Renewal Act*, 1902; 2 Edw. 7 c. 42 is the *Education Act*, 1902).

— **Administrative Provisions.**—7 Edw. 7 c. 43 is the *Education (Administrative Provisions) Act*, 1907.

— **Elementary.**—63 & 64 Vict. c. 53 is the *Elementary Education Act*, 1900.

— 3 Edw. 7 c. 13 is the *Elementary Education Amendment Act*, 1903.

— **Local Authority.**—4 Edw. 7 c. 18 is the *Education (Local Authority Default) Act*, 1904.

— **London.**—3 Edw. 7 c. 24 is the *Education (London) Act*, 1903.

Reformatory Schools.—62 & 63 Vict. c. 12 is the *Reformatory Schools Act*, 1899.

School Attendance.—62 & 63 Vict. c. 13 is the *Elementary Education (School Attendance) Act*, 1899.

Teachers' Superannuation.—61 & 62 Vict. c. 57 is the *Elementary School Teachers (Superannuation) Act*, 1898.

Working Balances.—3 Edw. 7 c. 10 is the *Education (Provision of Working Balances) Act*, 1903.

2. EDUCATIONAL AUTHORITY.

(a) Generally.

Local Education Authority—Education Committee—Scheme—Provision Empowering Local Education Authority to Determine Order of Retirement of Members—Resolution Determining Order—Subsequent Resolution Varying Order—Validity.—An urban district council, as the local education authority under section 1 of the *Education Act*, 1902, made a scheme for the establishment of an education committee under section 17, sub-section 1 of the Act, which was duly approved by the Board of Education. The scheme provided (*inter alia*) that the council should determine the order of retirement of the members of the committee. The council passed a resolution determining the order, and subsequently passed a second resolution by which it purported to vary the order of retirement:—*Held*, that the council, having by the first resolution determined the order of retirement, was *functus officio*, and that the subsequent resolution purporting to alter that order was therefore *ultra vires* and invalid. *Milward v. Barry Urban Council*, 73 L. J. Ch. 804; [1904] 2 Ch. 481; 91 L. T. 290; 53 W. R. 21; 68 J. P. 569; 2 L. G. R. 1222; 20 T. L. R. 705—Buckley, J.

“Public elementary school” — Non-provided School—Religious Instruction—“Maintain and keep efficient”—Salary of Teacher—Payment for Religious Teaching—Obligation of Local Education Authority.—The liability imposed by the *Education Act*, 1902, upon the local education authority to “maintain and keep efficient all public elementary schools within their area” includes the obligation to defray the expense of denominational religious instruction in a non-provided school, which is a public elementary school under the Act. *Att.-Gen. v. Yorkshire (West Riding) County Council; Grenside, Ex parte*, 76 L. J. K.B. 97; [1907] A.C. 29; 95 L. T. 845; 71 J. P. 41; 5 L. G. R. 89; 23 T. L. R. 171—H.L. (E.)

— **Non-provided — Religious Instruction—Alteration of Time Table—Direction of Local**

Education Authority—Non-compliance of Managers—Cesser of Maintenance—Question for Board of Education—Jurisdiction—Closing of School—Trespass—Inducing Teachers to Break Contract.]

—The time table of a non-provided school provided that religious observance and religious instruction should be from 9 A.M., when the school opened, till 9.55 A.M.; that at 9.55 A.M. the registers should be marked; and that secular instruction should commence at 10 A.M., and continue till noon. A footnote, approved by his Majesty's inspector, provided that on saints' days and holy days the registers should be marked at 9 A.M., the object being that the children might be taken, as the custom was, to church at 11 A.M. The defendants, the local education authority under the Education Act, 1902, issued a direction that secular instruction in all schools within their district should commence not later than 9.45 A.M., and continue through the school hours. The plaintiffs, the managers, did not comply with the direction, and continued to take the children to church on saints' days and holy days at 11 A.M., and took no step to alter the time table. The local education authority thereupon refused to continue to maintain the school. The Board of Education confirmed the action of the local education authority. The managers brought an action against the local education authority, claiming a declaration that the local education authority was bound to continue to maintain the school:—*Held*, that the direction given by the local education authority was a direction, not as to religious, but as to secular instruction within the meaning of section 7, sub-section 1 (a) of the Education Act, 1902, and that the issue, therefore, between the managers and the local education authority arose under section 7, and was a question to be determined by the Board of Education under sub-section 3 of section 1, and that the Court had no jurisdiction to determine it. *Blencowe v. Northamptonshire County Council*, 76 L. J. Ch. 276; [1907] 1 Ch. 504; 96 L. T. 385; 71 J. P. 258; 5 L. G. R. 551; 23 T. L. R. 319—Warrington, J.

Managers appointed under the Education Act, 1902, of a non-provided school have not such possession of the school building, in the absence of a special arrangement with the owner, as will support an action of trespass. *Ib.*

The local education authority having ceased to maintain a non-provided school, sent their inspector, who informed the teachers and the children that the school would be closed, and told the children that they were to go to another school, and offered to the teachers employment, which they accepted, in other schools; and he wrote in the log book, "School closed, teachers transferred." The managers brought an action against the local education authority claiming damages for trespass and illegal acts in closing the school and inducing the teachers to leave the service of the managers without due justification:—*Held*, that the managers, not having pleaded or proved any special arrangement with the owner of the school building giving them possession in a legal sense, could not maintain the action. *Ib.*

Held, also, upon the facts, that the offer of other employment by the local education au-

thority to the teachers was justified, and that the defendants had not induced the teachers to break their contracts with the plaintiffs without justification. *Ib.*

Duty of Local Education Authority to Maintain Voluntary School.]—*See Wilford v. Yorkshire (West Riding) County Council*, 77 L. J. K.B. 436; [1908] 1 K.B. 685; 6 L. G. R. 244.

Conditions of Maintenance—Effect of Non-compliance—Dismissal of Teacher without Consent of Authority—"Exclusive power" of Managers.]—Clauses (a) to (e) of section 7, sub-section 1 of the Education Act, 1902, are not affirmative statutory provisions independent of the enactment that the local education authority shall maintain non-provided schools. They are conditions operating solely between the authority and the managers, and the only effect of non-compliance is the forfeiture of maintenance. Clause (c) gives no rights to a teacher, and the power of the managers to dismiss him depends only on the terms of his agreement with them. "Exclusive power" in section 7, sub-section 7, means "exclusive of the education authority." *Young v. Cuthbert*, 75 L. J. Ch. 247; [1906] 1 Ch. 451; 94 L. T. 191; 54 W. R. 296; 70 J. P. 130; 4 L. G. R. 356; 22 T. L. R. 251—Buckley, J.

Delegation of Powers.]—An education committee appointed under section 17 can exercise the powers of the education authority and can delegate them to a sub-committee under the First Schedule, A (6), and the consent of either such body, given after the dismissal of a teacher by the managers, would refer back and ratify such dismissal if ratification were required. *Ib.*

United District School Board—Transfer to Educational Authorities—Different "appointed days"—Adjustment of Liabilities—Immediate or Postponed Arbitration.]—The H. Urban District Council is the local education authority for the H. Urban District. June 1, 1903, was the "appointed day" for the coming into operation of the Education Act, 1902, within the district. The corporation of J. and the county council of D. are respectively the local education authorities for the borough of J. and the rural district of M. At the passing of the Education Act, 1902, the H., M., and J. United District School Board was the school board for the urban district of H., the rural district of M., and the borough of J. April 1, 1904, was the appointed day for the coming into operation of that Act within the county of D. and the borough of J. Matters having arisen requiring adjustment between the council and the united district school board, and clause 1 of the second schedule to the Act providing that the rights and liabilities "of any school board" existing at the appointed day should be transferred to the council exercising the powers of the school board,—*Held*, that an arbitrator should be at once appointed to adjust such matters, and that the appointment should not be delayed until the appointed day for the remainder of the united district school board. *Hebburn Urban Council and Hedworth School Board, In re*, 90 L. T. 145; 63 J. P. 232; 2 L. G. R. 821; 20 T. L. R. 244—Kekewich, J.

Improvement of Public Elementary School—

"Capital Expenditure"—Payment out of Current Rate.]—The words "capital expenditure" in clause (c) of section 18, sub-section 1 of the Education Act, 1902, mean the expenditure, irrespective of the source from which it is obtained, which, on its being laid out, becomes in itself capital. *Re v. Wraith; Kent County Council, Ex parte*, 76 L. J. K.B. 881; [1907] 2 K.B. 756; 97 L.T. 577; 71 J.P. 447; 5 L.G.R. 1091—D.

Science and Art Schools and Classes—Power to Provide and Maintain out of Rates.]—It is not within the powers of the London School Board as a statutory corporation to provide or to pay the expenses of maintaining science and art schools or classes either in their day schools or in their evening continuation schools out of the School Board rate. *Re v. Cockerton*, 70 L. J. K.B. 441; [1901] 1 K.B. 726; 84 L.T. 488; 49 W.R. 433; 65 J.P. 435—C.A.

Scheme—Publication by Board of Education—Disapproval of Scheme.]—Where a scheme for the establishment of an education committee has been submitted by the local education authority to the Board of Education, and is not approved by them, there is no duty imposed upon the Board by section 17, sub-section 6 of the Education Act, 1902, to publish the scheme. *Cardiff Corporation, Ex parte*, 20 T.L.R. 317—D.

(b) School Board Election.

Votes Indicated by Crosses — Costs against Returning Officer.]—Ballot papers at a school board election are not invalid merely because votes are indicated thereon by crosses instead of figures. Where the returning officer is not a party to an election petition no costs can be given against him. *Long Sutton Election Petition, In re*, 62 J.P. 565—D.

Election Petition—Re-count of Votes.]—At an election of a School Board eight candidates contested five seats, and five were elected. A petition was afterwards presented for a re-count of votes as between the fifth and the sixth candidates. The re-count shewed a majority in favour of the sixth candidate over the fifth:—*Held*, that to unseat the fifth candidate and seat the sixth, the re-count need not include a re-count also of the votes polled for the first four candidates. *Monkswell (Lord) v. Thompson (No. 2)*, 67 L.J. Q.B. 378; [1898] 1 Q.B. 479; 78 L.T. 116; 46 W.R. 382; 62 J.P. 212—D.

— Order for Special Case—Appeal to Court of Appeal.]—An order of a Judge at chambers upon an application under section 93, sub-section 7 of the Municipal Corporations Act, 1882, for a Special Case to be stated in proceedings relating to a school board election petition, is an order on an interlocutory question arising in such petition, from which an appeal lies to the Court of Appeal. *Harmon v. Park* (50 L.J. Q.B. 227; 6 Q.B. D. 323) followed. *Monkswell (Lord) v. Thompson (No. 1)*, 67 L.J. Q.B. 243; [1898] 1 Q.B. 353; 77 L.T. 707—C.A.

(c) Transfer of Property.

Division of Area — Adjustment of Property and Liabilities—Compromise of Dispute.]—A school board district ceased to exist, by reason of the provisions of section 1 of the Education Act, 1902, part of the district becoming, for educational purposes, part of an urban district, and the rest coming under the jurisdiction of the county council. A dispute having arisen between the county council and the urban district council as to the proportion which each were to contribute towards the cost of education in the added parts, an agreement was arrived at by which separate accounts of the cost of education in the added parts were to be kept, excluding establishment and capital expenditure, the amounts shown by such accounts were to be added together, and the net charge for the same on the rates was to be annually divided between the county council and the urban council in the proportion that the rateable value of the added parts bore to each other. In an action to have the agreement declared *ultra vires*,—*Held*, that the agreement was a compromise of the dispute, and was therefore binding. *Att.-Gen. v. Essex County Council*, 71 J.P. 557; 24 T.L.R. 22—Kekewich, J.

United School Board District—Property and Liabilities—Two New Education Authorities—Adjustment.]—Where an united school board district, which has borrowed money for building purposes, becomes by the effect of the Education Act, 1902, divided into two districts, each having a different council as education authority, there must be an adjustment of property and liabilities between the councils, for neither does the Act automatically vest in each council the schools which happen to be situate within that part of the united school board district which becomes its district, nor does it vest them in both jointly or in undivided shares, and the debt is one aggregate liability of the old board, though the amount borrowed for each school may have been earmarked. *Wallsend Corporation and Northumberland County Council, In re*, 75 L.J. Ch. 813; [1906] 2 Ch. 506; 95 L.T. 259; 70 J.P. 434; 4 L.G.R. 1141; 22 T.L.R. 773—Swinfen Eady, J.

Stock Standing in Bank Books in Name of School Board "Abolished."]—Section 5 of the Education Act, 1902, provides that on the appointed day under the Act school boards "shall be abolished":—*Held*, that on the happening of the appointed day the school board for the district in question was dissolved, and ceased to exist for all purposes. *Oldham Corporation v. Bank of England*, 73 L.J. Ch. 785; [1904] 2 Ch. 716; 91 L.T. 582; 53 W.R. 243; 68 J.P. 584; 2 L.G.R. 1324; 20 T.L.R. 787—C.A.

Clause 1 of Schedule II. to the Act provides that the property, powers, rights, and liabilities of any school board existing at the appointed day "shall be transferred" to the council exercising the powers of the school board:—*Held*, that on the happening of the appointed day all the property, powers, rights, and liabilities of a school board *ipso facto*, by operation of the Act, vest in the new educational

authority without the aid of any additional instrument of any sort or kind; and consequently where Consols were standing in the name of a school board in the books of the Bank of England on the appointed day, the Consols vested in the new educational authority under the Act, and they were entitled to be entered in the bank books as owners thereof. *Ib.*

Dissolution of School District—Title to Consols.—The Poor Law Amendment Act, 1844, which empowers parishes and poor law unions to combine into school districts, by section 45 incorporates the boards of management for such school districts, and not the school district itself. When a school district has been dissolved by the Local Government Board under the Dissolved Boards of Management and Guardians Act, 1870, section 12 of that Act does not automatically vest in the members constituting the board of management the property of the school district which has been dissolved, but such property remains vested in the district board. Consols vested in the board of management of a dissolved school district are therefore not transferable by the individual members constituting the board until some further act has taken place vesting the right to transfer in them. *Morton v. Bank of England*, 73 L. J. Ch. 503; [1904] 1 Ch. 664; 90 L. T. 375; 52 W. R. 393; 68 J. P. 268; 2 L. G. R. 734; 20 T. L. R. 230—Farwell, J.

Office—Abolition—Compensation—“In pursuance or in consequence of this Act”—**Superintendent of Training Ship.**—The applicant was in 1877 appointed by the London School Board captain-superintendent of the training ship *Shafesbury*. By the Education Act, 1902, the powers and duties of the School Board were transferred to the London County Council, who determined to discontinue the use of the ship, and they accordingly gave the applicant six months' notice. The applicant applied, under clause 21 of schedule 2 to the Education Act, 1902, for compensation for the abolition of his office:—*Held*, that the abolition of the applicant's office was not “in pursuance of or in consequence of” the Act, and that therefore he was not entitled to compensation. *Rex v. London County Council; Scriven, Ex parte*, 23 T. L. R. 493—D.

3. TEACHERS.

Non-provided School—Salary of Schoolmistress—Liability of Local Education Authority.—Section 7 of the Education Act, 1902, does not create any privity of contract between a teacher appointed by the managers of a non-provided school and the local education authority. Therefore an action will not lie at the suit of the teacher against the local education authority to recover arrears of salary. Nor does a contract arise from the mere fact that the local education authority pays the teacher direct. *Crocker v. Plymouth Corporation*, 75 L. J. K.B. 375; [1906] 1 K.B. 494; 94 L. T. 734; 54 W. R. 391; 70 J. P. 204; 4 L. G. R. 571; 22 T. L. R. 336—D.

Pupil Teachers' Centres—Power to Provide and Maintain out of Rates.—It is not within

the powers of the London School Board to expend money out of the rates for the purpose of providing separate schools for the education of pupil teachers (commonly called “Pupil Teachers' Centres”), in which the education is in reality higher education and not the elementary education contemplated by the Elementary Education Act, 1870. *Rex v. Cockerton* (70 L. J. K.B. 441; [1901] 1 K.B. 726) followed. *Dyer v. London School Board*, 72 L. J. Ch. 10; [1902] 2 Ch. 768; 87 L. T. 225; 51 W. R. 34—C.A.

National School—Teacher Appointed by Managers under Trust Deed—Notice of Dismissal before “appointed day”—Expiration of Notice Afterwards—Consent of Local Education Authority.—The plaintiff was in July, 1899, appointed teacher at a National school by the then managers under the trust deed, by an agreement, one of the terms of which was that his engagement should be determinable by three months' notice. On May 6, 1904, the then managers gave the plaintiff notice that they would not require his services as master after August 9, 1904. On July 1, 1904, the Education Act, 1902, came into operation in the county in which the school was situated, that being the “appointed day” in that county. The county council, the local education authority, refused to consent to the plaintiff's dismissal. Under section 7, sub-section 1 (c), in the case of a non-provided school maintained by the local education authority the consent of the authority is required to the dismissal of a teacher except in the case there mentioned:—*Held*, that on the day when the Act came into operation the plaintiff was being employed for a term which ended on August 9, 1904, when the term came to an end by the expiration of the time fixed by the previous notice which was validly given in accordance with the terms of the contract; that the managers had not to give any further notice, or do anything which would amount to a dismissal within the meaning of the Act; and that section 7, sub-section 1 (c) of the Education Act, 1902, had no application to the case. *Jones v. Hughes*, 74 L. J. Ch. 57; [1905] 1 Ch. 180; 92 L. T. 218; 53 W. R. 344; 69 J. P. 33; 3 L. G. R. 1; 21 T. L. R. 59—C.A.

Parties to Action.—The action was brought for an injunction restraining the defendants from preventing the plaintiff from exercising his duty as teacher. The defendants were the four persons who were “foundation managers” under the Education Act, 1902. They were not the persons with whom the plaintiff made his contract, neither were they the whole body of managers under the Act:—*Held*, that the action was not properly constituted. *Ib.*

Superannuation Fund—Deductions from Salaries of Teachers—Ultra Vires.—A School Board formed under the Elementary Education Act, 1870, established a scheme for a superannuation fund for such of their teachers as elected to join it, the fund being provided by a deduction of 2 per cent. from the salaries of the teachers. After the scheme was established the Board appointed all their teachers subject to the scheme. The expenses of the management of the fund were defrayed out of the funds of the Board, the deficiencies

in which were made up out of the local rate, but the Board made no contribution to the benefits of the fund, and did not guarantee its solvency. The plaintiffs, one of whom had elected to join the scheme, while the other was appointed subject to the scheme, having ceased to be in the employment of the Board without becoming entitled to any benefit from the fund, brought actions to recover from the Board the deductions which had been made from their salaries under the scheme as money had and received by the Board to their use:—*Held*, that, as the contract between the plaintiffs and the Board contained no provision that the Board should pay the expenses of the management of the scheme out of the ratepayers' money, such payment, even if *ultra vires*, did not make the contract illegal; and secondly, that, even assuming that the Board were administering the fund as a trust without statutory powers, as the money had been voluntarily contributed by the plaintiffs to a fund to which others had subscribed on the basis of mutual subscription, and had been applied to the purpose for which they contributed it, and as the plaintiffs had, as long as they remained in the employment of the Board, a right to a grant from the fund according to the provisions of the scheme, they were not entitled to recover the money back on the ground that there had been a total failure of consideration. *Phillips v. London School Board*, 67 L. J. Q.B. 874; [1898] 2 Q.B. 447; 79 L. T. 50; 46 W. R. 658—C.A. Affirming, 61 J. P. 758—D.

Right of Assistant Teacher in Public Elementary School to Inflict Corporal Punishment.]—*Mansell v. Griffin*, [1908] 1 K.B. 160; 98 L. T. 51; 72 J. P. 6.

4. ATTENDANCE OF CHILDREN.

Refusal to Admit Child.]—Under the by-laws of the S. School Board, the parent of every child not less than five or more than thirteen years of age shall cause such child to attend school unless there shall be a reasonable excuse for non-attendance. The child of the appellant was ten years of age, and had up to May, 1898, attended at St. G. School, which was a voluntary and public elementary school, but had then been refused admission. The Education Department had confirmed the action of the managers in refusing admission. Since then the appellant had and still declined to send the child to any other school than St. G. School. He had had notice of the managers' refusal, and was informed by the S. School Board that he must send his child to another school, and the board had mentioned to him certain schools within two miles that would receive the child. On several occasions the appellant sent the child, between May and September, to the doors of St. G. School, but it was always refused admission:—*Held*, that the offering did not constitute an attendance, and that no reasonable excuse for the non-attendance had been proved. *Jones v. Rowland*, 80 L. T. 630; 63 J. P. 454; 19 Cox C.C. 315—D.

Absence from School—Attendance at Church.—"Day exclusively set apart for religious observance"—*Ascension Day.*—*Ascension Day* is a "day exclusively set apart for religious VOL. II.

observance" by the Church of England within the meaning of sections 7 and 7' of the Elementary Education Act, 1870; and a member of that Church who desires to send his child to church on that day, and withdraws it from school for the purpose, is entitled to the protection of those sections from prosecution under a by-law which directs him to cause his child to attend school. *Held*, also, that these facts constituted a "reasonable excuse" under that by-law for withdrawing the child from school in order to attend one service. *Bell v. Graham; Marshall v. Graham*, 76 L. J. K.B. 690; [1907] 2 K.B. 112; 97 L. T. 52; 5 L. G. R. 738; 71 J. P. 270; 23 T. L. R. 435—D.

Quare, whether they would constitute a "reasonable excuse" for withdrawal from school all day. *Id.*

5. EMPLOYMENT OF CHILDREN.

Employment of Child by Parent "for purposes of gain."—A father who keeps his child at home for domestic purposes in order to enable his wife to earn money by going out to work does not employ the child "for the purposes of gain" within the meaning of section 47 of the Elementary Education Act, 1876, and cannot therefore be convicted under section 6. *Mather v. Lawrence*, 68 L. J. Q.B. 714; [1899] 1 Q.B. 1000; 80 L. T. 600; 47 W. R. 559; 63 J. P. 455; 19 Cox C.C. 300—D.

Taking Child into Employment.]—A father whose child at the age of thirteen was subject to fits, acting on medical advice, allowed such child to come into his workshop when he pleased and do such work as he was minded and able to do. He never compelled the child to work or go into the workshop:—*Held*, that the father had not taken the child into his employment within section 47 of the Elementary Education Act, 1876. *Rex v. Austin; Leah, Ex parte*, 96 L. T. 29; 71 J. P. 29; 5 L. G. R. 126—D.

Employment of Child in Factory—Full Time—Half Time—School Attendance.]—*See* cols. 1469-1470.

6. EDUCATION RATE.

Rate Collector Employed by Corporation of London—Collection of Education Rate—Transfer of Officers—Compensation for Loss of Fees.]—A rate collector in the employment of the Corporation of the City of London is not entitled to compensation under the Second Schedule, provision 21 of the Education Act, 1902, by reason of loss of poundage incurred through the education rate ceasing to be collected by the Corporation:—*So held* by LORD ALVERSTONE, C.J., and RIDLEY, J.; DARLING, J., dissenting. *Rex v. London County Council; Norris, Ex parte*, 75 L. J. K.B. 241; [1906] 1 K.B. 346; 94 L. T. 218; 54 W. R. 439; 70 J. P. 160; 4 L. G. R. 305; 22 T. L. R. 235—D. And see *Whitehaven Harbour Commissioners v. Whitehaven Union, ante*, POOR LAW.

Non-payment.]—*See* ELECTION LAW, col. 777.

7. SUBSCRIBER TO SCHOOL.

Management Vested in Subscribers—Bona fide Subscriber.]—Where the management of a school and the right to appoint the teachers were, under a deed, vested in the subscribers to the school to the amount of 20s. and upwards:—*Held*, that certain persons, on behalf of whom subscriptions were sent to the school treasurer on the day of the election of headmaster, with a view to their voting at such election, and whose subscriptions were returned by him to the persons sending the same, were not *bona fide* subscribers with a right to vote at such election. It appears to be a right inherent in such a body of subscribers to refuse to admit a new subscriber for good cause. *Nott v. Williams*, 48 W. R. 316—Byrne, J.

8. SCHOOL BOARD CONTRACTS.

Contract—Not under Seal—Executory Contract.]—The plaintiff prepared, at the request of the defendant board, plans for an enlargement of their school, and did certain other work in connection therewith. There was no express contract to pay for such services, the only real contract between the parties being expressed in a resolution by the defendants to pay the plaintiff a percentage on the cost of construction of the buildings to be erected. The defendants having thereafter refused to carry out the work on the plaintiff's plans, the plaintiff sued them for breach of contract:—*Held*, that, the contract not being under seal, the plaintiff was not entitled to recover. *Start v. West Mersea School Board*, 63 J. P. 440—Wills, J.

Member Concerned in Contract with Board—Sale of Sand to Contractor—Offence.]—The respondent, a member of a school board, sold a quantity of sand and gravel to a contractor, who was under a contract with the board to build certain schools. The respondent knew that the sand and gravel were to be used in the building of the schools:—*Held*, that the respondent had committed an offence under section 34 of the Elementary Education Act, 1870, as having been concerned in work done under the authority of the school board. *Barnacle v. Clark*, 69 L. J. Q.B. 15; [1900] 1 Q.B. 279; 81 L. T. 484; 48 W. R. 336; 64 J. P. 87—D.

9. LAND COMPULSORILY TAKEN FOR.

Compensation.]—In assessing the compensation to be paid to the owner of land compulsorily purchased for the erection of a board school, the noise made by children outside a board school may be taken into consideration as injuriously affecting his adjoining land. *Reg. v. Pearce*; *London School Board, ex parte*, 67 L. J. Q.B. 842; 78 L. T. 681—D.

Deficiency in Poor Rate.]—*See* POOR LAW.

10. TRANSFER OF PART OF PARISH.

Claim by School Board for Compensation for Additions to School—Question for Adjustment by

Arbitration.]—By an order of the Local Government Board a part of the parish of L., in which were certain schools vested in the L. School Board, was transferred to the parish of Y., and such schools became vested in the Y. School Board. All contracts, liabilities, and engagements attaching to or incurred by the L. School Board in respect of such schools were declared by the order to vest in the Y. School Board, and all questions arising between the two School Boards as to these schools, or the interests of the two School Boards, it was further declared should be dealt with in an adjustment order under section 68 of the Local Government Act, 1894. The L. School Board claimed compensation for outlay on the schools in increasing their accommodation:—*Held*, that this was a matter proper to be dealt with by arbitration under the section mentioned. *Llanwornno School Board and Ystradgofdwg School Board, In re*, 62 J. P. 644—D.

11. ENDOWED SCHOOL.

Scheme—Dismissal of Assistant Master by Head Master without Notice—Right of Action against Governors.]—The plaintiff was an assistant master in a school which came within the provisions of the Endowed Schools Act, 1868 and 1869, and was regulated by a scheme made by the Charity Commissioners under the latter Act. Rule 30 of the scheme empowered the governors to dismiss at pleasure the head master without assigning cause, after giving six calendar months' written notice. Rule 37 defined the powers of the governors as to prescribing subjects of instruction, fixing the number of assistant masters to be employed, and fixing each year the amount to be paid out of the income of the foundation for the purpose of maintaining assistant masters and school plant. Rule 40 provided that "The head master shall have the sole power of appointing, and may at pleasure dismiss all assistant masters in the school, and shall determine, subject to the approval of the governors, in what proportions the sum fixed by the governors for the maintenance of assistant masters and school plant and apparatus shall be divided among the various persons and objects for which it is fixed in the aggregate. The governors shall pay the same accordingly, either through the hands of the head master or directly, as they think best." The plaintiff having been dismissed by the head master without notice, sued the defendants as the governors of the school for wrongful dismissal:—*Held*, that there was no contract between the plaintiff and the defendants, and that they were not responsible for his dismissal by the head master, whether such dismissal was wrongful or not. *Wright v. Zetland (Marquis)*, 23 T. L. R. 709—Lawrance, J. Affirmed, 77 L. J. K.B. 152; [1908] 1 K.B. 63; 97 L. T. 867; 24 T. L. R. 48—C.A.

Effect.]—A scheme for the government of an endowed school framed by the Commissioners under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), abrogates all pre-existing statutes except so far as they may be expressly preserved by such scheme. *Chester (Dean) v. Chester (Bishop)*, 87 L. T. 618—H.L. (E.). *And see* CHARITY.

12. OTHER MATTERS.

Bequest to.]—See CHARITY, col. 223.

Board School Buildings—Surveyor's Fees.]—See METROPOLIS, col. 1623.

Breach of Covenant—Noise or Nuisance.]—See VENDOR AND PURCHASER.

Charity—Cy-près—Scheme.]—See CHARITY, cols. 238, 240.

Control of Charity Commissioners.]—See CHARITY, col. 243.

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1. STATUTES.

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Electric Lighting.]—2 Edw. 7 c. 35 is the *Electric Lighting (Scotland) Act*, 1902.

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Fatal Accidents.]—6 Edw. 7 c. 35 is the *Fatal Accidents and Sudden Deaths Enquiry (Scotland) Act*, 1906.

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Public Libraries.]—62 & 63 Vict. c. 5 is the *Public Libraries (Scotland) Act*, 1899.

Qualification of Women.]—7 Edw. 7 c. 48 is the *Qualification of Women (County and Town Councils) (Scotland) Act*, 1907.

Sea Fisheries.]—7 Edw. 7 c. 42 is the *Sea Fisheries (Scotland) Application of Penalties Act*, 1907.

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Sheriff Courts.]—7 Edw. 7 c. 51 is the *Sheriff Courts (Scotland) Act*, 1907.

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— 3 Edw. 7 c. 34 is the *Town Councils (Scotland) Act*, 1903.

Trusts.]—61 & 62 Vict. c. 42 is the *Trusts (Scotland) Act*, 1898.

Vaccination.]—7 Edw. 7 c. 49 is the *Vaccination (Scotland) Act*, 1907.

Vexatious Actions.]—61 & 62 Vict. c. 35 is the *Vexatious Actions (Scotland) Act*, 1898.

Whale Fisheries.]—7 Edw. 7 c. 41 is the *Whale Fisheries (Scotland) Act*, 1907.

2. APPEAL.

To the House of Lords from Scotland—Competency—Workmen's Compensation Act, 1897.]—By section 14 (c) of the second schedule to the Workmen's Compensation Act, 1897, which applies to Scotland, "Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced":—*Held*, that in cases within this enactment no appeal lies to the House of Lords from a decision of the Court of Session. *Osborne v. Barclay, Curle & Co.*, [1901] A.C. 269; 85 L. T. 286—H.L. (Sc.)

3. BANKRUPTCY.

Trust for Creditors—Right in Security—Preference—Pledge—Private Manager.]—By trust deed executed July, 1895, S., a farmer, conveyed his whole estate to M., "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified," "with full power to manage the farm until expiry or renunciation of the lease, to sell the stock, &c., to sue and defend actions, pay rent and wages, and out of the remainder pay the creditors" of S.; "or if the remainder was inadequate, to call for claims and divide the sums." S. was declared bankrupt July 10, 1896. M. claimed a preferential right to be paid a balance due to him in respect of his actings in the management of the farm. He alleged that at the date of the bankruptcy he held the whole estate in security and for

payment of his advances, expenses, and remuneration as trustee, and claimed full payment of his debt. And in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed to be preferred to the whole sum arising from the realisation of the crops, or such part as would recoup him for his expenses, advances, and remuneration. The trustee rejected M.'s claim so far as it included law expenses after the date of the bankruptcy and other small sums, and under deduction of these sums the trustee admitted M.'s claim to be an ordinary debt, rejecting the debt altogether as a preferable one:—*Held*, that M. had no right to a preferable claim, on the ground that he had never held the bankrupt's estate in security, and that the payments made for seed and labour did not entitle him to a preferable ranking. *Mess v. Hay*, [1899] A.C. 233—H.L. (Sc.)

4. BY-LAW.

Ultra Vires—Ice-cream Vendor's Licence—Lawful Day.]—By section 80 of the Edinburgh Corporation Act, 1900, as amended by the Edinburgh Corporation Order Confirmation Act, 1901, any person selling ice-cream (except in a duly licensed hotel) without a licence from the magistrates "who are hereby empowered to grant the same" for the house, building, or premises where such ice-cream is kept for sale or sold shall be liable to a penalty: Provided that such licence shall run from the date of issue until May 15 next ensuing, and upon renewal from the date of expiry of the licence so renewed to May 15 succeeding such expiry, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice-cream, under the provisions of this Act who shall . . . sell ice-cream, except during the hours of" 8 A.M. and 11 P.M. "on any lawful day, or at such extended hour at night as the magistrates may by special regulation in particular cases and for reasons assigned permit," shall be liable in a penalty. No form of licence was annexed to the statute. The magistrates proposed to issue the following licence: "(1.) That the said licensee shall not keep open said premises, or sell or permit the sale of ice-cream therein, on Sunday or on any other day set apart for public worship by lawful authority. (2.) That the said licensee shall not keep open said premises or sell or permit the sale of ice-cream therein before 8 o'clock in the morning or after 11 o'clock at night. (3.) That the said magistrates, or any of them, may at any time suspend or revoke this licence":—*Held*, that the conditions of the licence were *ultra vires*. *Rossi v. Edinburgh Corporation*, [1905] A.C. 21; 91 L. T. 668—H.L. (Sc.)

5. DIVORCE.

Wife's Costs.]—Where the wife is successful in her defence to an action of divorce the rule of the law of Scotland is to give the wife her costs as between agent and client. *Grant v. Grant*, [1905] A.C. 466—H.L. (Sc.)

6. ENTAIL.

Restriction—Provision for Widow—Deduction from Free Rental.]—By section 1 of the Entail

Provisions Act, 1824, it was provided that the annuity to the widow of the deceased heir of entail "shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, including the interest of provisions to children . . . and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor":—*Held*, that on the calculation of the widow's annuity the heir of entail in possession was not entitled to make deduction for upkeep of estate, buildings, and fences, or for management and superintendence of the estate, these outgoings not being, in the sense of the statute, burdens affecting either the estate or its rents. *Galloway (Earl) v. Galloway (Dowager Countess)*, [1904] A.C. 50; 20 T. L. R. 58—H.L. (Sc.)

7. FEU CONTRACT.

Construction—Stipulation for Additional Rent for Ground "on which building shall be erected."—Land, which then consisted of a mansion-house and grounds, was let upon a contract by which a feu-duty (or rent) of 5*l.* an acre was reserved, and, 't being in the contemplation of the parties that the land might eventually come to be used as building land, a provision was inserted for an additional duty "for every square pole of the said piece of ground on which buildings shall be erected," with an exception in the case of additions to the mansion-house, or the building of a lodge. Other buildings were afterwards erected on the land:—*Held*, that the additional duty was only payable for land on which buildings were actually erected, and not for land accessory to such buildings, though it might be incapable of separate occupation. *McFarlane v. Stirling-Maxwell*, 87 L. T. 554—H.L. (Sc.)

8. FISHERY.

Mussel Fishings—Crown Rights.—Mussel scalps on the foreshore or the estuary of a navigable river form part of the patrimonial property of the Crown, which it can convey or let in lease to a subject. *Parker v. Lord Advocate*, [1904] A.C. 364; 20 T. L. R. 547—H.L. (Sc.)

Salmon Fishery Acts—Illegal Methods—Fixed Engines—Toot and Haul Net—Prescription—Hang Nets—Illegal Methods.—The toot and haul net used in the estuary of the Tay is fastened by a rope at one end to the shore. The net is then placed on a boat or coble; and the boat with its net is pulled out by means of an overhaul rope to an anchor in the stream; the boatman on reaching the anchor attaches the net at about twenty yards from its end to a floating rope fastened to the anchor; the end of the net is then turned inward toward the shore forming a bend or hook, and the men on shore haul the net taut. Another rope attached to the boat keeps the net upright. The net is retained in this upright position

until a fish strikes it, when the outer end is freed and hauled in by fishermen on shore so as to encircle the fish:—*Held*, that this mode of fishing for salmon was an illegal method within the meaning of the Salmon Fishery Acts. The drift or hang nets used in the river Tay are from 80 to 220 yards long and 12 to 19 feet in depth, and are shot into the river about an hour before the turn of the tide both at high and low water, when the current is least. They are run out of a boat over the stern, in a straight line across the river, and followed with the current by a man in a boat, who, when he sees or feels the net struck by a fish, rows to the spot and captures the fish entangled in the net, or, if the fish is getting away, he secures it with a gaff. The net is not fixed to any post on the shore:—*Held*, that fishing in the tidal portions of the river Tay with drift or hang nets was an illegal method of fishing for salmon within the meaning of the Salmon Fishery Acts. *Weidernburn v. Atholl (Duke)*, [1900] A.C. 403—H.L. (Sc.). *And see FISHERY.*

9. HERITAGE.

Right in Security—Messenger-at-Arms.—By the Heritable Securities (Scotland) Act, 1894, s. 8, any creditor who has exposed for sale under his security the lands held in security . . . may apply to the sheriff for decree in the terms of Schedule D thereto annexed, and the sheriff may, "after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced and an extract thereof in which said lands shall be described at length or by reference recorded in the appropriate register of sasine, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disposed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree." By section 10 "no purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor." In 1895 certain creditors presented a petition under section 8 of the above Act. The appellant, the proprietor of the lands, did not appear. The sheriff granted decree. Thereafter the creditors sold the lands and granted dispositions in favour of the purchasers. In 1901 the original proprietor brought an action against the creditors and purchasers for reduction of the citation and execution of service upon him of the petition in the sheriff Court, alleging that the service had been executed by a messenger-at-arms, who was not an officer of the sheriff Court; and he pleaded that such service, with all that had followed thereon, including the disposition to the purchasers, was null and ineffectual:—*Held*, that, assuming the service to be as stated, the error was an "irregularity in the proceedings" within the meaning of section 10 of the Heritable Securities (Scot-

land) Act, 1894, and consequently that the right of the purchasers was not affected thereby. *Sutherland v. Thomson*, [1906] A.C. 51—H.L. (Sc.)

10. LANDLORD AND TENANT.

Landlord and Tenant—Condition to take over Sheep at Expiration of Lease—Forfeiture of Lease.]—A tenant in a letter offering to take a lease of a farm for ten years from 1897 stipulated that at his “awaygoing at the expiration of the lease” the landlord should take over the sheep at a valuation. The lease contained a clause that the lease should be forfeited for non-payment of rent, and, the tenant having failed to pay five half-years’ rent, the landlord put an end to the lease in February, 1902, and refused to take over the sheep:—*Held*, that “awaygoing” must be taken to mean the legal expiration of the lease, and that the landlord on the tenant’s default was not bound to take over the sheep. *Breadalbane (Marquess) v. Stewart*, [1904] A.C. 217—H.L. (Sc.)

11. LICENSING.

Licensing Acts—Refusal to Renew Certificate—Evidence on which Magistrates Entitled to Act—Absolute Discretion of Magistrates.]—The pursuer, a widow, by her condescence averred that she was possessed of a house which had been licensed for fifty years; that in 1904 she applied to the Licensing Court under the Licensing (Scotland) Act, 1903, for renewal of her licence, that no complaint of the management or sanitary condition of the premises was ever made, nor any notice of objection given at any time prior to April, 1904; but at the licensing Court on that date an inspector of police objected to the renewal on the ground that the premises were insanitary and the district congested; that he was not put on oath, nor was any evidence given as to either objection; that the pursuer through her agent offered to carry out any recommendation in regard to sanitary arrangements of the premises, but the Court thereupon, without calling any evidence, refused to renew the certificate on the ground that the premises were insanitary and the district congested. She further averred that the licensing authority had prejudiced the question by having come to a resolution previous to the sitting of the Court to reduce the number of licensed premises; and that an appeal to the licensing Court of appeal was overruled by the same preconceived determination, and that no evidence was heard by the said Court. She brought her action against the licensing authorities and town clerk of the burgh and the members of the licensing appeal Court for non-performance of their duty:—*Held*, that the discretion of the licensing authority was absolute when exercised within the limits of its statutory authority, and that the pursuer’s averments set out no case of ignorance, prejudice or bias, or refusal to give the hearing prescribed by the Act of 1903; secondly, that the licensing Court of appeal could give its decision without the appearance of any objector or evidence. *Lundie v. Falkirk Magistrates* (18 R. 60) affirmed. *Boyle v. Wilson*, [1907] A.C. 45; 95 L. T. 763; 23 T. L. R. 124—H.L. (Sc.)

12. MARRIAGE CONTRACT.

Effect of Divorce on Children’s Provisions—Income Undisposed of.]—By antenuptial contract of marriage the intended wife conveyed a sum of about 19,000*l.* to trustees, directing them to pay the annual income to her during her life, and after her death, in the event of her being survived by her husband, to pay the same to him during all the days of his life and survivorship, and on the death of the said spouses to pay or deliver the fee or capital of the said means and estate to the child or children of the marriage. The marriage was dissolved by decree of divorce obtained by the wife against the husband on the ground of desertion. Thereafter the wife died, survived by her husband and a daughter. The daughter and her marriage-contract trustees claimed that in consequence of the wife’s death and the husband being divorced she (the daughter) and her trustees became entitled to the funds in the hands of her mother’s marriage trustees:—*Held*, first, that the divorce of the father was not equivalent to his death in a question as to the vesting of the daughter’s provisions; secondly, that during her father’s life nothing fell to the daughter; and thirdly, that the income which but for the divorce would have been paid to the father fell into the executory estate of the wife. *Dawson v. Smart*, [1903] A.C. 457; 89 L. T. 943—H.L. (Sc.)

Wife’s Acquirenda—Accumulations of Income—Legitim.]—By antenuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds and estate real and personal which she might hereafter “conquest and acquire by purchase succession or otherwise.” The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit and use exclusive of the *jus mariti*, and by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of *legitim*:—*Held*, that the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife’s separate income; secondly, that the only child of the marriage was not entitled to *legitim* out of his mother’s estate. *Mackenzie v. Allardie*, [1905] A.C. 285—H.L. (Sc.)

13. MINES.

Mines — Minerals — Coal Below Low-water Mark—Barony Title.]—The doctrine of possession by prescriptive working of minerals applicable to the foreshore *ex adverso* of a barony, granted with parts and pertinents, cannot be extended to a barony granted with power to work minerals *infra fluxum maris*, because these words shew that the grant is limited to the minerals under the foreshore only. Nor can such prescriptive use be extended to a third barony where a barony with a bounding charter lies between. *Quære*, whether the doctrine can be extended to cover minerals running from the foreshore under the sea-bed. *Lord Advocate v. Wemyss*, [1900] A.C. 48—H.L. (Sc.)

Adoption—Minor—Lease of Coal.—The right of a proprietor of estates adjoining the sea to work the coal below low-water mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low-water mark *ex adverso* of both the entailed and unentailed lands, and the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under the lease, and a modification of the whole mode of working the coal. When the proprietor so acted in regard to the lease, he was unaware that he had a claim to some of the coal below low-water mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding, *inter alia*, for a declarator that he was not bound by the lease,—*Held*, that the act of the proprietor after he came of age barred him from challenging the lease. *Ib.*

14. POOR LAW.

Settlement by Residence—Maintenance without Recourse to Common Begging or Receipt of or Application for Parochial Relief—Support by Charitable Institution—Bodily and Mental Unfitness for Self-maintenance.—Under section 1 of the Poor Law (Scotland) Act, 1898, which enacts that "no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging . . . and without having received or applied for parochial relief,"—*Held*, that a person who had for three years continuously resided in a charitable institution in the appellants' parish, and during that period had not had recourse to common begging and did not apply for parochial relief, had acquired a residential settlement, and that the fact that during the whole time of her residence she suffered from mental weakness and chronic physical disease, which made her incapable of maintaining herself, did not take her out of the enactment. *Kirkintilloch Parish Council v. Eastwood Parish Council* (5 F. 274) approved. *Kilmacolm Parish Council v. Glasgow Parish Council*, [1906] A.C. 344; 94 L. T. 826; 22 T. L. R. 602—H.L. (Sc.)

Capacity of Deserted Wife to Acquire a Settlement.—By section 1 of the Poor Law Settlement Act, 1898, "No person shall be held to have acquired a settlement in any parish in Scotland by residence therein, unless such person shall . . . have resided for three years continuously in such parish and shall have maintained himself . . . and without having received or applied for parochial relief. . . ."—*Held*, that a married woman having a husband

living from whom she has derived a settlement cannot, although deserted by him, acquire a settlement different from that of her husband. *Gray v. Fowlie* (9 D. 811) affirmed. *Rutherglen Parish Council v. Glasgow Parish Council*, [1902] A.C. 360; 86 L. T. 607; 51 W. R. 65—H.L. (Sc.).

15. PRESCRIPTION.

Public Right to User of Land—Claim by Immemorial User.—According to the practice of the Scottish Courts, at least forty years' user of land by the public must be proved in order to establish a claim of right by immemorial user; and the evidence required to establish such a right must be of the same character and cogency as would be required in a case of prescription—that is, the right must be shewn to have been enjoyed *nec vi, nec clam, nec precario*. *Montgomerie v. Wallace-James* (No. 1), 73 L. J. P.C. 25; [1904] A.C. 73; 90 L. T. 1—H.L. (Sc.)

16. PROCURATOR FISCAL.

Remuneration of—Preliminary Enquiries into Non-prosecuted Cases.—In an action for debt, the debt must be established either by contract or at common law or by statute. Section 4 of the County General Assessment Act, 1868, authorised an assessment to be imposed called the "county general assessment"; and section 3 provided that "the following salaries, fees, outlays, and expenses, namely (sub-s. 2): The salaries or fees and the necessary outlays of Procurators Fiscal in the Sheriff and Justice of Peace Courts . . . , in so far as such salaries, fees, and outlays are at present in use to be paid by each county." Sub-section 3: "The expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals:—in so far as any such salaries, fees, outlays, and expenses are not by law or usage payable or provided from other funds than those raised by the Commissioners of Supply, may be defrayed by the said Commissioners out of the county general assessment." Under the Rogue Money Act of 1724 certain fees had been paid to the Procurators Fiscal for criminal prosecutions. Subsequently these charges which lay on the county were undertaken by the Treasury, and eventually a salary in lieu of fees was paid to the Procurators Fiscal. The Procurator Fiscal of the lower ward of Lanark alleged that his salary only included cases which were reported or went to trial, and made a claim for remuneration for those cases in which he made enquiry, but which went no further. Since 1851 the county council had refused to pay this claim. And from 1851 to 1868, when the County General Assessment Act came into force, no attempt had been made by the then Procurator Fiscal to compel the county to pay, although accounts by the Procurator Fiscal were furnished at different periods:—*Held*, that it could not be said that in the county of Lanark "it was in use" to pay these fees at the date of the Act of 1868, and therefore the county was not liable. *Lanark County Council v. Hart*, [1904] A.C. 235—H.L. (Sc.)

17. PUBLIC HEALTH.

Assessment—Special Drainage District—Expenses of Forming Special District.]—By section 133 of the Public Health (Scotland) Act, 1897: "In any burgh or where any special drainage district has been formed under this Act . . . the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment which the local authority shall raise and levy on and within such . . . special district".—*Held*, that where a special drainage district has been formed in a county the local authority is entitled to levy an assessment within the special district to meet expenses, including legal expenses necessarily and properly incurred in connection with, but prior to, the formation of the district. *Inverarity v. Forfarshire County Council*, [1906] A.C. 354; 70 J. P. 509—H.L. (Sc.)

18. SERVITUDE.

Construction—Bond to Secure Amenity—Meaning of the Word "unseemly" in a Bond of Servitude.]—The pursuers, proprietors of a feu, raised an action against the defenders, the proprietors of an adjoining feu held of the same superior, to enforce building restrictions. These restrictions were contained in a bond of servitude, by which the defenders bound themselves and their successors not to erect on any part of an adjoining piece of ground "any building of an unseemly description." The pursuers alleged that the defenders were about to allow the erection of unseemly buildings within the meaning of the bond of servitude:—*Held*, that a condition against the erection of buildings of "an unseemly description" was too vague and indefinite to be valid as a permanent restraint on the use of property. *Murray v. Dunn*, [1907] A.C. 283; 97 L. T. 112—H.L. (Sc.)

19. SHOPS.

By-law—Ultra Vires—Power of Magistrate to Close Shops at 10 p.m.]—By section 380 of the Burgh Police (Scotland Act), 1892 (55 & 56 Vict. c. 55), a penalty is imposed on the occupier of any building for the sale or consumption of provisions or refreshments who opens his premises for business before five o'clock in the morning or keeps them open after midnight. By section 82, sub-section 1 of the Burgh Police (Scotland) Act, 1903, any building used as an ice-cream shop must be registered. By section 82, sub-section 2, town councils of burghs in Scotland may make by-laws (subject to confirmation of the sheriff and the Secretary for Scotland: section 318 of the Act of 1892) in regard to the hours of opening and closing of premises registered as ice-cream shops, "the hours for business not being more restricted than fifteen hours daily." The defenders, the town council of a burgh, made a by-law by which it was illegal for such premises to be kept open except between seven o'clock in the

morning and ten o'clock at night:—*Held*, that the by-law was not *ultra vires* or unreasonable. *De Prato v. Partick (Provost)*, [1907] A.C. 153; 96 L. T. 398—H.L. (Sc.)

20. STREETS.

Building Regulations—Meaning of "Width" in Respect to Existing Streets.]—Section 9 of the Glasgow Building Regulations Act, 1900, Part II., which has a general heading "Streets," provides for the formation by the defenders of a "register of public streets," in which are to be entered various particulars as regards all public streets then in existence, and, *inter alia*, the "point of commencement and termination" and the "width," and enjoins the marking of such streets, and the area thereof, on an Ordnance Survey map:—*Held*, that the "width" as used in the Act meant in the case of existing public streets the actual width; and secondly, that the action of the pursuers raised while the register was in preparation and before the statutory period was exhausted was competent, but premature. *Caledonian Railway v. Glasgow Corporation*, [1907] A.C. 160—H.L. (Sc.)

Fixing Width of Existing Street.]—The Glasgow Building Regulations Act, 1900, makes provision for a register of public streets in Glasgow, and by section 20 imposes restrictions upon the erection of any building upon ground adjoining any street, and for the purpose enacts that the "width" of any public street shall be the "width" set forth in the register where such width is entered therein. And the width of any public street of which the dimensions are not set forth in the register . . . shall be fixed by the master of works:—*Held*, that the master of works was bound to fix as the width of a public street the width of the street actually existing. *Nisbet v. Hamilton*, [1907] A.C. 153—H.L. (Sc.)

21. SUCCESSION.

Will—Provision for Widow—Partial Intestacy—Terce, Jus Relictæ, and Legitim.]—A testator by his will made a provision for his wife declaring it to be in full of all claims by her of *terce* and *jus relictæ* or otherwise. Through the death of certain devisees before vesting took place, the residue fell into intestacy:—*Held*, that the declaration was to be construed as excluding the widow's claim in so far only as conflicting with the will, and, an event happening which the testator never contemplated, the widow was entitled both to her provision and to *terce* and *jus relictæ* out of such heritables and movables as had fallen into intestacy. *Nat Smith v. Boyes*, [1899] A.C. 495—H.L. (Sc.)

Vesting—Postponed Period of Distribution—Conditional Institution.]—A testator directed his trustees to allow his widow the life-rent use of his house and such allowance as they thought necessary, and "on the dissolution and winding up of the firm of B. & Co." (of which he was a partner), "in the event of the predecease of my said wife, and if she then survives, on her death, to realise my whole means and estate and to divide the same into four equal shares, and pay

one share to each of my children," A, B, C, and D, "or to their respective heirs." The widow survived the testator, and the firm had not been wound up. C and D survived the testator, but were dead:—*Held*, that the interests of all the children were not in suspense, but had vested *a morte testatoris*. *Bowman v. Bowman*, [1899] A.C. 518—H.L. (Sc.)

Will—Residue of Estate to Heir Entitled to Succeed to Entail—Lands Disentailed—Intestacy.—The testator directed his trustees to entail his Kintail estate upon a series of heirs specified in a tailzied destination clause, and gave certain beneficial interests in the residue of his estate "to the heir for the time being entitled to succeed under the said deed of entail" upon his attaining the age of twenty-four. On his attaining twenty-one the institute heir of entail took advantage of the Entail Amendment (Scotland) Act of 1848, s. 27, and before any deed of entail had been executed obtained from the Court an order to have the estate of Kintail conveyed to him in fee simple, and he evacuated the tailzied destination, thus destroying the entail; he afterwards died unmarried before attaining the age of twenty-four. The next-of-kin claimed that, in the circumstances of the entail, the residue had fallen into intestacy:—*Held*, that the residue did not fall into intestacy, as the will declared that the beneficial interest therein was to go to the heir for the time being under the tailzied destination, and it was not a condition of such heir succeeding to the said interest that he should be in the position of heir of entail of Kintail under a deed of entail. *Wesselenyi v. Jamieson*, [1907] A.C. 440—H.L. (Sc.)

22. SUPERIOR AND VASSAL.

Casualty or Composition—Singular Successor—Annual Value of Minerals.—The measure of the right of a superior to a casualty or composition on the entry of a singular successor is the year's rent for which the land is let for the time, and this rent includes mineral rents or royalties where coal or other minerals are being worked; and it makes no difference that the minerals are approaching exhaustion. *Home (Earl) v. Belhaven (Lord)*, [1903] A.C. 327—H.L. (Sc.).

23. TRAMWAY.

Lease—Landlord's Rates and Taxes—Covenant by Tenant to Keep Free from all Expenses whatever.—By section 6 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that a tenant whose name has been entered in the valuation roll as proprietor "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation." The corporation of Glasgow agreed to borrow money and to construct certain tramways in Glasgow and lease the undertaking to

the Glasgow Tramway Co. for twenty-three years. The company agreed to make various payments to the corporation, and then agreed as follows: "And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The lease exceeding twenty-one years, the company, under the Valuation of Lands (Scotland) Act, 1854, s. 6, became primarily liable to pay and did pay during the whole term of the lease, "owner's assessments, rates, and taxes," amounting in the aggregate to over 14,000*l*. During the currency of the lease the company intimated to the corporation that they had a claim in this respect, but did not make any deduction from the rent when paid. The company contended that the corporation ought to reimburse them these outgoings, or such other sum as might be ascertained to be the amount of owner's assessments, rates, and taxes paid by the company during the lease:—*Held*, that the assessments, rates, and taxes, whether imperial or local, levied on the owner in respect of a tramway or other erection *in solo*, were an expense connected with the tramway or erection, and that the company were bound by their lease to relieve the corporation from these expenses, and were not entitled to claim reimbursement. *Glasgow Corporation v. Glasgow Tramway and Omnibus Co.*, [1898] A.C. 631—H.L. (Sc.)

24. TRUST.

Property held in Trust for Religious Body—Power to Unite with other Religious Body—Variation of Fundamental Tenets—Position of Dissident Minority—Right to Trust Fund.—Where property is held in trust for a religious body holding certain definite tenets, it is not lawful for a majority of such body, by agreeing to unite with another religious body differing from them on some essential points, to alienate the trust property from its original destination for the use of such united body, in the absence of an express power to modify their original tenets; but a dissident minority, who disapprove of the union, and hold to the original tenets of the founders of the body, are entitled to retain the trust property. *Free Church of Scotland v. Overtoun (Lord)*, [1904] A.C. 515; 91 L. T. 394—H.L. (Sc.)

The position is not affected by the fact that the two bodies proposing to unite agree to regard certain points upon which they differ as open questions. *Ib.*

Judgment of the Court below reversed, LORD MACNAGHTEN and LORD LINDLEY dissenting on the question of whether there was in the particular case a power to modify the original tenets of the founders. *Ib.*

Will — Denuding — Vesting.—A testator directed that the income of his property (consisting of movable and real estate) be divided between his children; that in the event of any child dying leaving issue, his or her share of income should be paid to the issue; and if a child left no issue, the deceased child's share should be divided among the survivors; and he

finally directed that "on the death of all" his children his estate should "be winded up and converted into money" . . . and divided among the children of his sons and daughters *per stirpes*. The testator was survived by four children—Andrew, who died unmarried; George, who died in 1880, survived by the appellant (who became of age in 1898), Mary, and Jane. The two latter were still alive, and had families. The appellant claimed payment of one-third of the *corpus* of the testator's estate:—*Held*, that the appellant was not entitled to immediate payment on the ground that the third of the income of the *corpus* was not by any means the same as the income of a severed portion of the estate; and it did not follow that if the estate was now divided the remaining portion of the estate left undivided would represent in the future the present value. *Macculloch v. Anderson*, [1904] A.C. 55—H.L. (Sc.)

Uncertainty—"Such public purposes as my trustee thinks proper."—*See* CHARITY.

25. WATERWORKS.

"Heritor"—Church and Manse—Assessment of Wayleave.—The Scottish Act, 1663 (c. 21 or c. 31): "Wher competent manses are already built, ordaines the heritors of the parochie to releive the minister and his executors of all costs charges and expenses for repairing of the forsaid manses." A conduit of the Glasgow Waterworks Commissioners was carried underground through lands in a parish in virtue of grants of wayleave in perpetuity, obtained from the proprietors of the land:—*Held*, that the Commissioners were liable under the Act of 1663 to assessment in respect of their conduit as "heritors" of the parish for the repair of the manse. *Glasgow Corporation v. M'Ewan*, [1900] A.C. 91—H.L. (Sc.)

SEA.

Charter—Long User—Evidence.—The respondent claimed to be entitled, under a charter of 1621, to a quay and the foreshore on which it was built in 1848. The charter did not in terms grant the foreshore:—*Held*, on the evidence of long and notorious user, that the quay and foreshore were included in the charter. *Att.-Gen. for Ireland v. Vandeleur*, 76 L. J. P.C. 89; [1907] A.C. 369; 97 L. T. 221—H.L. (Ir.)

Foreshore—Crown Lease—Trespass—Rights of Public—Right to Preach and Hold Meetings.—The public have no right at common law to enter upon the foreshore except for the purpose of navigation or fishing. They are not entitled to cross the shore even for the purpose of bathing or amusement. *Llandudno Urban Council v. Woods*, 68 L. J. Ch. 623; [1899] 2 Ch. 705; 81 L. T. 170; 48 W. R. 43; 63 J. P. 775—Cozens-Hardy, J.

The sands of the seashore are not in the full sense of the word a highway. *Ib.*

A more extended right to use the foreshore may be gained by prescription or by custom either by individuals or by the temporary or

permanent inhabitants of the place in which the foreshore is situate, but the existence of this more extensive right must be proved, and will not be presumed in the absence of proof. *Blundell v. Catterall*, (5 B. & Ald. 268) followed. *Ib.*

Foreshore—Private Owner—Right of Public to Bathe.—There is no right in the public by common law to go upon a foreshore which is private property for the purpose of bathing in the sea from it. The judgment of the majority of the Court in *Blundell v. Catterall* (5 B. & Ald. 268) followed. *Brinckman v. Matley*, 73 L. J. Ch. 642; [1904] 2 Ch. 313; 91 L. T. 429; 68 J. P. 534; 2 L. G. R. 1057; 20 T. L. R. 671—C.A. Affirming, 52 W. R. 363—Buckley, J.

Conveyance of Land on Foreshore—Boundaries.—*See* BOUNDARIES.

Minerals below Low-Water Mark.—*See* SCOTLAND.

Sewage—Discharge of.—*See* NUISANCE.

SECURITY FOR COSTS.

See PRACTICE; COSTS, col. 571; and COLONY, col. 306.

SEDUCTION.

See MASTER AND SERVANT, cols. 1597–8.

SEPARATION DEED.

See HUSBAND AND WIFE, cols. 977–981.

SEQUESTRATION.

See EXECUTION, col. 824.

SERVICE OF WRIT.

See PRACTICE, col. 1903.

SESSIONS.

See JUSTICE OF THE PEACE.

SET-OFF.

Bankruptcy, in.—*See* BANKRUPTCY, col. 143.

Contributory, by, in Winding-up.—*See* COMPANY, col. 464.

Costs, of.—*See* COSTS, col. 578.

SETTLED LAND.

1. *Statute*, 2223.

2. *Conditions Tending to Defeat Acts*, 2223.

3. "Settlement," 2225.
4. *Compound Settlement*, 2227.
5. *Tenant for Life*, 2230.
 - (a) *Who is*, 2230.
 - (b) *Right to Possession*, 2235.
 - (c) *Power of Leasing*, 2236.
 - (i.) *Generally*, 2236.
 - (ii.) *Building Lease*, 2238.
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 - (f) *Sale*, 2240.
6. *Insurance Moneys*, 2244.
7. *Timber*, 2244.
8. *Waste*, 2244.
9. *Trustees*, 2245.
10. *Incumbrances*, 2246.
11. *Capital Moneys*, 2248.
 - (a) *Generally*, 2248.
 - (b) *Investment*, 2248.
 - (c) *Improvements*, 2250.
12. *Minerals*, 2258.
13. *Heirlooms*, 2259.
14. *Costs*, 2260.
15. *Other Matters*, 2261.

1. STATUTE.

62 & 63 Vict. c. 46, is the *Improvement of Land Act*, 1899.

2. CONDITIONS TENDING TO DEFEAT ACTS.

Condition as to Residence—Provision "tending to induce" Non-execution of Powers—Invalidity—Sale by Tenant for Life to Trustees of Beneficial Interest—Compromise—Sanction of Court—Jurisdiction.]—Testator by his will gave his widow the use of his residence so long as she should desire to make it her permanent place of residence and should remain his widow, his estate to pay all rates and taxes and outgoings in respect thereof, and to keep the house and grounds in tenantable repair. Subject to this, the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell and to divide the proceeds equally among his children, and he settled his daughters' shares. The rental value of the house and grounds, together with the average amount of the rates and taxes which would be payable out of the estate, was estimated to exceed 350*l.* per annum. The widow had entered into an agreement by way of compromise with the trustees, under which, in consideration of the payment of an annuity of 275*l.* during widowhood, she agreed to give up her beneficial interest in the house, and applied to the Court to sanction the compromise.—*Held*, that there was nothing in the Settled Land Act, 1882, which precluded her from making any arrangement she chose for disposing of her beneficial interest in the house; and

that the compromise being in the opinion of the Court beneficial to all parties interested, the Court would declare that it was within the powers of the trustees to enter into and would sanction it. *Trenchard, In re*; *Trenchard v. Trenchard*, 71 L. J. Ch. 178; [1902] 1 Ch. 378; 86 L. T. 196; 50 W. R. 266—Buckley, J.

Section 51 of the Settled Land Act, 1882, only renders void a condition as to residence so far as it tends to induce the tenant for life to abstain from exercising the power of sale given by the Act. It does not apply to the case of a tenant for life voluntarily ceasing to reside apart from a sale.* *Ib.*

— **Devise of Freeholds upon trust to One for Life, Subject to—Trust upon Breach of Condition to Sell and Pay One-third Only of Income to Devisee for Life.]**—S. D. by her will devised certain freeholds to trustees upon trust for T. S. for life, subject to a condition of residence; and in case T. S. should cease to reside there, then on trust to sell and invest the proceeds and pay one-third of the income thereof to T. S. for life, and the remaining two-thirds to other persons therein mentioned.—*Held*, that the provision was such as to induce the tenant for life to abstain from exercising his powers under the Settled Land Act, 1882, within the meaning of section 51, and was void. *Dalrymple, In re*; *Bircham v. Springfield*, 49 W. R. 627—Kekewich, J.

— **Invalidity.]**—A testatrix devised her residuary real and personal estate to her niece upon condition that she should reside in the testatrix's house during the lifetime of the testatrix's sister, and provide there a home for her said sister whenever she chose to avail herself of it; in the event of the niece not complying with the condition there was a gift over of the property to another niece upon the like condition. The sister of the testatrix was a lunatic not so found, and had been under restraint for twelve years:—*Held*, that the provision as to residence was a condition, and not a trust or reservation for the benefit of the lunatic, and the devisee being a person having the powers of a tenant for life within the meaning of section 58, subsection 1, clause (ii.) of the Settled Land Act, 1882, the condition in question was void under section 51 of the Act. *Richardson, In re*; *Richardson v. Richardson*, 73 L. J. Ch. 783; [1904] 2 Ch. 777; 91 L. T. 775; 53 W. R. 11—Joyce, J.

— **Forfeiture Clause.]**—A testatrix gave to A B the use of her house in Dublin during her life as a residence, with a proviso that in the event of A B ceasing to reside in it it should form part of her residuary estate. She also gave to A B the income of a sum of 10,000*l.* for life, or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence:—*Held*, in the event of a sale of the house by A B under the Settled Land Acts, the gift over of the 10,000*l.* was void under the Settled Land Act, 1882, s. 51. *Fitzgerald, In re*; *Brereton v. Day*, [1902] 1 Ir. R. 162—M.R.

— **Tenant for Life—Sale of Option—Validity—Whether Binding on Successors in Title.]**—In

1887 a water company entered into a contract with a tenant for life, acting under the powers conferred by the Settled Land Acts, 1882 to 1890, for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, and agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purpose of their undertaking. They promoted a bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, and thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold. The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the company, to which the trustees of the settlement were parties, to the effect that if the company should not require the land for the purposes of their undertaking and should desire to erect other buildings thereon or to sell or let the same and thereof should give notice to the vendor, then the vendor would, on payment of 10*l.*, consent to the company building upon or selling the land without the restriction as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously and formed one transaction with it. The vendor died, and was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold. The company then gave the notice and tendered to him 10*l.* in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby:—*Held*, that the vendor as tenant for life of the settled land had no power under the Settled Land Acts, 1882 to 1890, to enter into such an agreement with the company, which therefore was not binding on his successors in title. *Palmer v. Grand Junction Waterworks Co.*, 86 L. T. 352—Swinfen Eady, J.

— **Inducement to Tenant for Life not to Exercise Powers—Separate Settlement—Different Settlers.**—Section 51 of the Settled Land Act, 1882, which makes void any provision in a settlement tending to induce a tenant for life to abstain from exercising his powers under the Act, applies to a case where the inducement is contained in a separate instrument made by a person other than the settlor of the land. *Smith, In re*; *Grose-Smith v. Bridges*, 68 L. J. Ch. 198; [1899] 1 Ch. 331; 80 L. T. 218; 47 W. R. 357—North, J.

3. "SETTLEMENT."

Trusts for Settlor for Life—Remainder to Settlor subject to Rentcharge to Wife and Term for Securing Portions to Children.—By a settlement dated in 1862, and made upon the marriage of the plaintiff, certain lands and hereditaments were limited by the plaintiff to the use of himself for life, with remainder to the use that if his wife should survive him she might receive a jointure during her life, and to further uses limiting powers of distress and entry for the purpose of enforcing payment of such jointure, and subject and charged as aforesaid to the use of trustees for the term of one hundred years, to commence from the decease of the plaintiff, upon trusts for raising portions for

the children of the marriage, and subject thereto and to the trusts of the term to the use of the plaintiff, his heirs and assigns for ever:—*Held*, that under or by virtue of the settlement the lands in question, or some estate or interest in them, stood "limited to or in trust for persons by way of succession" so as to create a "settlement" within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882, and that under sub-section (5) the plaintiff was the tenant for life of those lands for the purposes of that Act. *Mundy and Roper's Contract, In re* (68 L. J. Ch. 135, 141; [1899] 1 Ch. 275, 290), applied. *Marshall's Settlement, In re*; *Marshall v. Marshall*, 74 L. J. Ch. 588; [1905] 2 Ch. 325; 93 L. T. 246; 54 W. R. 75; 21 T. L. R. 678—Swinfen Eady, J.

Will and Jointure Deeds—Sale by Tenant for Life—Trustees for Purposes of the Settled Land Acts.—Real estate was devised in strict settlement to legal uses to A for life, remainder to B for life, with remainder to his first and every other son in tail male; remainder to C for life, with remainder to his first and every other son in tail male; remainder to D. for life, with remainder to his first and every other son in tail male, with remainders over. A, C, and D. were dead. A, B, and D had all executed jointure deeds under powers contained in the will. The deed executed by A was in operation, and created an existing charge on the property. B, the tenant for life in possession, contracted to sell part of the property under the powers conferred on him by the Settled Land Act, 1882. There were existing trustees of the will for the purposes of the Act, but the purchaser took the objection that it was necessary that trustees for the purposes of the Act should be appointed of the will and the three jointure deeds, on the ground that the same formed together a compound settlement:—*Held*, that the will by itself constituted a settlement within section 2 of the Settled Land Act, 1882; that B could under section 20 convey the land to the purchaser discharged from the jointures; and that the trustees appointed for the purposes of the settlement could give a good discharge for the purchase-money. *Meade's Settled Estates, In re* ([1897] 1 Ir. R. 121), and *Tibbitts' Settled Estates, In re* (66 L. J. Ch. 660; [1897] 2 Ch. 149), distinguished. *Powys-Keck and Hart's Contract, In re*, 67 L. J. Ch. 331; [1898] 1 Ch. 617; 78 L. T. 287; 46 W. R. 389—Stirling, J.

Charge of Jointure and Portions by Will—Disentailing Deed—Resettlement—Restoration and Subsequent Extinguishment of Life Estate—Sale by Original Tenant for Life—Original Settlement—Compound Settlement—Trustee's Receipt.—In 1852 lands stood limited under a will to the use of the vendor for life, with remainder to his first and other sons successively in tail. In 1868, upon his marriage and in exercise of a power given him by the will, the vendor charged the land with a jointure rentcharge in favour of his wife after his death, and a sum for portions for his younger children, and appointed terms to commence from his death to secure the same. In 1895 the vendor and his eldest son, by a disentailing assurance, conveyed the lands to such uses as the vendor and his son should by deed jointly appoint, and by a re-settlement, executed immediately afterwards, they appointed the lands to such uses as the vendor

and his son should by deed jointly appoint, and in default of and subject to such appointment to the use of the vendor for life in restoration and confirmation of the estate for his life limited by the will, and from and after his death to the use of his son for life, with divers remainders over: Subsequently the vendor, by deed of family arrangement, assigned his life estate to his son, and by a re-settlement executed in 1899 the vendor and his son, in exercise of the joint power of appointment contained in the earlier re-settlement of 1895, appointed that the settled land should remain and be to such uses as would be subsisting under the re-settlement of 1895 if the vendor were then dead. The vendor, as the person having the powers of a tenant for life under the original settlement created by the will, contracted to sell part of the settled land, and stipulated that the purchase-money should be paid to the trustees of that original settlement. The purchaser took the objection that such trustees could not give a good receipt, and required trustees of the compound settlement, made up of all or some of the above-mentioned deeds, to be appointed:—*Held*, that the original settlement created by the will was still subsisting by reason of the jointure and portions charges remaining to be raised; that the powers of a tenant for life under that settlement were still exercisable by the vendor, notwithstanding the extinguishment of his life estate; and that the trustees of such original settlement could give a good receipt for the purchase-money. *Du Cane and Nettleford's Contract, In re* (67 L. J. Ch. 393; [1898] 2 Ch. 96), and *Mundy and Roper's Contract, In re* (68 L. J. Ch. 135; [1899] 1 Ch. 275), followed. *Cornwallis-West and Munro's Contract, In re* (72 L. J. Ch. 499; [1903] 2 Ch. 150), distinguished. *Wimborne (Lord) and Browne's Contract, In re*, 73 L. J. Ch. 270; [1904] 1 Ch. 537; 90 L. T. 540; 52 W. R. 334—Swinfen Eady, J.

4. COMPOUND SETTLEMENT.

Series of Deeds—Disentailing Deed and Re-settlement—Creation of New Life Estate—Jointure and Portions Existing under Prior Deed—Sale by Tenant for Life—Power to Convey Discharged from Jointure and Portions.—The definition in section 2, sub-section 1 of the Settled Land Act, 1882, of a settlement as being an instrument or number of instruments whereby "land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession," includes the case of a jointure and portions limited to arise on or after the death of a tenant for life and the terms of years limited to secure them. *Mundy and Roper's Contract, In re*, 68 L. J. Ch. 135; [1899] 1 Ch. 275; 79 L. T. 533; 47 W. R. 226—O.A.

Under settlements of 1861 and 1865 land stood limited (in effect) to the use of A. for life, and subject thereto to the use of trustees for a term of three hundred years from the death of A. to secure a jointure rentcharge for his wife, and subject thereto to the use of trustees for a term of fifteen hundred years from the death of A. to secure portions for his younger children, and subject thereto to the use of the eldest son of A. in tail male. In

1889 A. and his eldest son disentailed the estate, and by subsequent deed re-settled it. Under the re-settlement the land was limited to the use of A. for life, but his life estate was not stated to be in restoration of his old life estate:—*Held (dubitante VAUGHAN WILLIAMS, L.J.)*, that the settlement consisted of the deeds of 1861, 1865, and 1889; and that, though the life estate of A. must be treated as a new life estate arising under the re-settlement, he had power, upon trustees of the settlement consisting of these deeds being appointed, to convey the land discharged from the jointure and portions. *Ailesbury (Marquis) and Iveagh (Lord), In re* (62 L. J. Ch. 713; [1893] 2 Ch. 345), approved. *Ib.*

Per LINDLEY, M.R., and CHITTY, L.J.: There may be at the same time a settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only. *Du Cane and Nettleford's Contract, In re* (67 L. J. Ch. 393, 399; [1898] 2 Ch. 96, 105), on this point approved. *Ib.*

By virtue of section 50 of the Settled Land Act, 1882, the statutory power of sale of a tenant for life is not annexed to his estate, but is vested by the Act once for all in the tenant for life, and remains vested in him, is incapable of being assigned or released, and continues exercisable by the tenant for life, notwithstanding any assignment by him of his estate. Consequently the statutory power of sale which A. had given to the execution of the deeds of 1889 was not affected by those deeds. *Ib.*

Series of Deeds—Disentail and Re-settlement—Old Life Estate Restored—Persons Competent to Dispose of Property—Trustees for Purposes of Acts—Declaration.—Land was conveyed by a marriage settlement in 1878 to the use of the husband for life, remainder to the use of his first and other sons successively in tail male, remainders over. There were no jointure portions or other charges, and no power of sale. In 1903 the husband and his eldest son, by a disentailing deed, re-settled the land to the subsisting uses of the marriage settlement "so as to restore and confirm the same uses," and they declared that the trustees and trustee for the time being of the marriage settlement should be the trustees or trustee of the settlement constituted by the joint effect of the two indentures for the purposes of the Settled Land Acts:—*Held*, that effect must be given to the manifest intention of the parties to create a compound settlement; that they had power to declare trustees thereof for the purposes of the Acts; and that H., who was sole surviving trustee of the marriage settlement, had been effectually declared trustee of the compound settlement for those purposes. *Spencer's Settled Estates, In re* (72 L. J. Ch. 59; [1903] 1 Ch. 75), distinguished. *Spearman's Settled Estates, In re*, 75 L. J. Ch. 829; [1906] 2 Ch. 502; 95 L. T. 605—Swinfen Eady, J.

Separate Documents—Infant Tenant in Tail Absolutely Entitled—Sale of Heirlooms—Application of Proceeds of Sale—Discharge of Incumbrance on Settled Land.—Where by will made in 1884 a testator who died in the same year bequeathed certain pictures to the trustees of his will upon trust to hold the same as heirlooms

for the successive owners of land settled in strict settlement in 1874, but the same were not to vest absolutely in any tenant in tail male by purchase who should not attain twenty-one or should die under that age leaving issue male, and the heirlooms were now vested absolutely in the first tenant in tail in remainder, a female infant, subject to certain life estates and to any possible estates tail that might come in and defeat her estate, and one of the pictures had been recently sold by the tenant for life in possession of the settled land and heirlooms, and the purchase-money had with the sanction of the Court been paid to the trustees of the will and invested in Consols, and such trustees had been appointed trustees of the compound settlement of the heirlooms and the proceeds of sale thereof created by the will and the settlement of 1874 for all the purposes of the Settled Land Acts, the Court held that the land and heirlooms, although settled by different documents, must be treated as if they had been settled by the same document, and that, consequently, the tenant for life was, under section 21, sub-section 2, and section 37 of the Settled Land Act, 1882, entitled to have the proceeds of the sale of the picture applied in discharge of a mortgage on the settled land. *Marlborough's (Duke) Settlement, In re; Marlborough (Duke) v. Marjoribanks* (54 L. J. Ch. 833; 30 Ch. D. 127; affirmed, 55 L. J. Ch. 339; 32 Ch. D. 1), applied. *Stafford's (Lord) Settlement and Will, In re; Gerard v. Stafford*, 73 L. J. Ch. 560; [1904] 2 Ch. 72; 91 L. T. 229; 52 W. R. 536—Warrington, J.

Separate Instruments—Trusts by Reference—Appointment of Trustees for Purposes of Act—Discharge of Incumbrance on One Estate by Mortgage of Both.—Where it is necessary to appoint trustees for the purposes of the Settled Land Acts, and the settlement consists of two instruments forming one compound settlement, the trustees must be appointed of the compound settlement and not of either one or other of the separate instruments. *Coul's Settled Estates, In re*, 74 L. J. Ch. 378; [1905] 1 Ch. 712; 92 L. T. 616; 53 W. R. 504—Kekewich, J.

Semble, a power of sale does not constitute trustees for the purposes of the Acts unless it is a general power—that is, a power exercisable at any time and for any purpose, and not a power exercisable on a contingency and for a particular purpose. *Ib.*

Re-settlement—New Life Tenancy in Restoration of Old—Trustees for Purposes of Settled Land Acts.—Where a tenant for life and tenant in tail in remainder under a strict settlement of land have executed a disentailing assurance, and have subsequently, in re-settling the property, expressly restored the former life tenancy, the life tenant is tenant, not under the re-settlement alone, but under the compound settlement constituted by the original settlement, the re-settlement, and the disentailing assurance. It is therefore necessary, in order that he may exercise his powers as tenant for life under the Settled Land Acts, 1882 to 1890, that there should be trustees of this compound settlement for the purposes of those Acts. *Cornwallis-West and Munro's Contract, In re*, 72 L. J. Ch. 499; [1903] 2 Ch. 150; 88 L. T. 351; 51 W. R. 602—Farwell, J.

Wright to Marshall, In re (54 L. J. Ch. 60; 28 Ch. D. 93), and *Du Cane and Nettlefold's Contract, In re* (67 L. J. Ch. 393; [1898] 2 Ch. 96), followed; *Mundy and Roper's Contract, In re* (68 L. J. Ch. 135; [1899] 1 Ch. 275), distinguished. *Ib.*

Limitation of Remainder Subject to Payment of Annuities and of a Capital Sum—Settlement of Remainder.—A settlor in exercise of a power by deed settled freehold and leasehold estates upon himself for life, with remainder in trust to pay certain reversionary annuities and to raise a capital sum, with remainder to himself, his heirs, executors, administrators, and assigns. He settled the ultimate remainder by his will:—*Held*, that the deed creating the power, the appointment, and the will constituted a compound settlement. *Ailesbury (Marquis) and Iveagh (Lord), In re* (62 L. J. Ch. 713; [1893] 2 Ch. 345), followed. *Phillimore, In re; Phillimore v. Milnes*, 73 L. J. Ch. 671; [1904] 2 Ch. 460; 91 L. T. 256; 52 W. R. 682—Farwell, J.

Will—Power to Jointure—Exercise of Power by Deed—Appointment of Trustees.—Where lands have been put in settlement by a will with power to the tenant for life to charge the lands by way of jointure, and the power is exercised by the tenant for life by a deed, the will and deed do not together constitute a “compound” settlement. In such a case it is only necessary to appoint trustees, for the purposes of the Settled Land Act, of the will. *Hayes' Settled Estates, In re*, [1907] 1 Ir. R. 88—Barton, J.

5. TENANT FOR LIFE.

(a) Who is.

Beneficial Interest.—Section 58 of the Settled Land Act, 1882, extends the powers conferred by the Act on tenants for life only to persons whose interests are beneficial. *Jemmett and Guest's Contract, In re*; 76 L. J. Ch. 367; [1907] 1 Ch. 629—Swinfen Eady, J.

Tenant pur Autre Vie—Right to Sell the Fee.—Where by a voluntary settlement land is conveyed to trustees without words of limitation to the use of one for life with remainders over, the tenant for life can sell the fee under the Settled Land Act, 1882, for by section 58, sub-section 1 (v. and vi.), he has the powers of a tenant for life, and the fee reverting to the settlor is comprised in the settlement by virtue of section 2, sub-section 2 of the same Act. *Hunter & Hewlett's Contract, In re*, 76 L. J. Ch. 26; [1907] 1 Ch. 46; 95 L. T. 674—Swinfen Eady, J.

Person “deemed to be tenant for life”—Sale of Settled Land.—A person who, by virtue of section 63 of the Settled Land Act, 1882, is “deemed to be tenant for life” of settled land is not entitled, as a matter of course, to an order under section 7 (iii.) of the Settled Land Act, 1884, giving the applicant leave to sell or proceed with a sale of the settled land. *Tutill, In re*, [1907] 1 Ir. R. 305—M.R.

Undivided Share of Land—Power to Sell—Vendor and Purchaser.—A tenant for life of an undivided moiety of land can sell the moiety of which he is tenant for life under the powers of the Settled Land Act, 1882, without the

concurrence of the owner or person having the power or right of disposition of the other undivided moiety. *Collinge's Settled Estates, In re* (57 L. J. Ch. 219; 36 Ch. D. 516), overruled. *Cooper v. Belsey*, 68 L. J. Ch. 258; [1899] 1 Ch. 639; 80 L. T. 69; 47 W. R. 443—C.A.

Personalty only Settled—Power to Invest in Land—Land Purchased—Settled Land—Capital Money.]—Where a settlement comprises personalty only, with a power to invest in land (but no trust for investment in land), and a direction that land purchased shall be held until sale upon the trusts of the settlement, in that case land so purchased is settled land, and the person entitled for the time being to the income of the personal property comprised in the settlement is tenant for life within section 63 of the Settled Land Act, 1882, and any personal property in the hands of the trustees of the settlement is capital money within section 33 of the Act. *Childs' Settlement, In re*, 76 L. J. Ch. 565; [1907] 2 Ch. 348; 97 L. T. 80; 23 T. L. R. 609—Kekewich, J.

Person Beneficially Entitled to Settled Land for Life—Trust to Keep up Mansion-house and Grounds and Permit Daughter to Reside.]—Testatrix by her will devised her real estate to trustees upon trust to enter into possession of the rents and profits thereof, and to pay the expenses of the management of the estates, and certain annuities; and she directed her trustees to apply such sums as should be necessary for keeping up certain country mansion-houses and the gardens and grounds thereof, and also a town mansion-house, in a fit state for residence, including in such keeping up the wages of all servants and other persons employed by the trustees about such houses and grounds, and to permit the testatrix's daughter at any time and from time during her life to reside at the said mansion-houses, and during such residence pay to her an allowance of 80l. per week; and after the death of her daughter she directed that certain of her grandchildren should be successively permitted to reside in the mansion-houses in a similar manner; and she directed that the heirlooms in the houses should be enjoyed by the person or persons for the time being entitled to the same residences respectively under the directions in her will:—*Held*, that the daughter was a person "for the time being, under a settlement, beneficially entitled to possession of settled land, for her life" within sub-section 5 of section 2 of the Settled Land Act, 1882, and she was accordingly tenant for life of the mansion-houses and grounds under the Act. *Llanover's (Baroness) Will, In re*; *Herbert v. Freshfield* (No. 1), 72 L. J. Ch. 406; [1903] 2 Ch. 16; 88 L. T. 648; 51 W. R. 418—C.A.

Trust for Sale—Tenant for Life of Proceeds—Right to Income before Conversion.]—Where real estate is settled upon trust to sell and to pay the income of the proceeds to a person for life, that person is, by the general rule of law, unless the sale is improperly postponed, entitled to the rents and profits of the land until sale, and therefore is "for the time being beneficially entitled to the income of the land until sale" within the meaning of section 63 of the Settled Land Act, 1882, and is a tenant for life under

that Act. *Searle's Settlement Trusts In re*, 69 L. J. Ch. 712; [1900] 2 Ch. 829; 83 L. T. 864; 49 W. R. 44—Kekewich, J.

The principle laid down in *Chesterfield's (Earl) Trusts, In re* (52 L. J. Ch. 958; 24 Ch. D. 643), does not apply to a devise of land upon trusts for conversion. *Id.*

Persons having Powers of Tenant for Life—Annuitants.]—Annuitants under a will, who between them are entitled to the receipt of the whole of the rents and profits of a portion of a testator's settled estate, will be declared to be persons having together the powers of a tenant for life within the meaning of section 58 of the Settled Land Act, 1882, in respect of that portion of the estate. *Bennet, In re*; *Bennet v. Bennet*, 72 L. J. Ch. 524; [1903] 2 Ch. 136; 88 L. T. 683—Kekewich, J.

Trust for Accumulation.]—Where land is limited to trustees of a marriage settlement to the use of the trustees for twenty-one years and subject thereto to the use of the husband for life, and the trusts of the term are to manage the property, pay certain annuities, and to accumulate the residue, such accumulations to be capital moneys under the Settled Land Act, the husband is a person having the powers of a tenant for life under the Settled Land Act, 1882, s. 58. *Strangways, In re*; *Hickley v. Strangways* (56 L. J. Ch. 195; 34 Ch. D. 423), distinguished. *Martyn, In re*; *Coode v. Martyn*, 69 L. J. Ch. 733; 83 L. T. 146—Kekewich, J.

Gift of Income to Wife of Testator during Widowhood for Benefit and Maintenance of Herself and their Children—Tenant for Life.]—Testator devised all his real estate to trustees in trust for his wife "during her widowhood for the benefit and maintenance of herself and our dear children, and the proper bringing up of the latter":—*Held*, that the widow had the powers of a tenant for life under section 58, sub-section 1 (vi.) of the Settled Land Act, 1882, notwithstanding that her estate was incumbered or charged with the liability to provide maintenance for such of her children as required it. *Pollock, In re*; *Pollock v. Pollock*, 75 L. J. Ch. 120; [1906] 1 Ch. 146; 94 L. T. 92; 54 W. R. 267—Swinfen Eady, J.

Devise in Trust to Keep up Mansion-house and Permit A to Reside.]—A testatrix devised certain mansion-houses to trustees upon trust to keep up the same, and the gardens and grounds thereof, in a fit state for residence, paying the wages of all servants and persons employed by them for that purpose, and to permit her daughter at any time or from time to time during her life to reside at any of the said mansion-houses, and during such residence to pay her an annuity of 80l. a week:—*Held*, that the daughter had the powers of a tenant for life under the Settled Land Acts. *Llanover's (Baroness) Will, In re*; *Herbert v. Freshfield*, [1902] 2 Ch. 679; 51 W. R. 89—Swinfen Eady, J.

Direction to Apply Surplus Rents—Discharge of Incumbrances—Alternative Object Void—Heiress-at-Law Entitled—Interest Liable to be Suspended.]—A testatrix devised freeholds to

trustees upon trust to manage the same and receive the rents and profits, and, after making thereout various annual payments, to apply the surplus (if any) during the lives of her daughter, grandson, and great-granddaughter successively, but not for more than twenty years after testatrix's death, in the discharge of incumbrances, or in the purchase of other estates. Subject to and after the determination or failure of the foregoing directions, the trustees were to stand possessed of the freeholds (subject to subsisting incumbrances), and all surplus rents thereof, in trust for all the daughters successively in tail male—first, of the great-granddaughter and afterwards of a great-grandson, both of whom were young and unmarried; and there were limitations over, but no ultimate disposition of the fee. The direction to buy land having been held void under the Accumulations Act, 1892, the daughter, as heiress-at-law, became entitled to the surplus rents so far and so long as they were undisposed of by the will, and in virtue thereof she claimed to be a person having the powers of a tenant for life under section 58 of the Settled Land Act, 1882. The period of twenty years had not expired, and the trustees stated that the accumulations were as yet insufficient to pay off the incumbrances:—*Held*, that the daughter was not within clause vi. of section 58, sub-section 1, because the freeholds were not devised to her for her own or any other life; nor within clause ix., because she was not entitled to the rents "during her own or any other life" or under a "trust or direction for payment thereof to her," nor was such a trust or direction to be implied by virtue of section 2, sub-section 2. *Ilanover (Baroness), In re; Herbert v. Ram*, 76 L. J. Ch. 427; [1907] 1 Ch. 635; 97 L. T. 286—Swinfen Eady, J.

— **Mortgage to Raise Estate Duty.**—*Held*, also, that a mortgage to secure moneys borrowed by the trustees to pay estate duties on testatrix's death was an incumbrance that should be paid off under the direction in the will. *Ib.*

— **Trust to Allow Residue to Remain as Invested—Absolute Discretion to Sell.**—A testator who died in the year 1901 gave the residue of his estate real and personal, consisting of certain stocks and shares, freehold hereditaments, and leasehold houses held on leases expiring in the year 1924, to trustees upon trust either to allow the same to remain in its state of investment at his decease or, as and when his trustees should, in their absolute discretion, see fit so to do, from time to time to realise and sell and convert the same or any part thereof. The testator directed his trustees to reinvest the money when realised in trustees' securities and to hold the investments, whether original or substituted, upon trust to pay unto or permit his wife, F. C. (who was one of the trustees), to receive the income of his residuary estate during widowhood, to be reduced to a moiety of the income on her re-marriage, and, subject to her life interest, the testator gave his residuary estate to his son F. R. C., to be paid to him as to a moiety at twenty-five and the residue on his attaining thirty, but should his son die under twenty-five the whole residue was given to F. C.:—*Held*, that the words of the will created a trust for sale; that F. C., being the person for the time being beneficially

entitled to the income until sale, must be deemed to be the tenant for life of the estate within section 63 of the Settled Land Act, 1882. *Seem*, no case ought to be treated as falling within section 58, sub-section 1 (ix.), which is covered by section 63. *Crips, In re; Crips v. Todd*, 95 L. T. 865—Kekewich, J.

— **Power to Raise Money by Mortgage**—"Person beneficially entitled to possession."—A testator devised portion of his estates to trustees upon trust to pay out of the rents and profits a proportion of certain annuities and interest on legacies, and to accumulate the residue until a sum sufficient to pay certain debts and the legacies had been formed, and then to pay the said debts and legacies. Subject to these trusts the testator devised the said estates in trust for his son for life, remainder to J.'s sons in tail male, with remainder to the testator's son C. for life. J. died unmarried. C., who was also one of the trustees of the will, went into possession as tenant for life. The trustees did not accumulate the rents, and the testator's debts and legacies remained unpaid. On an application for an order authorising C. to raise money under the Settled Land Act, 1890, s. 11, for the purpose of discharging incumbrances upon the settled lands,—*Held*, that, notwithstanding the trust for accumulation, C. was "beneficially entitled to possession," and entitled to exercise the powers of a tenant for life, although his enjoyment of the estate was intercepted by the provision for accumulation. *Annesley v. Woodhouse*, [1898] 1 Ir. R. 69—V.C.

— **Dwelling-house—Right of Occupation**—Trustees of Term—Power to Mortgage—Trustees for Purposes of Settled Land Acts.—An unlimited right of personal occupation of a dwelling-house and premises, if exercised, constitutes the occupier a tenant for life thereof within the meaning of the Settled Land Acts. *Carne's Settled Estates, In re*, 68 L. J. Ch. 120; [1899] 1 Ch. 324; 79 L. T. 542; 47 W. R. 352—North, J.

Land was limited to trustees for a term of 1,000 years on trust, as to the premises therein comprised, to allow the applicant to occupy a dwelling-house and appurtenances forming part thereof rent free for so long as she might wish to continue to do so; and also by mortgage of the said premises, or by or out of the rents and profits thereof, or by any other reasonable ways and means, to raise and pay certain moneys and interest. Subject to the trusts of the said term, the property was limited over in fee-simple:—*Held*, that the applicant was tenant for life of the dwelling-house and appurtenances. *Ib.*

But *held* that the trustees of the term were not trustees for the purposes of the Settled Land Acts. *Ib.*

— **Land Vested in Bishop in Right of See—Grant to Church Dignitary under Custom—Right of Selling.**—Land vested in a bishop in right of his see, and from time immemorial granted by him to a dignitary of his cathedral church for life so long as he should continue in his dignity, —*Held*, not to be settled land which could be sold under the Settled Land Act. *Bath and Wells (Bishop), Ex parte*, 68 L. J. Ch. 524; [1899] 2 Ch. 138; 81 L. T. 69—North, J.

(b) *Right to Possession.*

Tenant for Life Subject to Term for Discharge of Incumbrances—Possession and Management Given to Trustees of Term—Right of Tenant for Life to Possession.—A testator devised certain estates to trustees for a term of years upon trust to manage the same and receive the rents and profits thereof until certain incumbrances thereon had been paid off, and subject thereto to uses under which A. was tenant for life and his infant son was tenant in tail in remainder. The trustees had out of the rents and profits greatly reduced the incumbrances, but had not had time to pay them off, and they objected to hand over the management of the estates to the tenant for life, as calculated, in their opinion, to be prejudicial to the carrying into execution of the trusts of the term, and to the interests of the infant remainderman:—*Held*, that the tenant for life was entitled to the possession of the estates and to the custody of the title-deeds upon his undertaking to account for the rents and to hand over the surplus rents to the trustees to be applied by them in carrying out the trusts of the term, and also to pay an occupation rent in case he should occupy any part of the estates, and upon his giving security to the satisfaction of the Judge in chambers for the due performance of such undertaking. *Money-Kyrle, In re; Money-Kyrle v. Money-Kyrle*, 69 L. J. Ch. 780; [1900] 2 Ch. 839; 83 L. T. 74; 49 W. R. 44—Cozens-Hardy, J.

Term of Years to Discharge Mortgages—Legal Tenant for Life subject to Term—Possession—Exercise of Powers.—By settlement in 1879 lands were conveyed subject to certain mortgages affecting the same to the use of the settlor for life, and after his death to the use that his wife and daughters should receive certain rent-charges, and subject as aforesaid to the use of trustees for the term of 1,000 years from the death of the settlor upon the trusts thereafter declared, and after the determination of the term and in the meantime subject thereto to the use (in the events which had happened) of J. B. R. for life. The settlement conferred upon the trustees a power of sale and exchange, but not of leasing. The trusts of the term were that so long as any incumbrance should remain unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest on the mortgages and rent-charges, and in the next place pay the tenant for life a certain annuity and apply the residue in or towards the discharge of the principal moneys charged by way of mortgage or otherwise upon the premises. There was a proviso for cesser of the term upon the discharge of all principal moneys charged by way of mortgage or otherwise upon the premises. The settlor and his wife were both dead, but the rentcharge in favour of the daughters was still in force, and the mortgages had not been paid off:—*Held*, on the authority of *Clitheroe Estate, In re* (54 L. J. Ch. 401; 28 Ch. D. 378; affirmed, 55 L. J. Ch. 107; 31 Ch. D. 135), that J. B. R. was a person having the powers of a tenant for life under the Settled Land Acts, and that he was not precluded from exercising the powers by the existence of the term; that he ought to be let into possession upon giving the usual undertakings as to the performance of the

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trusts of the term, and that the title-deeds ought to be delivered into his possession. *Richardson, In re; Richardson v. Richardson*, 69 L. J. Ch. 804; [1900] 2 Ch. 778—Stirling, J.

Contract for Sale—Proceeds of Sale—Direction to Trustees to Pay off Mortgages—Validity—Cesser of Term.—Subsequently J. B. R. entered into a contract for the sale of certain portions of the settled lands, the purchase-money for which was a little more than sufficient to pay off the mortgages; and he, acting under section 21, sub-section 2, and section 22, sub-section 2 of the Settled Land Act, 1882, gave a direction to the trustees of the settlement that the proceeds of sale should be applied in paying off the mortgages. The sale was a *bona fide* one, and J. B. R. made an affidavit in which he stated that he had considered the interests of all parties entitled under the settlement:—*Held*, that the direction was a proper one, and that the mortgages ought not to be transferred to the trustees or otherwise kept on foot, and that on payment off of the mortgages the trusts of the term would cease. *Semble*, if the trustees had been themselves selling under their power of sale they might have paid off the existing incumbrances out of the purchase-money. *Knatchbull's Settled Estate, In re* (54 L. J. Ch. 1168; 29 Ch. D. 588), and *Hampden v. Buckinghamshire (Earl)* (62 L. J. Ch. 643; [1893] 2 Ch. 531) discussed. *Ib.*

(c) *Power of Leasing.*(i.) *Generally.*

Statutory Power—Lease by Donee to Himself and Others—Joint Covenants by Lessees—Invalid Exercise—Lease to Trustee for Lessor.—A tenant for life purported, in exercise of the powers of section 46 of the Settled Estates Act, 1877, to demise the settled messuage, works, and premises to himself and his two partners for twenty-one years, the lease containing the usual lessee's covenants entered into by the three lessees jointly. A certain rent was reserved by the lease, but *dehors* the lease it was arranged between the partners that the tenant for life should be allowed to occupy the house rent free, and should receive an additional rent as compensation in the event of his ceasing to reside there. In an action by the remaindermen, after the death of the tenant for life, to recover possession of the premises from an assignee of the lease,—*Held*, that the lease was void for non-compliance with the requirements of section 46 of the Settled Estates Act, 1877, both on the ground that the best rent had not been reserved, and also because the covenants in the lease, being joint covenants by a man and others with himself, were not enforceable at law, and consequently were not proper covenants within the meaning of the section, or such as the reversioners were entitled to have inserted in the lease. *Boyce v. Edbrooke*, 72 L. J. Ch. 547; [1903] 1 Ch. 836; 88 L. T. 344; 51 W. R. 424—Farwell, J.

"Covenant," in the Act, means a legal covenant which can be sued upon at law, and not some right which might or might not arise from equitable considerations. *Ib.*

The donee of an ordinary power of leasing

cannot validly exercise the power by leasing to himself either alone or jointly with others. *Quare*, whether, independently of express statutory authority or some long-established special custom, the donee can validly exercise such a power by leasing to a trustee for himself, as such an execution would seem to transgress the doctrine of equity forbidding a man to put himself in such a position that his interest conflicts with his duty. *Ib.*

Wilson v. Sewell (4 Burr. 1975, 1979; 1 W. Bl. 617, 620), and *Cardigan (Earl) v. Montague* (App. *Sugden on Powers* (8th ed.), p. 917) examined and explained. *Bevan v. Habgood* (30 L. J. Ch. 107; 1 J. & H. 222) commented upon and dissented from. *Ib.*

"Usually occupied therewith"—"Park"—Easement over Mansion-house.—The words "usually occupied therewith" in section 10, sub-section 2 of the Settled Land Act, 1890, must be read as qualifying "lands (if any)," and not as qualifying "pleasure grounds in park." "Park" in section 10, sub-section 2 of the Settled Land Act, 1890, is used in a popular, and not in its ancient technical, sense. It is used, for example, in the second sense attributed to the word in the *Imperial Dictionary*, but not in the first. *Pease v. Courtney*, 73 L. J. Ch. 760; [1904] 2 Ch. 503; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653—Swinfen Eady, J.

Specific Performance—Damages.—A tenant for life of settled land agreed to let a "park" without having first obtained the consent of the trustees of the settlement or an order of the Court. The lessees had not stipulated for the investigation of the lessor's title, nor had they ever asked him to execute a lease. There was no evidence to shew that the lessor could have obtained the necessary consent or order, had he endeavoured to do so. The lessor had subsequently died, and the lessees were refused specific performance:—*Held*, that under the circumstances the estate of the lessor was not liable to the lessees for damages. *Day v. Singleton* (68 L. J. Ch. 593; [1899] 2 Ch. 320) considered and distinguished. *Ib.*

Two Estates with Mansion-house on Each—"Principal mansion-house"—Lease by Tenant for Life to his Wife—"Good faith"—Consent of Trustees.—A lease by a tenant for life under the Settled Land Acts to his wife is good if it is in other respects free from objection. *Gilbey v. Rush*, 75 L. J. Ch. 32; [1906] 1 Ch. 11; 93 L. T. 616; 54 W. R. 71; 22 T. L. R. 23—Kekewich, J.

"Good faith" in section 54 of the Settled Land Act, 1882, means nothing more than that the provisions of the Act must be complied with. *Ib.*

Where there are two or more mansion-houses in the same settlement the question which is the principal mansion-house is a question to be tried in each case, having regard to the particular circumstance and on a comparison of the different houses. *Semble*, there may be two or more principal mansion-houses comprised in the same settlement. *Ib.* See *In re Wythe's Settled Estates*, 77 L. J. Ch. 319; [1908] 1 Ch. 593—Eve, J.

Semble, the consent of the trustees of the settlement to a lease of the principal mansion-house need not be formally expressed or recorded, but may be gathered from the approval and other acts of the trustees. *Ib.*

Bona Fide Exercise of Power—Determination of Tenancy for Life.—A widow, being under the Settled Land Acts tenant for life during her widowhood of settled estate, on the eve of her second marriage intended to grant a twenty-one years' lease of the settled estate to her intended husband:—*Held*, that the granting of such lease must be restrained, as not being a bona fide exercise of the powers of a tenant for life. *Middlemas v. Stevens*, 70 L. J. Ch. 320; [1901] 1 Ch. 574; 84 L. T. 47; 49 W. R. 430—Joyce, J.

Commission Payable to an Estate Agent.—The commission payable to an estate agent for letting parts of a settled estate on building leases is a charge or expense incidental to the exercise of some of the powers of the Settled Land Act, 1882, and is payable out of capital moneys arising under the Act. *Maryon-Wilson's Settled Estates, In re*, 70 L. J. Ch. 500; [1901] 1 Ch. 934; 84 L. T. 708—Joyce, J.

Premiums whether Passing under Power of Appointment.—See *Beddington v. Baumann, ante*, POWERS, col. 1880.

Best Rent not Reserved—Title.—See *Handman and Wilcox, In re*, 71 L. J. Ch. 263, *post*, VENDOR AND PURCHASER and POWERS.

(ii.) Building Lease.

Reservation of Mines and Minerals.—A tenant for life has power under the Settled Land Act, 1882, to grant a building lease of settled land with a reservation of the mines and minerals. *Nevill and Newell's Contract, In re* (69 L. J. Ch. 94; [1900] 1 Ch. 90), overruled. *Gladstone, In re*; *Gladstone v. Gladstone*, 69 L. J. Ch. 455; [1900] 2 Ch. 101; 82 L. T. 515; 48 W. R. 531—C.A.

Where a settlement of land contains the usual powers of granting building and mining leases, the donee of the powers can grant a building lease with a reservation of minerals, notwithstanding the absence of any express authorisation to that effect. *Rutland's (Duke) Settled Estates, In re*; *Rutland (Duke) v. Bristol (Marquis)*, 69 L. J. Ch. 603; [1900] 2 Ch. 206—Byrne, J.

A tenant for life of settled land cannot grant a valid building lease of the surface of the land under the Settled Land Act, 1882, with a reservation of the mines and minerals. *Nevill and Newell's Contract, In re*, 69 L. J. Ch. 94; [1900] 1 Ch. 90; 81 L. T. 581; 48 W. R. 181—Kekewich, J.

Where a tenant for life purports to grant such a lease, it will not be rendered a valid lease by virtue of the provisions of the Leases Act, 1849. *Ib.*

Extended Term.—Leave given to the tenant for life of a settlement to grant a building lease of settled land for 500 years under the Settled

Land Act, 1882, s. 10, sub-s. 2. *O'Connell's Estate, In re*, [1903] 1 Ir. R. 154—V.C.

(iii.) *Mining Lease.*

Power as to Rent.—A tenant for life in granting a mining lease under the powers of the Settled Land Act, 1882, may—first, reserve no minimum rent for the first year and then a minimum rent on an ascending scale from the second to the fifth years; secondly, may reserve a nominal rent only during the residue of the term after all the saleable coal has been worked out under the provisions of the lease; and thirdly, may include in the lease a wayleave for foreign coal without reserving any separate rent, though the wayleave is to continue during the residue of the term after all the saleable coal has been worked out and after the cesser of the minimum rent. *Aldam's Settlement, In re*, 71 L. J. Ch. 552; [1902] 2 Ch. 46; 86 L. T. 510; 50 W. R. 500—C.A.

A "fixed or minimum rent" under section 9, sub-section 1 (ii.) of the Settled Land Act, 1882, need not be a uniform rent. *Ib.*

The requirements of the Settled Land Acts are that the best rent should be reserved which can be reasonably obtained, regard being had to all the circumstances of the case, and that due regard should be had to the interests of all parties entitled under the settlement. Whether any particular lease satisfies these requirements must depend on the evidence, which should not be couched in general language, but should set out the material circumstances and state the grounds for the conclusion arrived at. *Ib.* And see col. 2258.

(d) *Mortgage.*

Different Instruments—Identical Trusts—Mortgage of One Estate to Discharge Incumbrance on the Other.—Where different estates stand limited on identical trusts under different instruments, the effect of section 2, sub-section 1 of the Settled Land Act, 1882, by which both the instruments are made to create "a settlement" for the purposes of the Act, is to enable the tenant for life, under section 11 of the Act of 1890, to raise the money required to discharge an incumbrance on the one estate by means of a mortgage of the other estate, although the settlement of the latter estate was the earlier in date, and was made free from incumbrances, and the former estate was settled by the tenant for life himself, and subject to the incumbrance which it is sought to discharge. *Monson's (Baron) Settled Estates, In re*, 67 L. J. Ch. 176; [1898] 1 Ch. 427; 78 L. T. 225; 46 W. R. 330—Romer, J.

Payment of Instalment—Deficiency of Proceeds—Rateable Repayment.—A testator devised certain lands, subject to an instalment mortgage, to his wife for life, remainder to his children for life, remainder over. After the testator's death his widow paid several instalments of the mortgage. She died intestate, and further instalments were then paid by the other tenants for life. The lands were sold under the Settled Land Act, and the balance of the mortgage paid out of the proceeds; and

by an order of the Court the tenants for life were declared entitled to be recouped the sums expended by them on the mortgage out of the remaining surplus of the purchase-money. The fund proving insufficient to repay the tenants for life in full,—*Held*, that the several tenants for life were entitled to be recouped rateably, the first tenant for life having no right to be repaid the sums expended by her on the mortgage in priority to the other tenants for life. *Nepean's Settled Estate, In re*, [1900] 1 Ir. R. 298—V.C.

•(e) *Easement.*

Power to Exchange for other Easement.—Section 5 of the Settled Land Act, 1890, empowers a tenant for life to grant an easement over the settled land in exchange for an easement over adjoining land. *Bracken's Settled Estates, In re*, 72 L. J. Ch. 101; [1903] 1 Ch. 265; 87 L. T. 743—Swinfen Eady, J.

The latter part of the section is independent of the earlier part, and is not dominated by the first words of the section, "on an exchange or partition." *Ib.*

Power to Release.—A tenant for life has no power under the Settled Land Acts to release an easement over the settled land. *Brotherton, In re; Brotherton v. Brotherton*, 77 L. J. Ch. 58; 97 L. T. 880—Joyce, J. And see *Pearson's Will, In re*, 83 L. T. 626, *infra*.

Exchange of—Extinguishment.—An exchange of easements between two adjoining settled estates cannot be made under section 5 of the Settled Land Act, 1890, so as to extinguish the easements. *Ib.*

"Incorporeal hereditament."—An easement is not an incorporeal hereditament within the meaning of section 2, sub-section 10 (i) of the Settled Land Act, 1882. *Ib.*

Right to Let Down Surface of Settled Land.—A tenant for life under a settlement of the surface of lands, being also entitled in fee-simple to the mines and minerals under the settled lands, may grant to the lessee of the mines and minerals a right to let down the surface, although the tenant for life could not, under the terms of the settlement, himself so work the mines as to let down the surface. *Sitwell, In re; Sitwell v. Londesborough (Earl)*, 74 L. J. Ch. 254; [1905] 1 Ch. 460; 53 W. R. 445—Warrington, J.

The rent to be reserved is not incapable of ascertainment if experts can say what rent should be reserved. *Ib.*

Section 6 and section 7, sub-section 3 of the Settled Land Act must be read together, and a lease may be granted of an incorporeal hereditament to which a condition of re-entry is inapplicable. *Ib.*

(f) *Sale.*

Power of—Right to Construct and Maintain Tunnels for Railway under Land—Easement.—

A tenant for life by virtue of section 63 of the Settled Land Act, 1882, of a settlement by way of trust for sale created by will, of undivided shares of settled land beneath which a railway company desired to construct tunnels for an electric railway, having joined with the owners of the remaining shares in entering into an agreement with the company for the sale to them of the right to construct, maintain, and use tunnels with railways therein under the land, took out a summons under section 7 of the Settled Land Act, 1884, asking for leave to enter into a contract in the form of the agreement with the company for the sale to them of that right. It was urged in support of the application that to proceed under the Settled Land Acts was cheaper and more simple than under the Lands Clauses Act, and that the right in question constituted an easement under section 3 of the Settled Land Act, 1882, or, if not, that the Court had power under that section to make the order asked for:—*Held*, that the sale of the subsoil of the settled land was not the sale of an easement under section 3 of the Settled Land Act, 1882, but that the Court had power under that section to make an order authorising the sale as being a sale of a part of the settled land. *Pearson's Will, In re*, 88 L. T. 626—Cozens-Hardy, J.

— **Partial Merger of Life Interest—Sale of Entirety.**—A tenant for life assigned her life interest in two undivided third parts of the settled land to the remaindermen respectively entitled to those parts, and subsequently contracted to sell the entirety:—*Held*, that, notwithstanding the partial merger, her power of sale under the Settled Land Act, 1882, was still subsisting in respect of the entirety of the settled land, and that with the consent of her assignees she could make a good title thereto. *Barlow's Contract, In re*, 72 L. J. Ch. 214; [1903] 1 Ch. 382; 88 L. T. 84; 51 W. R. 399—Swinfen Eady, J.

— **Devise of Real Estate—Settlement of Undivided Shares—Persons having Powers of Tenant for Life—Sale of Entirety—Conflict of Powers—Consents.**—Land was devised to trustees upon trust to divide the same into five equal parts, and stand possessed of each part upon certain trusts under which some of the beneficiaries had the powers of a tenant for life within the meaning of the Settled Land Act, 1882, in respect of their one-fifth shares. The testator gave the trustees a general power of sale over the whole or any part of the land. Upon a sale of the entirety by the trustees,—*Held*, that there was a conflict between the trustees' power of sale and the power of such beneficiaries to sell their individual shares, by virtue of the Settled Land Act, 1882, and that consequently the trustees must obtain the consent of the tenants for life, or of the persons having the powers of a tenant for life in respect of such settled shares. *Osborne to Brights, Linn., In re*, 71 L. J. Ch. 285; [1902] 1 Ch. 335; 86 L. T. 178; 50 W. R. 468—Kekewich, J.

Sub-section 2 of section 56 of the Settled Land Act, 1882, is not confined to the case of a tenant for life, but includes as well the case of a person having the powers of a tenant for life. *Id.*

Agreement—Price to be Fixed by Arbitration

— **Breach of Trust—Confirmation of Agreement by Local Act—Effect—Whether Binding on Remaindermen—Necessary Implication.**—A tenant for life of settled land agreed with a municipal corporation to sell a portion of the settled land at a price to be fixed by arbitration. The agreement was conditional on the sanction of Parliament by a local Act being obtained. The corporation obtained a local Act which confirmed the agreement (scheduled to it) and made it "binding on the parties thereto respectively, and the same shall and may be carried into effect accordingly." The agreement was made between the tenant for life, an assignee of his life estate, and the corporation, and provided that the award of the arbitrators or umpire fixing the price should be "binding upon all the parties hereto respectively and upon all parties interested in the said" (settled) "estates":—*Held*, that, although it was a breach of trust on the part of the tenant for life to delegate his authority and enter into an agreement to sell at a price to be fixed by some one else, yet the effect of the agreement and the Act was that the agreement should be carried into effect as a sale by a tenant for life under the Settled Land Acts, with all the consequences which that involved, and the persons interested in remainder in the settled estates were therefore bound. *Wilton's (Earl) Settled Estates, In re*, 76 L. J. Ch. 37; [1907] 1 Ch. 50; 96 L. T. 193; 23 T. L. R. 64—Warrington, J.

— **Conveyance—Mortgage on Life Estate—Concurrence of Mortgagee—Consent.**—On a sale by a tenant for life under the Settled Land Acts, 1882 to 1890, a mortgagee of the life estate cannot be required to join in conveying to the purchaser. His consent once obtained under section 50 of the Settled Land Act, 1882, the tenant for life can convey the land under section 20 discharged from his own mortgage; for the estates, interests, and charges mentioned in section 20, sub-section 2 (ii.), are only such as subsist or arise under the settlement, and that is not the case with those created by the tenant for life. *Dictum* of NORTH, J., in *Sebright's Settled Estates, In re* (56 L. J. Ch. 169; 33 Ch. D. 429, 438), not followed. *Dickin and Kelsall's Contract, In re*, 77 L. J. Ch. 177; [1908] 1 Ch. 213—Swinfen Eady, J.

The true construction of section 20, sub-section 2 of the Settled Land Act, 1882, is to read the words "subject to" as applying to clause (i.), and the words "with the exception of" as applying to clauses (ii.) and (iii.) *Id.*

— **No Trustees of Settlement for Purposes of Act—Payment of Purchase-money into Court.**—A purchaser on a sale under the Settled Land Act cannot be compelled by the tenant for life, under the option conferred by section 22 of the Act, to pay the purchase-money into Court, unless there are in existence trustees of the settlement for the purposes of the Act. *Fisher and Grazebrook's Contract, In re*, 67 L. J. Ch. 613; [1898] 2 Ch. 660; 79 L. T. 268; 47 W. R. 58—Romer, J.

— **Licensed Freehold Public-house—Inadequate Price—Good Faith of Purchaser.**—The tenant for life of a licensed freehold public-house sold it to W. for 2,000l., the purchaser (who had

supplied the house with goods) having heard that it was for sale from a friend, but not an authorised agent, of the solicitors of the tenant for life. No strict valuation appeared to have been made by the tenant for life or the trustees. Shortly afterwards W. re-sold the property for 3,000*l.* to brewers, who held a lease from the tenant for life, and had previously refused to give 2,700*l.* for the property. In an action by a remainderman to set aside the sale,—*Held*, that, in the absence of fraud, the purchaser was not proved to have dealt otherwise than in good faith with the tenant for life, and that section 54 of the Settled Land Act, 1882, supplied a good defence to the action. *Hurrell v. Littlejohn*, 73 L. J. Ch. 287; [1904] 1 Ch. 689; 90 L. T. 260; 20 T. L. R. 198—Joyce, J.

The mere fact that a purchase of this nature and character is at an undervalue of itself, without anything more at all, is insufficient to invalidate a sale. *Ib.*

Subsequent Dealings with Interests under Settlement—Assignment of Life Interest—Contract for Sale by Tenant for Life—Consent of Assignees.—Upon a sale by a tenant for life who has alienated for value, the purchaser is in general entitled under section 50 of the Settled Land Act, 1882, to ask for evidence of the consent of the assignee, but if the assignment contains a general consent beforehand all the powers of the tenant for life under the Settled Land Act, 1882, will remain unfettered. *Du Cane and Nettlefold's Contract, In re*, 67 L. J. Ch. 893; [1898] 2 Ch. 96; 78 L. T. 458; 46 W. R. 523—Stirling, J.

Section 4 of the Settled Land Act, 1890, only applies to a limited class of assignments—namely, assignments or charges in consideration of marriage or as part of or by way of family arrangement, and in such cases is limited to the purpose of excluding the operation of section 50 of the Act of 1882. It therefore does not make an assignment by a tenant for life by way of family arrangement one of the instruments creating the settlement for all the purposes of the Acts, so as to make it necessary in order to carry out a sale by the tenant for life to appoint trustees of the compound settlement made up of the original settlement and the assignment. *Tibbits' Settled Estates, In re* (66 L. J. Ch. 660; [1897] 2 Ch. 149), and *Meade's Settled Estates, In re* ([1897] 1 Ir. R. 121), distinguished. *Ib.*

Jointure—Portions—Sale.—By a deed of re-settlement, made in exercise of a general power of appointment conferred by a disentailing assurance, A. B. and his eldest son C. D. appointed an estate to the use of A. B. during his life, with remainders over; but the life estate of A. B. was not expressed to be in continuation, restoration, or confirmation of any estate in him. On summons taken out under the Vendor and Purchaser Act, 1874,—*Held*, that this was a new settlement, and not a compound settlement; the tenant for life therefore could not sell under the Settled Land Acts free from a jointure and portions charged on the estate by previous settlements. *Mundy and Roper, In re*, 78 L. T. 547—Kekewich, J.

“Principal Mansion-house, What is.]—See

Wythe's Settled Estates, In re, 77 L. J. Ch. 319; [1908] 1 Ch. 593—Eve, J.

Power of—Exercise by Quasi-Committee.—See *S. S. B., In re, ante*, LUNATIC, col. 1442.

Tenant for Life, by—No Heir—Bona Vacantia.—See CROWN, col. 664.

See also cols. 1887–8.

6. INSURANCE MONEYS.

Fire Insurance—Premiums Paid by Trustees out of Income—Right to Policy-moneys—Gift to Trustees of Fund.—A tenant for life under no liability by the settlement to insure and not impeachable for waste, by whose directions a policy of insurance has been kept up on the mansion-house, and the premiums thereon paid out of his income, is entitled as against the trustees of the settlement to money paid by the insurance office in respect of damage to the mansion-house by fire. *Seymour v. Vernon* (16 Jur. 189) and *Warwick v. Brentnall* (23 Ch. D. 188), which were cases of tenants in tail, followed. *Gausson v. Whatman*, 93 L. T. 101—Kekewich, J.

The fact that, pending a decision by the tenant for life as to whether he will expend the insurance fund in rebuilding the premises, the money had been invested in the names of the trustees of the settlement during a period of fourteen years,—*Held*, not, under the circumstances, to amount to an abandonment of the life tenant's right to the fund or a gift of it by him to the trustees for the benefit of the corpus of the settlement fund. *Ib.*

7. TIMBER.

Sale of, by Court—Conversion.—Where timber growing on settled land has been rightfully felled and sold under an order of the Court it becomes personal estate, and all the consequences of conversion must follow; and there is no equity for re-conversion as between the heir-at-law and the legal personal representative of the tenant in fee in remainder. *Field v. Brown* (27 Beav. 90) not followed. *Hartley v. Pendarves*, 70 L. J. Ch. 745; [1901] 2 Ch. 498; 85 L. T. 64; 50 W. R. 56—Cozens-Hardy, J.

8. WASTE.

Tenant for Life and Remainderman—Equitable Waste—Ornamental Timber—Planted or Left for Ornament or Shelter—Intention—Evidence.—The fact that, in the opinion of an expert in forestry, trees on a settled estate, from their position, must have been planted or left for ornament or shelter, is sufficient evidence to call for an answer from the tenant for life who proposes to fell them, that they were not so planted or left, without specific evidence of such intention on the part of the settlor. The issue to be determined is not whether the trees are in fact ornamental or give shelter, but whether they have been planted or left for ornament or shelter by the settlor. *Weld Blundell v. Wolseley*, 73 L. J. Ch. 45; [1903] 2 Ch. 664; 89 L. T. 59; 51 W. R. 635—Swinfen Eady, J.

9. TRUSTEES.

Power of Sale—Conveyancing Act, 1881, s. 42—Infant.]—The testamentary guardian of an infant tenant for life is entitled under section 9 of 12 Car. 2, c. 24 (Abolition of Tenures Act), to receive during the infancy the rents and profits of real estate devised in strict settlement unless the testator has appointed trustees qualified, either expressly or otherwise, to exercise the powers of section 42 of the Conveyancing and Law of Property Act, 1881. *Sed quære*, how far this right of the testamentary guardian has been affected by the provisions of the Land Transfer Act, 1897, Part I. *Helyar, In re; Helyar v. Beckett*, 71 L. J. Ch. 209; [1902] 1 Ch. 391; 85 L. T. 627—Joyce, J.

It is upon the person who is tenant for life, or who has the powers of a tenant for life, whether *sui juris* or an infant, that the Settled Land Act, 1882, confers a power of sale. Section 60 of that Act does not, by authorising the trustees of the settlement to exercise such power on behalf of an infant, thereby constitute them "trustees with power of sale of the settled land" so as to bring them within the purview of section 42 of the Conveyancing and Law of Property Act, 1881, and enable them to exercise the powers given by that section. *Ib.*

"Other land comprised in settlement"—Power of Sale—Land Purchased.]—Section 16, sub-section (i.) of the Settled Land Act, 1890, applies as well to land for the time being comprised in a settlement as to land originally comprised therein; so that trustees of the settlement created by a will are none the less trustees for the purposes of the Settled Land Acts by virtue of the sub-section because all the land comprised in their power of sale at the testator's death has been sold, and the only land subject to the power has been purchased since under a direction in the will. *Moore, In re; Moore v. Bigg*, 75 L. J. Ch. 342; [1906] 1 Ch. 789; 95 L. T. 521; 54 W. R. 434; 22 T. L. R. 342—Swinfen Eady, J.

Appointment of—Validity of Sale.]—A compound settlement consisted of a settlement made in 1863 and a disentailing deed and a re-settlement made in 1898. The re-settlement deed contained a declaration that the trustees of it should be trustees of the compound settlement for the purposes of the Settled Land Acts. A jointress and portioners, whose interests arose under the settlement of 1863 and were outstanding, were not parties to the re-settlement deed:—*Held*, that the trustees of the re-settlement deed were not validly appointed trustees of the compound settlement. *Seemle*, if all the persons interested under the settlement had been parties to the re-settlement deed, the declaration of appointment would have been effectual. *Hammond Spencer's Settled Estates, In re*, 72 L. J. Ch. 59; [1903] 1 Ch. 75; 88 L. T. 158; 51 W. R. 262—Byrne, J.

Appointment of Trustees by Court.]—The trustees purported to be appointed were the existing trustees of the original settlement, one being the tenant for life's solicitor. THE COURT, being asked to appoint trustees of the compound settlement, declined to appoint the

tenant for life's solicitor to be one, in accordance with the ordinary rule that it will not, in the absence of special reason, appoint the tenant for life's solicitor to be a trustee of the settlement. *Ib.*

Compulsory Purchase—Payment of Proceeds out of Court.]—By post-nuptial settlement, lands were conveyed to trustees, upon trust for the wife, without power of anticipation, and after the death of the husband or wife upon trust for the survivor for life, and subject thereto upon trust for the children of the marriage as the husband and wife should jointly appoint. The settlement contained a power of advancement but no express power of sale. Part of the lands having been taken under compulsory powers, the husband and wife appointed the trust property to the children of the marriage, and a joint application for payment out of the fund to the trustees was made by the husband, wife, children, and trustees. An order was made appointing the trustees of the settlement trustees for the purpose of the Settled Land Acts, and directing the fund to be paid out to them, to be held upon the trusts of the settlement. *Belfast Improvement Acts, In re; Reid, ex parte*, [1898] 1 Ir. R. 1—M.K.

For Purposes of Settled Land Act—Powers of Court.]—As a general rule, new trustees for the purposes of the Settled Land Acts need not be appointed in every case in which a deed has been executed affecting the interests created by the original settlement, so that such settlement is no longer the only instrument under or by virtue of which land stands limited for the time being to or in trust for persons by way of succession, but section 38 of the Settled Land Act, 1882, does in a proper case enable the Court to appoint trustees of a settlement made up of the original settlement and subsequent instruments. *Du Cane and Nettlefold's Contract, In re*, 67 L. J. Ch. 393; [1898] 2 Ch. 96; 78 L. T. 458; 46 W. R. 523—Stirling, J.

Future Trust for Sale—Trust Exercisable on Death of Tenant for Life—Tenant for Life One of Trustees.]—The persons who are for the time being trustees of a settlement with a future trust for sale are trustees for the purposes of the Settled Land Acts, 1882 to 1890, within section 16, sub-section (ii.) of the Act of 1890, notwithstanding that some or one of such persons, in all probability, will not, or in fact cannot, exercise the trust for sale. A tenant for life may therefore be a trustee for the purposes of the Acts, where he is a trustee with a future trust for sale, although such trust does not arise until his death. *Jackson's Settled Estate, In re*, 71 L. J. Ch. 154; [1902] 1 Ch. 258; 85 L. T. 625; 50 W. R. 235—Buckley, J.

10. INCUMBRANCES.

Conveyance—Money "actually raised."]—By his will made in 1854 a testator resident in Scotland devised his real estate, including the lands of B. in Ireland, to his six daughters for life, with remainders over. The testator died in 1857, having, prior to his death, advanced 1,500*l.* to the husband of one of his daughters, and 475*l.* to the husband of another daughter.

In 1882, by deed of family arrangement, the testator's real estate was conveyed to trustees, to hold on the trusts of the will, charged, as to the life estates of the two daughters therein, with repayment of the sums of 1,500*l.* and 475*l.* advanced to their husbands respectively. An order was subsequently made for the administration of the testator's real and personal estate in Ireland, and the lands of B. were sold to a purchaser:—*Held*, that the sums of 1,500*l.* and 475*l.* were not money "actually raised" within the exception to section 20 of the Settled Land Act, 1882, and that the persons who together constituted the tenant for life of the settled lands could convey to the purchaser discharged from these two sums. *Connolly v. Keating* (No. 1), [1903] 1 Ir. R. 353—M.R.

— **Payment Off—Possession by Tenant for Life—Ground-rents.**—A testator gave his annual ground-rents, secured on two estates, to trustees upon trust to collect and apply the same in reduction of a mortgage debt thereon, and subject thereto upon trust as to two-fifths of the annual income for J. for life, as to other two-fifths for P. for life, and as to the remaining one-fifth for L. for life. And he directed that on the decease of either J., P., or L., his or her share of the ground-rents should go to his or her children. And the testator empowered his trustees to sell the ground-rents, pay off the mortgage debt, invest the residuary proceeds of sale, and stand possessed thereof upon the trusts declared respecting the annual ground-rents should they remain unsold. The testator died in 1891. J. had three, and P. one, infant children entitled to the ground-rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground-rents and apply the income in reduction of the mortgage debt thereon, which by January, 1901, was reduced to less than half. The mortgage debt became vested in the surviving trustee of the will:—*Held*, that the tenants for life were entitled to immediate possession of the ground-rents and to sell them to pay off the mortgage debt, and also to delivery up of the documents of title held by the surviving trustee, as trustee, relating to the ground-rents. *Wilkinson, In re; Lloyd v. Steel*, 85 L. T. 43—Cozens-Hardy, J.

Money "Required" for Discharging—Costs of Tenant for Life of Raising Amount.—The word "required" in section 11 of the Settled Land Act, 1890, is not confined to the case of the calling in of a mortgage by the mortgagee, but extends to all cases in which the money is reasonably required, having regard to the circumstances of the settled land:—*Held*, therefore, that a tenant for life who had effected a discharge of incumbrances on the settled land amounting in the aggregate to 26,043*l.*, bearing interest at 4 per cent., of which 15,000*l.* has been called in by the mortgagees, and had raised a new loan on the settled land for the same amount at a reduced rate of 3½ per cent., was entitled under the section to raise the costs of so doing by mortgage of the settled land. *Clifford, In re; Scott v. Clifford*, 71 L. J. Ch. 10; [1902] 1 Ch. 87; 85 L. T. 410; 50 W. R. 58—Buckley, J.

Expenses of Sewering and Paving—Charge upon Premises.—A tenant for life who has

been required by an urban authority under section 150 of the Public Health Act, 1875, as owner of premises forming part of the settled land, to pay certain expenses for making up streets fronting, adjoining, or abutting thereon, and has done so with a view of keeping the charge constituted by section 257 of that Act alive for his own benefit, is entitled under section 11 of the Settled Land Act, 1890, to raise the money necessary for discharging such incumbrance and the costs thereof by mortgage of the settled land or any part thereof. *Smith's Settled Estates, In re*, 70 L. J. Ch. 273; [1901] 1 Ch. 689—Buckley, J.

11. CAPITAL MONEYS.

(a) Generally.

Redemption of Improvement Rentcharges—Money Paid by Tenant for Life for Reduction of Interest.—The Settled Land Act, 1887, s. 1, does not entitle a tenant for life to be repaid out of capital moneys a lump sum paid by him in obtaining a reduction of interest on terminable rentcharges created under the Improvement of Land Act, 1864. *Verney's Settled Estates, In re*, 67 L. J. Ch. 243; [1898] 1 Ch. 508; 78 L. T. 191; 46 W. R. 348—Kekewich, J.

Where an improvement rentcharge has been duly created under the Improvement of Land Act, 1864, for an improvement described by that Act in terms substantially identical with those used in section 25 of the Settled Land Act, 1882, the Court will without further enquiry treat the improvement as of a kind authorised by the Act of 1882, for the purpose of allowing redemption of the rentcharge out of capital money, under the Settled Land Act, 1887, s. 1. *Ib.*

Improvements—Fencing—Re-roofing.—The re-roofing of farm buildings with galvanised iron in place of thatch is an improvement authorised by the Settled Land Act, 1882, s. 25, sub-s. (xx). *Ib.*

Quære, whether the making of new fences, partly in place of old ones rotten through age, partly in order to divide a park for grazing purposes, is an improvement authorised by section 25, sub-s. (vi.). *Ib.*

(b) Investment.

Personal Settlement—Power to Purchase Land—Trust for Re-sale and Re-investment—"Money liable to be laid out in the purchase of land."—Money in the hands of trustees of a personal settlement, whereby the proceeds of sale of land are settled, with power to lay out the trust funds in the purchase of land to be made subject to the settlement, may be applied as capital money under section 33 of the Settled Land Act, 1882, such money being "liable to be laid out in the purchase of land" within the meaning of that section, which is not confined to money that must necessarily be so laid out. *Soltan's Settled Estates, In re*, 68 L. J. Ch. 39; [1898] 2 Ch. 620; 79 L. T. 335—North, J.

Selection by Tenant for Life—Fiduciary Posi-

tion—Improper Investment—Interference by Court—Bona Fides.]—In the selection of investments for capital moneys under the Settled Land Acts, the tenant for life is in the position of an ordinary trustee who has a discretionary power, and it is not enough for the selected investment merely to fall within the description of investments authorised by those Acts, it must in other respects also be a proper and suitable investment, and one which a trustee would be justified in accepting. *Hunt's Settled Estates, In re*; *Bulteel v. Lawdeshayne*, 74 L. J. Ch. 759; [1905] 2 Ch. 418; 93 L. T. 333; 54 W. R. 119—Farwell, J.

Whether the tenant for life in selecting such investments has acted *bona fide* or not, the Court will, in the interest of the remaindermen, interfere to prevent improper or unsuitable investment, and in such a case the trustees of the settlement are not bound to comply with the direction of the tenant for life, but are justified in obtaining the direction of the Court. *Ib.*

Eight leasehold houses of the artisan class, held for a term of ninety-two years unexpired, at ground rents amounting to 50l. per annum, and which were described by the surveyor employed by the trustees as "badly planned, badly built, badly drained," and as likely to be "increasingly expensive to maintain in repair and keep occupied," held not to be a proper investment for capital money. *Ib.*

—Fiduciary Position—Discretion—Improper Investment—Interference by Court—Bona Fides.]

—Decision of FARWELL, J. (74 L. J. Ch. 759; [1905] 2 Ch. 418), affirmed on the facts; COLLINS, M.R., and COZENS-HARDY, L.J., stating that they entirely agreed with FARWELL, J.'s judgment on the point of law as to the duties of a tenant for life with regard to investments of capital moneys under the Settled Land Acts. *Hunt's Settled Estates, In re*; *Bulteel v. Lawdeshayne*, 75 L. J. Ch. 496; [1906] 2 Ch. 11; 94 L. T. 747—C.A.

English Settlement—Power to Lay out Money in Purchase of Land—Land in Scotland—Power to Purchase Specified Real Estate in Scotland—Improvements on Real Estate in Scotland—Jurisdiction.]—Where there is power in an English settlement to lay out capital moneys in purchase of land, and part of the settled estate consists of land in Scotland, capital moneys arising out of the settlement can be applied to improvements of such real estate. *Gurney's Marriage Settlement, In re*; *Sullivan v. Gurney*, 76 L. J. Ch. 609; [1907] 2 Ch. 496; 97 L. T. 687—Neville, J.

Purchase of Ground-rents.]—Where trustees are empowered to invest trust funds "in or upon the purchase of freehold ground-rents, . . . such ground-rents bearing a proportion to the rack-rents at the time of purchase of not more than one-tenth, and the property from which the said ground-rents shall arise being let for a term of not less than sixty years unexpired at the time of the purchase," the trust funds may be treated as capital moneys under the Settled Land Acts. *Thomas, In re*; *Weatherall v. Thomas*, 69 L. J. Ch. 198; [1900] 1 Ch. 319; 48 W. R. 409—Byrne, J.

Direction of Tenant for Life—Mortgage—Investigation by Trustees.]—Where a tenant for life of settled land directs the trustees of the settlement, under sub-section 2 of section 22 of the Settled Land Act, 1882, to invest capital moneys arising under the Act on a particular mortgage, the trustees are not bound to do anything with reference to it unless and until they are satisfied that the direction given by the tenant for life has been given upon a proper report as to value, and a proper investigation of the title to the property proposed to be comprised in the security, and upon proper advice as to the form of the mortgage; but upon being so satisfied they are bound to comply with such direction. *Hotham, In re*; *Hotham v. Doughty*, 71 L. J. Ch. 789; [1902] 2 Ch. 575; 87 L. T. 112; 50 W. R. 692—C.A.

Choice of Brokers—Trustees.]—The trustees of settled estates are entitled to select their own brokers for the purpose of investing capital moneys in their hands applicable for investment under the Settled Land Acts, and are not bound to employ the broker selected by the tenant for life for that purpose. *Hotham, In re*; *Hotham v. Doughty* (71 L. J. Ch. 68; [1901] 2 Ch. 790), followed. *Cleveland's (Duke) Settled Estates, In re*, 71 L. J. Ch. 763; [1902] 2 Ch. 350; 86 L. T. 678; 50 W. R. 508—Joyce, J.

After a sale of settled estates a tenant for life entered into negotiations with a firm of brokers for the investment of the proceeds of sale. The trustees refused to employ the broker nominated by the tenant for life, and desired the transaction to be carried through by their bankers, who would employ their own brokers. The tenant for life then asked that the trustees might be directed to apply the capital moneys in their hands in the purchase, through the brokers nominated by the tenant for life, of such investments, authorised by the Act, as the tenant for life might direct:—*Held*, that the trustees, and not the tenant for life, were the proper persons to select and employ a broker, just as they were the proper persons to select and employ a solicitor or banker. *Ib.*

Tenant for Life and Remainderman—Capital or Income—Payment for Acceptance of Surrender of Lease.]—*See ESTATE.*

(c) *Improvements.*

Estates in England and Ireland Settled by One Settlement upon the same Trusts—Application of Proceeds of Sale of Irish Estates in Payment for Improvement of English Estates.]—The tenant for life of estates in England and Ireland which were settled by the same will and upon the same trusts, laid out considerable sums on improvements upon the estates in England in pursuance of a scheme approved of by the trustees of the settlement, and was desirous that the trustees should apply capital moneys in their hands, being the proceeds of the sale of part of the estates in Ireland, in repaying him the sums already laid out on such improvements, and in completing the improvements authorised by the scheme which was left at the chambers of the Judge. On a summons by the tenant for life against the trustees as defendants,—*Held*, that the capital moneys in

the hands of the trustees arising from the sale of part of the estates in Ireland might be applied in payment for improvements on the estates in England in accordance with the principle of *Mundy's Settled Estates, In re* ([1891] 1 Ch. 399), and similar cases. *Coote, In re; Coote v. Cadogan*, 81 L. T. 535—North, J.

Trustees—Prospective Approval.]—Trustees under the Settled Land Acts may approve of a scheme for the improvement of settled land, although they have not at the time capital moneys in their hands; and if the tenant for life provides the moneys for carrying out the improvements, the trustees, on subsequently receiving capital money, may recoup the tenant for life what he has actually spent, subject to the proper certificate or order of the Court being obtained. *Millard's Settled Estates, In re* (62 L. J. Ch. 761; [1893] 3 Ch. 116), considered. *Norfolk's (Duke) Estates, In re; Norfolk (Duke) v. Herries (Lord)*, 69 L. J. Ch. 236; [1900] 1 Ch. 461; 82 L. T. 613; 48 W. R. 328—Byrne, J.

Opinion of Court—No Capital Money Available—Jurisdiction—Improvements to House—Tenant in Occupation—Intention to Leave unless Works Executed—“Reasonably necessary or proper to enable the same to be let”—Working-class Dwellings—“The building of which in the opinion of the Court is not injurious to the estate”—Old Dwellings.]—Where a tenant for life applies for the opinion of the Court upon a question of construction whether certain works proposed to be executed on the settled land, and included in a scheme submitted to the trustees for their approval, are improvements within the meaning of the Settled Land Acts, 1882 to 1890, and does not ask the Court to approve the scheme in any way, the Court can, as a mere matter of construction, decide the questions raised, although at the time the trustees have no capital money in hand. *Calverley's Settled Estates, In re*, 73 L. J. Ch. 25; [1904] 1 Ch. 150; 89 L. T. 500; 52 W. R. 206—Farwell, J.

A tenant was induced to enter into possession of a house upon settled land by the promise of the tenant for life to execute certain works upon the premises. The works were subsequently included in a scheme submitted by the tenant for life to the trustees for their approval, with a view to the expenditure thereon being borne by capital money. The evidence showed that unless the works were executed it would not be possible to procure another tenant:—*Held*, that, upon the trustees being satisfied that unless the works were carried out the tenant would leave, the works in question would become “additions to or alterations in buildings reasonably necessary or proper to enable the same to be let,” within the meaning of section 13, sub-section (ii.) of the Settled Land Act, 1890. *Ib.*

Section 74, sub-section 1 (b) of the Housing of the Working Classes Act, 1890, amended section 25 of the Settled Land Act, 1882, by enacting that improvements on which capital money might be expended should, in addition to “cottages for labourers, farm servants, and artisans whether employed on the settled land or not” (sub-section x.), include “any dwellings

available for the working classes the building of which in the opinion of the Court is not injurious to the estate.” Upon an application by the tenant for life for the opinion of the Court whether the execution of certain necessary sanitary works to cottages occupied by members of the working classes, and already existing at the date of the amending Act, constituted a “reconstruction, enlargement, or improvement of any of those works” within the meaning of section 25, sub-section (xx.) of the Settled Land Act, 1882,—*Held*, that the limitation “the building of which in the opinion of the Court is not injurious to the estate” was only applicable where the erection of new working-class dwellings was proposed, and did not narrow the operation of sub-section (xx.) so as to exclude the works in question. *Ib.*

Section 25, sub-section (xx.) of the Settled Land Act, 1882, as above amended, does not apply to dwellings which, although capable of being adapted for, are not actually occupied by, members of the working classes. *Ib.*

Order of Court—Discretion.]—Where an application is made to the Court for an order under section 26 of the Settled Land Act, 1882, directing or authorising trustees to apply a specified portion of capital moneys in or towards payment for an improvement authorised by the Act, the Court must be satisfied by evidence that the proposed expenditure is proper and provident. The Court, in exercising the power conferred by section 26 of the Settled Land Act, 1882, does not act merely ministerially. *Keck's Settlement, In re*, 73 L. J. Ch. 262; [1904] 2 Ch. 22; 90 L. T. 113; 52 W. R. 362; 20 T. L. R. 156—Farwell, J.

Undertaking to Expend in Permanent Improvements—Small Sum in Court.]—A sum of 76l. lodged in Court as the purchase-money of lands taken under the Labourers (Ireland) Acts was ordered to be paid out to a tenant for life, after advertisements, on his undertaking to expend it in permanent improvements as if it was capital money under the Settled Land Acts. *Coleraine Rural Council, In re; Lyle, ex parte*, [1903] 1 Ir. R. 445—M.R.

A sum of 47l., lodged in Court as the purchase money of lands taken under the Labourers (Ireland) Acts, was ordered to be paid out to a tenant for life without requiring advertisements, on his undertaking to expend it in making an avenue to the mansion-house on the settled lands. *Coleraine Rural Council, In re; Givcen, ex parte*, [1903] 1 Ir. R. 447—M.R.

Scheme for the Execution of Improvements—Discretion of Trustees.]—Where under section 26 of the Settled Land Act, 1882, a tenant for life is desirous that capital money arising under that Act shall be applied towards payment for an improvement authorised by that Act, and submits a scheme for the execution of the improvement to the trustees of the settlement for approval, the discretion of the trustees is limited to considering—first, whether the scheme is for the benefit of settled land; secondly, whether the scheme for the execution of the improvement is a proper scheme; and thirdly, whether in proposing the scheme the tenant for life is acting within the restrictions imposed upon him

by section 53. The trustees are not bound to take into consideration the number of previous schemes and the amount of capital moneys already expended; nor the general connection between the proposed improvements with improvements already sanctioned or the general policy of the tenant for life in improving the property; nor the proportion between the probable cost of the proposed improvements and the probable increased annual value of the estate; nor the amount of capital moneys in their hands and the relation between such amount and the value of the estate. *Egmont's (Earl) Settled Estates, In re; Lefroy v. Egmont (Earl)*, 75 L. J. Ch. 649; [1906] 2 Ch. 151; 95 L. T. 187; 54 W. R. 504; 22 T. L. R. 430—Warrington, J.

Agreement to Advance Money for—Assignment of Provisional Order for Creation of Rentcharge—Action for Breach of Contract to Pay Instalments of Loan.]—A Land Improvement Society (only incorporated for making advances) agreed to advance to the owner of an estate 4,000*l.* for improvements on his lands on condition of having assigned to them a provisional order from the Board of Works, under the Act of 1864, sanctioning the proposed expenditure for improvements, and subject to the requirements of the Act, creating a rentcharge on the estate. The Board of Works sanctioned the loan, and the owner assigned the provisional order to the society which advanced 1,500*l.* on account of the loan by the specified instalments, but refused to make any further advances:—*Held*, that the owner was entitled to specific performance of his contract with the society, the transaction being in substance a purchase by the society of a rentcharge to be created in part by means of the purchase-money to be paid for it. *Gorringe v. Land Improvement Society*, [1899] 1 Ir. R. 142—M.R.

Developing Settled Land as Building Estate—Rebuilding Principal Mansion-house—Salvage—Dry-rot.]—Where a large sum has been expended by the tenant for life of settled estates upon the rebuilding and reconstruction of the principal mansion-house, owing to its threatened destruction by dry-rot, the Court will sanction the repayment to the tenant for life by the trustees, out of capital moneys in their hands, of a sum equal to one-half of the rental of the settled estate, pursuant to section 13, sub-section (iv.) of the Settled Land Act, 1890, but will decline to allow the repayment of any additional sum by way of salvage. *Legh's Settled Estates, In re*, 71 L. J. Ch. 668; [1902] 2 Ch. 274; 86 L. T. 884; 50 W. R. 570; 66 J. P. 600—Kekewich, J.

The Court will also sanction the payment by the trustees of the settlement of the instalments paid or payable to a corporation in respect of the expenses of making new streets on part of the settled land, but to the extent of capital only, not of interest. *Ib.*

Drainage.]—The Court sanctioned the payment out of capital moneys of the cost of new drains and of modernising leasehold houses with a view to enable the same to be more readily let, but refused to allow payment out of capital for repairs which were not structural or in the nature of a rebuilding. *Thomas,*

In re; Weatherall v. Thomas, 69 L. J. Ch. 198; [1900] 1 Ch. 319; 48 W. R. 409—Byrne, J.

Hot-water Supply.]—A was tenant for life under a will of house property, with remainder to B in fee. One of the houses having become vacant, A, in order to let it, but without consulting B, employed a contractor to put in a bath and hot-water supply and a new system of drainage, with the result that the house was let at a higher rent. A died shortly afterwards. The contractor, who had taken out administration to A as a creditor, sought to have the cost of the works charged on the inheritance as being "improvements" authorised by the Settled Land Acts. There was no capital money arising under the Acts:—*Held*, first, assuming the works were "improvements" authorised by the Acts, that there was no power under the Acts to charge the cost of executing them on the inheritance; secondly, that the new system of drainage was an "alteration in buildings reasonably necessary or proper to enable the same to be let" within section 13 (ii.) of the Act of 1890. *Semble*, that the bath and hot-water supply were also within the same sub-section. *Standing v. Gray*, [1903] 1 Ir. R. 49—M.R.

Electric-Light Installation.]—The installation of a system of electric lighting into tenantless houses situated in a fashionable neighbourhood and having nothing but a worn-out and ineffective gas service, with a view to rendering them more attractive to responsible tenants, is an "addition to the building" within the meaning of section 13, sub-section (ii.) of the Settled Land Act, 1890, and the cost of such an installation may be paid out of capital moneys in the hands of the trustees. *Freake's Settlement, In re; Kinnaird (Lord) v. Freake*, 71 L. J. Ch. 20; [1902] 1 Ch. 97; 85 L. T. 454; 50 W. R. 237—Joyce, J.

— "Additions" with a View of Letting.]—The installation of a system of electric lighting in a house is not an "addition" to the building within the meaning of section 13, sub-section (ii.) of the Settled Land Act, 1890, and the cost thereof cannot therefore be paid out of capital moneys in the hands of the trustees. *Clarke's Settlement, In re*, 71 L. J. Ch. 593; [1902] 2 Ch. 327; 86 L. T. 653; 50 W. R. 585—Buckley, J.

An "addition" to come within the sub-section must be a structural addition. *Gaskell's Settled Estates, In re* (63 L. J. Ch. 243; [1894] 1 Ch. 485), followed. *Freake's Settlement, In re; Kinnaird (Lord) v. Freake* (71 L. J. Ch. 20; [1902] 1 Ch. 97), not followed. *Ib.*

— — — Installation at Mansion-house.]—An "addition" to a building in sub-section ii. of section 13 of the Settled Land Act, 1890, means something in the nature of a building, a structural addition. The installation of a system of electric lighting in a house is not, though ornamental fittings be excluded, an addition to a house within the meaning of the sub-section, and the cost of it cannot be paid out of capital moneys in the hands of the trustees of the settlement. *Gaskell's Settled Estates, In re* (63 L. J. Ch. 243; [1894] 1 Ch. 485), and *Clarke's Settlement, In re* (71 L. J. Ch. 593; [1902] 2 Ch. 327), approved. *Blaggrave's Settled Estates,*

In re, 72 L. J. Ch. 317; [1903] 1 Ch. 560; 88 L. T. 258; 51 W. R. 437—C.A.

Quere, per ROMER, L.J., and COZENS-HARDY, L.J., whether a dynamo-house erected at a little distance from the mansion-house for the purpose of the supply of electric light in the mansion-house could be called an "addition" to it within sub-section ii. of section 13. *Ib.*

— **Engine-house — Electric Lighting of Mansion-house — Drainage — Baths and Lavatories.**—An engine-house for engines to supply electric light to the principal mansion-house is not an improvement which is authorised by section 25 (xii.) of the Settled Land Act, 1882, and the cost of which can be paid for out of capital money. Mere improvements in sanitary arrangements for the more convenient occupation of the mansion-house are not within section 25. But where the system of drainage is imperfect from beginning to end, a new and complete system not confined to mere matters of convenience ought to be allowed. *Leconfield's (Lord) Settled Estates, In re*, 76 L. J. Ch. 562; [1907] 2 Ch. 340; 97 L. T. 163; 23 T. L. R. 573—Kekewich, J.

— **"Enfranchisement" — Mortgage of Settled Land—Infant.**—The purchase by the trustees of settled property of a freehold reversion of leaseholds comes within the meaning of the word "enfranchisement" in section 18 of the Settled Land Act, 1882, and the raising of money upon mortgage of the settled property in order to make such purchase may be authorised. *Bruce, In re; Halsey v. Bruce*, 74 L. J. Ch. 578; [1905] 2 Ch. 372; 93 L. T. 119; 54 W. R. 60—Kekewich, J.

Expenditure out of Capital—Hydrants and Hose for Extinguishing Fire—Garden Walls—"Reconstruction"—Laundry.—Hydrants and hose to extinguish fire at the principal mansion-house are an improvement within sub-section xiii. of section 25 of the Settled Land Act, 1882. Garden walls inclosing new garden ground are an improvement within sub-section vi. New garden walls replacing old walls are a "reconstruction," and are therefore within sub-section xx. A laundry 250 yards from the mansion-house is not part of the mansion-house, and cannot therefore be rebuilt under the Settled Land Act, 1890, s. 13, sub-s. iv. *Dunraven's (Earl) Settled Estates, In re*, 76 L. J. Ch. 591; [1907] 2 Ch. 417; 97 L. T. 336; 23 T. L. R. 691—Kekewich, J.

Mansion-house—Rebuilding—Limit of Amount—New Water-supply—"Annual rental of the settled land."—Whether proposed structural work is a "rebuilding" of a mansion-house within section 13, sub-section iv. of the Settled Land Act, 1890, or merely an addition to or alteration in the house within section 13, sub-section ii., is a question of fact in each case. In order to ascertain the "annual rental" of the settled land within the meaning of section 13, sub-section iv.—which limits the sum to be applied in rebuilding the mansion-house to one-half of the annual rental of the settled land—the cost of repairs ought not to be taken into account. Capital moneys may be applied for the purpose of obtaining a new water-supply to a mansion-house. *Kensington Settled Estates, In re*, 21 T. L. R. 351—Swinfen Eady, J.

— **New Drainage and Water System.**—Certain structural works executed in the principal mansion-house held to be a "rebuilding" of the house within the meaning of section 13 (iv.) of the Settled Land Act, 1890; and a new drainage system and new water supply to the house and other works were sanctioned as improvements under the Settled Land Acts. *Dunham Massey Settled Estates, In re*, 22 T. L. R. 595—Kekewich, J.

— **"Additions to or alterations in buildings" — Detached Vinery and Peach-house—Rebuilding on Same Site.**—Upon the negotiation for an occupation lease of the principal mansion-house upon settled land, the intending tenant agreed to take the lease on condition that the dilapidated lean-to vinery and peach-house, situated near the kitchen garden and five hundred feet away from the mansion-house, were rebuilt. The tenant for life accordingly pulled them down and removed them and built an entirely new vinery and peach-house on the same sites. Upon the application of the tenant for life under section 13, sub-section (ii.), and section 15 of the Settled Land Act, 1890, to have this expenditure recouped out of capital moneys,—*Held*, that the removal of an old building and the erection of a new one in its place was not an improvement authorised by the words of section 13, sub-section (ii.)—namely, "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." *Leveson-Gower's Settled Estate, In re*, 74 L. J. Ch. 540; [1905] 2 Ch. 95; 92 L. T. 836; 53 W. R. 524—Swinfen Eady, J.

— **Short Occupation Lease—House Agent's Commission—Incidence.**—The commission payable to house agents for procuring a tenant for the principal mansion-house, on a short occupation lease granted by the tenant for life under his Settled Land Act powers, is not such an expense as ought to be paid out of capital moneys. *Ib.*

— **Structural Alterations—Rebuilding.**—It was proposed to pull down a substantial portion of the mansion-house, consisting of some old and inconvenient rooms, and upon the site thereof to build other rooms; and, so far as they were available for the purpose, to use the old walls, both internal and external:—*Held*, that this would not be a "rebuilding" within the meaning of section 13 (iv.) of the Settled Land Act, 1890. *Wright's Settled Estates, In re*, 83 L. T. 159—Farwell, J.

— **"Mill"—What included—Agricultural Purposes.**—The words "other mills" in section 25, sub-section (xii.) of the Settled Land Act, 1882, mean mills for the purpose of developing the agricultural produce of the settled land, and do not include a silk and cotton mill. *Harrington's (Earl) Settled Estates, In re*, 75 L. J. Ch. 460; 94 L. T. 623—C.A.

— **Addition to Shafting.**—The lengthening of a shaft in a silk and cotton mill to enable it to be driven by steam as well as by water power is not an "addition to or alteration in" a building within section 13, sub-section (ii.) of the Settled Land Act, 1890. *Ib.*

Repairs Executed under Sanitary Notices—

Payment out of Capital or Income.]—Testator possessed of leaseholds for the unexpired residues of long terms bequeathed them to trustees upon trust out of the rents and profits thereof to pay the rents reserved by the leases and perform and observe the covenants and conditions in the leases, and subject thereto to hold the premises upon trust for the tenant for life, with remainders over. Sanitary notices were served requiring repairs or improvements of drainage, and, without any scheme having been submitted for approval, 415*l.* was expended for this purpose. Each lease contained a covenant which would oblige the lessee to do all the works which had been done:—*Held*, that the 415*l.* was payable out of income and not capital on the ground—first, that the tenant for life was tenant for life not of the rents of the leaseholds, but only of the balance of such rents after payment (*inter alia*) of the 415*l.*; and secondly, that the improvements having been executed without any scheme having been submitted, the case fell within section 15 of the Settled Land Act, 1890, under which the Court had a discretion, which it would exercise by directing the expenses to be paid in accordance with the settlor's directions contained in his will. *Clarke v. Thornton* (56 L. J. Ch. 302; 35 Ch. D. 307) distinguished. *Partington, In re*; *Reigh v. Kane*, 71 L. J. Ch. 472; [1902] 1 Ch. 711; 86 L. T. 194; 50 W. R. 388—Buckley, J.

Sanitary Works—Capital or Income—Permanent Improvements.]—Notice was served under the Public Health (London) Act, 1891, upon the trustees of certain settled property as the owners of the premises to do certain sanitary works upon the premises. The plaintiffs, who were the assignees of the life interest of the equitable tenant for life, agreed with the trustees that they would themselves do the work without prejudice to the question who was liable to pay for it, and they carried out the works, and spent in so doing 255*l.* 19*s.* 10*d.*:—*Held*, that, having regard to the arrangement that had been come to, the plaintiffs were in the circumstances of the case entitled to be subrogated to the rights of the trustees, and to have a declaration of charge on the *corpus* of the estate for so much of the money expended by them as had been spent upon permanent improvements, and for the costs of the application and of the appeal. *Farnham's Trusts, In re*; *Law Union and Crown Insurance Co. v. Hartopp*, 73 L. J. Ch. 667; [1904] 2 Ch. 561; 91 L. T. 780; 2 L. G. R. 1050—C.A. Reversing, 52 W. R. 535—Kekewich, J.

Semble, in determining how the expenses of repairs of this kind ought to be borne as between the tenant for life and the remainderman, the Court is not bound by any hard-and-fast rule, but has a discretion, and can enquire into the nature of the repairs and the circumstances of the case. *Ib.*

Re-flooring.]—By section 13, sub-section (ii.) of the Settled Land Act, 1890, improvements authorised by the Settled Land Act, 1882, include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let":—*Held*, that the words "reasonably necessary or proper" refer to something which, although not absolutely necessary, is a thing which a reasonable

and prudent owner of a house would, if he were absolute owner, do to enable the house to be let. *Held* also, that the section contemplates not necessarily an intention to let immediately but a present intention to let either at the present or a future time, as distinguished from an intention to occupy. *Stanford, In re*; *Stanford v. Roberts*, 70 L. J. Ch. 203; [1901] 1 Ch. 440; 83 L. T. 756; 49 W. R. 315—Buckley, J.

Observations of CHITTY, J., in *De Teissier, In re*; *De Teissier v. De Teissier* (62 L. J. Ch. 552; [1893] 1 Ch. 153), as to the necessity of there being a present intention to let before an application under section 13, sub-section (ii.), could properly be made, explained. *Ib.*

On an application by a tenant for life of a building which was let out for offices that capital money might be applied in concreting and re-flooring the basement of the building, which was affected with dry rot, the Court sanctioned the application, notwithstanding that the rooms were all let, on the ground that the proposed concreting and re-flooring was an alteration which was necessary to make the building habitable, and was one which a reasonable and prudent owner would make if he were absolutely entitled to the property. *Ib.*

12. MINERALS.

Mining Leases—Rent in Kind—Rent Varying with Selling Price of Minerals—Concurrent Powers of Leasing—Conflict—Successive Tenants for Life—Alienation of Life Interest.]—Where under a settlement a power to grant mining leases authorises the reservation of a rent in kind, a rent varying with the selling prices of the minerals gotten may be reserved under such power, for the latter reservation, equally with the former, involves a variation in value, and has the additional advantage of being the more convenient of the two methods. *Lonsdale (Earl) v. Crawford*, 69 L. J. Ch. 686; [1900] 2 Ch. 687; 83 L. T. 312—Farwell, J.

The provisions of sub-section 2 of section 56 of the Settled Land Act, 1882, are provisions connected with the execution of any power under the Act—*e.g.* the consent of a third person—and not with the results of such execution, and therefore where a tenant for life has a power of leasing under the settlement and also under the Act, and exercises the former and more advantageous power, the provisions of the Act will not override the provisions of the settlement under which the donee derives a greater benefit from the execution of the power than he would have done if he had exercised the power conferred upon him as tenant for life under the Settled Land Act. *Ib.*

When such a tenant for life grants the leases "in exercise of every power or authority enabling him," he will, in the absence of any contrary intention, be presumed to have exercised the power earlier in time and more favourable to himself. *Ib.*

A power of leasing conferred by the settlement on each of several successive tenants for life "as and when he shall be entitled to the

possession or the receipt of the rents and profits," is referable to the falling into possession of the several life interests, and not to the unincumbered beneficial enjoyment thereof, and is exercisable by the donee notwithstanding that he has aliened his life interest. *Ib.* And see *Aldam's Settlement, In re*, 71 L. J. Ch. 552; [1902] 2 Ch. 46; 86 L. T. 510; 50 W. R. 500—C.A.

Tenant for Life—Not Expressly Unimpeachable for Waste—Implied Authority to Commit—Open Mines—Mineral Lease—Portion of Rent to be Set Aside.—A tenant for life entitled to work mines may be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arise from the terms of the settlement or from the circumstance that the mines are open. *Chaytor's Settlement, In re*, 69 L. J. Ch. 837; [1900] 2 Ch. 804; 49 W. R. 125—Stirling, J.

Where, therefore, a tenant for life, who is not expressly declared by the settlement under which he claims to be unimpeachable for waste in respect of minerals, grants a mining lease of open mines, he is only bound to set aside one-fourth part of the rent as capital money under section 11 of the Settled Land Act, 1882. *Ib.*

Open or Unopen—Tenant for Life—Lease—Lands Separated by Strip Belonging to Another Owner.—The statement of the law in *Elias v. Snowdon Slate Quarries Co.* (48 L. J. Ch. 811; 4 App. Cas. 454) to the effect that when a mine is once open, the sinking a new pit on the same vein is not necessarily the opening of a new mine, is inapplicable to a case where two portions of a settled estate are separated from each other by a strip of land belonging to a different owner, although one continuous seam of coal runs under the whole. If, therefore, the seam of coal has been worked under one portion of the settled estate in the lifetime of the settlor, but not under the other, the unworked portion cannot be held an "open mine," even when the tenant for life has acquired the coal under the intervening strip. The Court, in sanctioning a lease of the unworked portion, will consequently direct that three-fourths of the rent must be set aside and invested, according to section 4, sub-section iii. of the Settled Estates Act, 1877. *Maynard's Settled Estate, In re*, 68 L. J. Ch. 609; [1899] 2 Ch. 847; 81 L. T. 163; 48 W. R. 60; 63 J. P. 552—Kekewich, J.

13. HEIRLOOMS.

Family Portrait—Sale by Tenant for Life in Impediment Position through no Fault of his Own—Opposition by Remainderman—Discretion of Court.—A nobleman, tenant for life of settled estates to which but for a settlement, to which he had himself been a party, he would have been entitled as tenant in tail, was through no fault of his own in an impediment position and unable to marry. The sale of certain heirlooms, including family portraits, some of historical interest, would put him in a better pecuniary position, and he applied under the Settled Land Act, 1882, for leave to sell the same. A remainderman, who was older than the tenant for life, but who would succeed him

as tenant for life in the event of his not having male issue, opposed the sale of any family portraits or any portraits of persons connected with the family:—*Held*, under the circumstances of the case, that the Court ought to allow the sale of all the heirlooms, including the portraits. • *Townshend's Settlement, In re*, 89 L. T. 691—Farwell, J.

Unique Family Jewel—"Hope" Diamond—Opposition of Remaindermen—Discretion of Court.—When a tenant for life applies to the Court under section 37 of the Settled Land Act, 1882, for leave to sell heirlooms, he must show some reason why the Court should sanction the sale. The fact that he has involved himself in pecuniary difficulties is not a circumstance which ought to have weight in deciding in favour of a sale. *Hope's Settlement, In re* (9 Times L. R. 506), approved. *Hope's Settled Estates, In re*; *De Cetto v. Hope*, 68 L. J. Ch. 625; [1899] 2 Ch. 679; 81 L. T. 141; 47 W. R. 641—C.A.

In considering whether its sanction should be given to a sale of heirlooms the Court ought to look at all the circumstances—the settlement, the intention of the settlor, and the wishes and interests of the family—and consider whether it would be for the benefit of the estate as a whole that the heirlooms should be sold. Observations of LINDLEY, L.J., in *Ailesbury (Marquis) Settled Estates, In re* (61 L. J. Ch. 116, 123; [1892] 1 Ch. 506, 536), explained. *Ib.*

Application of Proceeds of Sale of Heirlooms for Repair of Unsold Heirlooms.—A settlement made by will included several large estates, with three mansion-houses and the pictures, china, and furniture therein, which were settled as heirlooms. Two of the mansion-houses were sold under orders of Court made in pursuance of the provisions of the Settled Land Acts, and certain pictures, china, and furniture removed therefrom, for which no room could be found in the remaining mansion-house and the town house of the tenant for life for the time being, were warehoused. Of the other pictures for which room was found in the remaining mansion-house, some were in a bad state of repair, and required the expenditure of a considerable sum for their preservation. On an originating summons taken out by the tenant for life, to which the trustees of the settlement were made defendants, for authority to sell the warehoused heirlooms, and that the trustees might have liberty out of the proceeds of sale to repair the remaining heirlooms,—*Held*, that the tenant for life might sell the warehoused heirlooms, and that the trustees might, out of the proceeds of sale, spend such a sum as was necessary in repairing the remaining heirlooms, with liberty to apply in chambers as to the amount to be spent for that purpose. *Waldegrave, In re*; *Waldegrave (Earl) v. Selborne (Earl)*, 81 L. T. 632—North, J.

14. COSTS.

Proceedings for Protection of Settled Estate—Salvage—Costs of Action made a Charge on Inheritance.—An action was brought by the tenant for life and the trustees of a settled

estate to establish their right to a several fishery which formed part of the settled estate, and a decree was made, and a perpetual injunction granted with costs. The defendants being persons, these costs could not be recovered, whereupon the plaintiffs instituted a separate action to have the costs made a charge upon the inheritance, on the ground that the original action had been brought for the preservation of the fishery, and was in the nature of a salvage suit, and made defendants the next tenant for life, and the first tenant in tail in remainder. The defendants filed no defence and gave a consent for judgment:—*Held*, that the Court had jurisdiction to make the costs a charge on the inheritance, and that it was a proper case to exercise the jurisdiction. *Hamilton v. Tighe*, [1898] 1 Ir. R. 123—M.R.

15. OTHER MATTERS.

Fixtures—Right to.—*See* FIXTURES.

Infant—Maintenance of.—*See* INFANT, col. 1005.

SETTLEMENT.

1. *Validity*, 2261.
2. *Ante-nuptial*, 2262.
3. *Post-nuptial*, 2263.
4. *Voluntary*, 2264.
5. *Fraudulent*, 2265.
6. *Executory Trust*, 2265.
7. *Settlement by Infant*, 2266.
8. *Construction*, 2267.
9. *Investment*, 2272.
10. *Protector of*, 2273.
11. *Tenant for Life and Remainderman*, 2274.
12. *Tenant in Tail*, 2275.
13. *Wife's Property*, 2275.
14. *After-acquired Property*, 2277.
15. *Covenant to Pay Money*, 2283.
16. *Power of Appointment*, 2284.
17. *Power of Jointuring*, 2284.
18. *Forfeiture Clause*, 2285.
19. *Conditional Limitation*, 2285.
20. *Hotchpot Clause*, 2286.
21. *Next-of-Kin*, 2287.
22. *Assignment of Share*, 2288.
23. *Rectification*, 2288.
24. *Other Matters*, 2288.

1. VALIDITY.

Consideration—Prohibited Marriage—Deceased Wife's Sister.—By a settlement executed in contemplation of marriage between the settlor and his deceased wife's sister, the settlor gave her a life interest in property which was thereby vested in trustees. The ceremony of marriage was gone through, and after the settlor's death the trustees applied to have it

determined whether the rents of the property were payable to the beneficiary or to the settlor's representative:—*Held*, that, the consideration being illegal, the gift of the life interest failed. *Phillips v. Probyn*, 68 L. J. Ch. 401; [1899] 1 Ch. 811; 80 L. T. 513—North, J.

Ayerst v. Jenkins (42 L. J. Ch. 690; L. R. 16 Eq. 275) distinguished on the ground that the trust here was being invalidated not at the instance of a person claiming through the settlor, but on an application by trustees for the Court's direction. *Id.*

Marriage with Deceased Husband's Brother—Invalid Marriage—Limitations after "solemnisation of the intended marriage"—Construction.]

—A widow, being about to marry her deceased husband's brother, executed a settlement by which her real estate was conveyed to trustees to hold to her use in fee "until the intended marriage" and "from and after the solemnisation of the said intended marriage" upon trust for her for life with remainder in fee to her younger son. She shortly afterwards went through the form of marriage with the deceased husband's brother, and subsequently died intestate:—*Held*, that the words "solemnisation of marriage" could be construed only as meaning a valid marriage, and that extrinsic evidence was not admissible to shew that this was not the intention of the parties; and that the heir-at-law was therefore entitled to the property. *Neale v. Neale*, 79 L. T. 629—C.A.

Personal Property—Perpetuity.—*See* col. 1814.

2. ANTE-NUPTIAL.

Agreement for Settlement—"Usual" Clauses—Covenant to Settle After-acquired Property.—According to the usage of conveyancers, a covenant by an intended wife to settle her after-acquired property is not a "usual" clause in a marriage settlement. *Maddy, In re; Maddy v. Maddy*, 71 L. J. Ch. 18; [1901] 2 Ch. 820; 85 L. T. 341—Joyce, J.

Ante-nuptial Settlements—Different Dates—After-acquired Property—Covenants to Settle—Conflicting Trusts—Intention—Evidence.—It is doubtful whether the principle of *Legg v. Goldwire* (Cas. t. Talb. 20), allowing marriage articles to be altered before marriage, applies to ante-nuptial settlements only partly executory. *Cundry, In re; Mills v. Mills*, 67 L. J. Ch. 641; [1898] 2 Ch. 504; 79 L. T. 438; 47 W. R. 137—North, J.

Each of two ante-nuptial settlements, besides settling different existing property, contained a covenant to settle the wife's after-acquired property. The second settlement, which contained no reference to the first, not only differed from the first in giving the husband a life interest, but gave the wife a general power enabling her to defeat the interest of her children. On becoming entitled to some property, the wife desired to have it transferred to the trustees of the second settlement on the trusts thereof, but neither she nor her husband gave, or offered to give or furnish, any evidence as to the circumstances under or the intention with which the

second settlement was executed, and the matter was left without any explanation:—*Held*, that even assuming the settlements could, *quoad* the covenants in question, be treated as articles, which was doubtful, the Court would, in the absence of any such evidence and under the circumstances, decline as a matter of law to say that the second settlement overrode the first merely because it was later in date. *Ib.*

As to the presumable legal effect of the second settlement on the first, if no evidence had been obtainable, *quære*. *Ib.*

3. POST-NUPTIAL.

Post-nuptial—Reversionary Property of Wife to which Husband Entitled *Jure Mariti*—Ante-nuptial Parol Agreement to Settle—Recital of, in Settlement—Admissibility of Recital as Evidence—Trustee in Bankruptcy of Husband—Life Interest of Husband Determinable on Bankruptcy.]—By a post-nuptial settlement which recited an ante-nuptial parol agreement to settle, the husband covenanted that certain reversionary personal property of the wife, then an infant, to which he was entitled *jure mariti*, subject to his not dying before her without having reduced it into possession, should as soon as it became an interest in possession be settled on trust for the wife for life, with remainder, if the husband should survive her, in trust for him for life or until he should become bankrupt or alienate his interest, with remainder to the children and issue of the marriage. The husband survived the wife, and twenty-five years after the date of the settlement became bankrupt. The fund afterwards fell into possession:—*Held*, first, that, as against the trustee in bankruptcy claiming to set aside the settlement, the recital must be disregarded and the settlement treated as voluntary; but in the absence of evidence that the husband was either indebted at the date of the settlement or intended at that date to enter into a business of such a speculative nature as to be likely to result in financial embarrassment, the settlement ought not to be regarded as void *in toto* under the statute 13 Eliz. c. 5, as having been executed with intent to delay or defraud creditors. *Pearson, In re; Stephens, ex parte* (3 Ch. D. 807), dissented from. *Holland, In re; Gregg v. Holland*, 71 L. J. Ch. 518; [1902] 2 Ch. 360; 86 L. T. 542; 50 W. R. 575; 9 Manson, 259—C.A.

Held, secondly, assuming the settlement not to be fraudulent, upon the question whether it was for valuable consideration and could be enforced in equity, the recital was admissible in evidence against all persons claiming through the husband, including in this respect the trustee in bankruptcy; and the settlement taken as a whole constituted a sufficient memorandum in writing of a parol ante-nuptial contract in consideration of marriage within section 4 of the Statute of Frauds, and the contract could be enforced against the husband and his trustee in bankruptcy. *Ib.*

Per STIRLING, L.J., and COZENS-HARDY, L.J.—There might be a question whether the limitation of the husband's life interest contained in the settlement was valid against his

trustee in bankruptcy, but the decision of the Court did not affect that question. *Ib.*

4. VOLUNTARY.

Expectancy—Spes Successionis—Effect.]—A voluntary settlement of an expectancy or *spes successionis* cannot be enforced. *Meeke v. Kettlewell* (13 L. J. Ch. 28; 1 Ph. 342), followed, and treated as not affected by *Kelkewich v. Manning* (21 L. J. Ch. 577; 1 De G. M. & G. 176). *Ellenborough, In re; Torry-Law v. Burne*, 72 L. J. Ch. 218; [1903] 1 Ch. 697; 87 L. T. 714; 51 W. R. 315—Buckley, J.

Real Estate—Grant to Trustee—Refusal to Act—Disclaimer by Grantee—Revesting of Legal Estate—Validity of Settlement—Imposition of Trust.]—By a voluntary settlement of 1866, real estate was granted unto and to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, and the settlor also purported to put an end to the settlement:—*Held*, that the settlement was not thereby rendered inoperative, but that the trust was imposed on the settlor, in whom, by operation of law, the estate had revested after the creation of the trust. *Mallott v. Wilson*, 72 L. J. Ch. 664; [1903] 2 Ch. 494; 89 L. T. 522—Byrne, J.

Statement in Preston's notes to *Sheppard's Touchstone* (7th ed.), p. 285, that "from the moment there is evidence of disagreement" between the grantor and grantee, "then in construction of law the grant is void *ab initio*, as if no grant had been made," discussed and explained. *Ib.*

Mortgage of Part of Settled Property—Marshalling for Payment of Mortgage—Priority of *Cestui que Trust*.]—In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899 the mortgage was paid off, and a transfer thereof taken for the benefit of the settlor's estate:—*Held*, that the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, and the mortgage discharged out of the unsettled portion of his assets. *Ib.*

Disclaimer by Trustee—Revesting of Legal Estate—Validity of Settlement—Imposition of Trust.]—By a voluntary settlement of 1866, real estate was granted unto and to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867 the trustee executed a deed of disclaimer, and the settlor also purported to put an end to the settlement:—*Held*, that the settlement was not thereby rendered inoperative, but that the trust was imposed on the settlor, in whom, by operation of law, the estate had revested after the creation of the trust. *Mallott v. Wilson*, 72 L. J. Ch. 664; [1903] 2 Ch. 494; 89 L. T. 522—Byrne, J.

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5. FRAUDULENT.

13 Eliz. c. 5.]—In considering whether a conveyance is fraudulent and void within the statute 13 Eliz. c. 5, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was in fact executed with the intent to defeat and delay creditors. *Holland, In re; Gregg v. Holland*, 71 L. J. Ch. 518; [1902] 2 Ch. 360; 86 L. T. 542; 50 W. R. 575; 9 Manson, 259—C.A. *And see* FRAUD AND MISREPRESENTATION, col. 873.

6. EXECUTORY TRUST.

Will—Direction to Duly and Properly Settle Share of Daughter Marrying—Provision for Children of Marriage.]—A testator gave his residuary estate to trustees upon trust for his sons and daughters who should attain twenty-one in equal shares, and declared that no daughter should be entitled in any case to receive her share, but should receive the income thereof only, with power to dispose of the principal by will, if unmarried; but in the event of any daughter marrying, then the testator especially empowered his trustees to see that her share was duly and properly settled upon her by deed, so that the same should be preserved for her separate use independently of her husband:—*Held*, that the share of a daughter marrying should be settled so as to give her a life estate for her separate use without power of anticipation, with trusts in favour of the children of the marriage, and the ultimate trusts usual in a settlement of the wife's property. *Spicer, In re; Spicer v. Spicer*, 84 L. T. 195—Buckley, J.

—**Direction in—To be Settled on Each Marriage "strictly on my said daughters on their demise on their lawful issue share and share alike"—Executory Trust—Children of Marriage Attaining Twenty-one, or Daughters Marrying, only to take.]**—A testator bequeathed to each of his four unmarried daughters a sum of stock to be settled on each marriage strictly on his said daughters and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband any of his daughters might marry; and in case of any of his said daughters dying and leaving no lawful issue who should attain twenty-one or get married, then such stock to be divided, share and share alike, among the survivors of his said four daughters. By a settlement made on the marriage of a daughter it was declared

that the trustees of the will should hold the daughter's stock upon trust for her for life, and after her decease for all and every her child and children, if more than one, share and share alike. There were four children of the marriage; one of whom died in the lifetime of the father and mother under age and unmarried. The other three attained twenty-one and survived their father, but one of them died in the lifetime of their mother:—*Held*, that the trust was executory, and that the settlement should have been for the mother for life, and then for sons attaining twenty-one and daughters attaining that age or marrying, and that the fund was divisible in thirds amongst the children who attained age. *Harris v. Loftus* (No. 2), [1903] 1 Ir. R. 203—V.C.

Gift to Son—Provision that Property "in the event of marriage be put in strict settlement"—Jointure.]—A testator devised real and personal estate to his son, and directed that in the event of his son getting married this property should be put in strict settlement. The son died, leaving a widow and three infant daughters, one infant daughter having predeceased him. An action was brought to carry out the trusts of the will. A second infant daughter died before the hearing of an application for an order declaring the rights of the parties:—*Held*, that the two deceased daughters, having died before attaining age or marrying, could take no share in the property directed to be settled, and that the Court, in the exercise of its jurisdiction in carrying out the executory trust, had power to and would provide an annuity, by way of jointure for the widow, and that, subject thereto, the property should be held in trust for the two infant daughters in equal shares, as tenants in common in fee on their respectively attaining twenty-one or marrying, and that in case one only should attain that age or marry, then the whole in trust for that one. *Wright v. Wright*, [1904] 1 Ir. R. 360—M.R.

Marriage Articles—Covenant to Convey Real Estate to Use of Children of Marriage as Tenants in Common and their Respective Heirs and Assigns—Death of Son under Twenty-one—Survivorship to other Children.]—By an indenture made in consideration of his intended marriage with B., W. covenanted with a trustee that he would convey and settle certain real estate to the use of himself for life, with remainder to the use that B. should receive a jointure, with remainder to the use of the children of W. and B. in equal shares as tenants in common and their respective heirs and assigns. A son of the marriage died in the lifetime of W. under age and without having married:—*Held*, that the other children, all of whom had attained twenty-one, became entitled to the entire estate, subject to the life interest and jointure. *Herring-Cooper v. Herring-Cooper*, [1905] 1 Ir. R. 465—Barton, J.

7. SETTLEMENT BY INFANT.

Repudiation.]—By a marriage settlement made in 1891, when the intended wife was an infant, after reciting that it was agreed that a sum of 1,000*l.* to which the wife was then entitled under the will of her father, who died in 1875, should be settled, it was witnessed that the wife, with the privity and approbation of

the husband, declared that the trustees of the will, in whom the fund was then vested, should hold it on the trusts declared by the settlement. The legacy was not expressed by the will to be given to the wife for her separate use. The wife on attaining twenty-one repudiated the settlement:—*Held*, that the fund was, notwithstanding the repudiation and section 2 of the Married Women's Property Act, 1882, bound by the settlement, by virtue of section 19 of the Act. *Stevens v. Trevor Garrick* (62 L. J. Ch. 660; [1893] 2 Ch. 307) followed. *Queade's Trusts, In re* (54 L. J. Ch. 786), disapproved. *Buckland v. Buckland*, 69 L. J. Ch. 648; [1900] 2 Ch. 534; 82 L. T. 759; 48 W. R. 637—Buckley, J.

Covenant to Settle After-acquired Property—Change of Domicil—Repudiation—Reasonable Time—Conflict of Laws.—The rule that an infant's contract is voidable, but binding upon the infant unless repudiated within a reasonable time after attaining majority, does not apply where the infant after entering into the contract acquires a foreign domicile and becomes under the law of the country of domicile incapable of validly ratifying the contract made by her. *Viditz v. O'Hagan*, 69 L. J. Ch. 507; [1900] 2 Ch. 87; 82 L. T. 480; 48 W. R. 516—C.A.

An infant executed marriage articles in 1864, and married an Austrian and became domiciled Austrian. Under the law of Austria she had power to revoke but no power of irrevocably affirming any marriage contract made by her:—*Held*, that the marriage articles were rendered void by a repudiation by her which took place in 1893. *Van Grutten v. Digby* (32 L. J. Ch. 179; 31 Beav. 561) distinguished. *Ib.* And see *INFANT*, col. 1009, and cols. 2277–2283.

8. CONSTRUCTION.

Gift to A. for Life and to "children or child or remoter issue" at his Death—Substitutionary Gifts per Stirpes.—In a settlement where property is given in default of appointment to "the children or any the child or remoter issue" of A. on the happening of certain contingencies, a child living at the happening of such contingencies will take to the exclusion of his issue. *Tand's Settlement, In re*; *Stanfield v. Keene*, 89 L. T. 606—Farwell, J.

Provision for "all and every the child and children or grandchild" of a Named Person Living at the Death of the Survivor of Husband and Wife—Right of Grandchildren to Take in Competition with Children.—Under a gift to "all and every the child and children or grandchild" of a named person, where there is no context requiring the word "or" to be read "and," a grandchild (whether his parent be living or dead) cannot take in competition with a child of the named person, if there be one of that class living at the period of distribution. *Coley, In re*; *Gibson v. Gibson*, 70 L. J. Ch. 153; [1901] 1 Ch. 40; 83 L. T. 671; 49 W. R. 165—Byrne, J.

Trust for Children of Marriage—No Words of Limitation—Intention—Equitable Fee—Life Estates.—Real and personal estate were vested

in the trustees of an ante-nuptial settlement, their heirs, executors, and administrators, upon the usual trusts in favour of the intended husband and wife and the children of the marriage. The trusts of the settlement contained apt words referable to the real estate, a power of advancement in the ordinary form, and an ultimate gift over to the settlor on failure of children of the marriage, but words of limitation had been omitted from the trust for the children in default of appointment, an event which happened:—*Held*, that there was sufficient on the face of the deed to show an intention that the children should take the equitable fee-simple, and not merely life estates. *Tringham's Trusts, In re*; *Tringham v. Greenhill* (73 L. J. Ch. 693; [1904] 2 Ch. 487), followed. *Oliver's Settlement, In re*; *Evered v. Leigh*, 73 L. J. Ch. 62; [1905] 1 Ch. 191; 53 W. R. 215; 21 T. L. R. 61—Farwell, J.

"Trusts aforesaid"—Life Interest to Unmarried Niece with Reversion to Children—Power to Appoint Life Interest to Surviving Husband—Gifts Over in Default of Children—Remoteness—Independent Alternative Trusts—Validity of Ultimate Trusts.—A testatrix, after settling a sum of money upon trusts for M. (a married niece) for life with power to appoint the income to any husband who might survive her for his life, with remainder to her children, if any, at twenty-one, settled three other sums of money upon such trusts and with such powers in favour of E., B., and J. (three unmarried nieces) and their respective husbands and children, if any, as should correspond with the preceding trusts and powers in favour of M. and her husband and children, if any. And the testatrix directed that, in case none of her said nieces should have any child who should become entitled to the said principal sums under "the trusts aforesaid," then all the said principal sums should, "subject to the preceding trusts," be held in trust for a class of persons, ascertained within due limits, in such shares, &c., as the last survivor of the four nieces should by will appoint. M. died without having had a child, and E., B., and J. all died unmarried; and B., the last survivor of them, by her will executed the power in favour of the class mentioned in the ultimate trust. On the death of B., the question arose whether the ultimate trust or gift was not void for remoteness on the ground that, if the power to appoint to husbands had been exercised, the period for ascertaining the class in the ultimate gift might have infringed the rule against perpetuities because the husbands need not necessarily have been born in the lifetime of the settlor:—*Held*, that the words "the trusts aforesaid" in the ultimate gift were not restricted to the previous trusts actually declared, but would include a trust created by the exercise of the power to appoint to husband. But *held*, that it was a case of alternative independent gifts within the principle of *Monypenny v. Dering* (22 L. J. Ch. 313; 2 Do G. M. & G. 145) and *Longhead v. Phelps* (2 W. Bl. 704); and that, inasmuch as the power in favour of husbands was never exercised, the ultimate gift in the events which had happened was valid, and therefore the appointment made by B. was good. *Bowles, In re*; *Page v. Page*, 74 L. J. Ch. 338; [1905] 1 Ch. 371; 92 L. T. 556—Farwell, J.

Settled Shares—Accruer—“Survivors” read “others”—Survivorship of Estates or Interests.]—By a settlement, freehold lands were assured to trustees upon trust for the seven children of the settlor's brother-in-law during their respective lives as tenants in common, and from and after their respective deaths the share of each was to go to his or her children, sons at twenty-one, daughters at twenty-one or marriage, with a proviso that in case one or more of the seven children should die without issue or, leaving issue, such issue should being sons die under twenty-one, or being daughters should die under that age without being or having been married, then the original and accrued share of the person so dying were to go and be divided “unto and equally between the survivors and survivor of them” the seven children “and their her and his issue respectively for such estates and interests in such shares and proportions and in such manner in all respects as the original shares” of the seven children “and their issue respectively are hereinbefore directed to be divided.” Then followed an ultimate gift over in the event of the total failure of the previous trusts. One of the seven children died in 1865 leaving a son who attained twenty-one and died in 1886. Another died in 1897, having had children, some of whom were living. Upon the death without issue of another of the seven children in 1901,—*Held*, that, as the original gift in each case was to the parent for life with remainder to the children at twenty-one or marriage, without any necessity for the children to survive their parent or any one else, the vesting of the accruing shares, which were directed to devolve in the same manner as the original share, was not contingent upon the children surviving any one of the tenants for life; and, consequently, that the words “survivors and survivor” must be taken as implying a survivorship not of individuals, but of estates or interests, and must be construed as “others.” *Billham, In re; Buchanan v. Hill* (70 L. J. Ch. 518; [1901] 2 Ch. 169), distinguished. *Friend's Settlement, In re; Cole v. Allcot*, 75 L. J. Ch. 14; [1906] 1 Ch. 47; 93 L. T. 739; 54 W. R. 295—Farwell, J.

Eldest Son—Mortgage by Tenant for Life and Tenant in Tail—Child other than Son becoming Entitled to Estate under Settlement—Disentail—Portions for Younger Children—Power of Appointment—Revocation.]—By marriage settlement of 1839 an estate was settled on H. (the husband) for life, remainder to the first and every other son of the marriage successively in tail male. The estate was charged with a sum of money (subject to life interests of H. and his wife therein) in favour of the children of the marriage “other than the son of the marriage who under the limitations of the settlement should become entitled to the lands” in such shares as H. and M. (the wife) or the survivor of them should appoint, and in default of appointment in trust for such children equally, the shares to be vested at twenty-one or marriage. There was a hotchpot clause in the settlement. There were four children of the marriage—A., J., and C., sons, and one daughter. By deed-poll of 1874 (after reciting the death of C. intestate) H. and M. appointed (subject to their life interests therein) the sum of 5,000*l.*, portion of the trust fund, to the daughter, and appointed the residue of the fund

to J., the second son. The deed-poll contained a power of revocation over the share thereby appointed to J. A., the eldest son, attained age, and joined with his father in mortgaging the estate for 1,100*l.* in 1876, and for 2,000*l.* in 1880, the lands having been disentailed by them for the purpose of carrying out the two loans, and to that extent only. J., the second son, joined in the mortgage of 1880 for the purpose of covenanting with the mortgagee that the principal sum of 2,000*l.* thereby secured, and interest thereon, should be paid before and have priority over his share and interest in the trust fund charged on the estate. The father, H., covenanted that so long as any money remained due on the mortgage security he would not exercise the power of revocation contained in the deed-poll of 1874. A., the eldest son, died in 1883, intestate and unmarried. In 1884 H. and J. disentailed the estate. H. died in 1896 (having survived his wife), and thereupon J. became owner in fee of the lands subject to incumbrances. By his will H. purported to revoke the appointment contained in the deed-poll of 1874 in favour of J., of the residue of the trust fund (after setting apart 5,000*l.*, the portion for the daughter), but made no further appointment of it:—*Held*, first, that A. had become entitled to the estate under the limitations of the settlement by reason of joining with his father in charging the inheritance, and that consequently his representatives could not share in the trust fund charged on the estate in favour of the other children; secondly, that the revocation by H. in his will of the share appointed to J. by the deed-poll of 1874 was invalid so far as it would prejudice the security of the mortgagees of 1880, but was otherwise valid as between the parties entitled under the settlement of 1839 to the trust fund; and that the residue thereof (after providing for the 5,000*l.* appointed to the daughter of the marriage) went as unappointed to J., and the representatives of C., the share of J. therein being bound by his covenant in the mortgage-deed of 1880. *Rooke v. Plunkett*, [1902] 1 Ir. R. 299—M.R.

Equitable Estate—Words of Limitation—Want of Word “heirs”—Absolute Interest.]—A settlement of land upon trust for a number of persons in remainder as tenants in common without the use of the word “heirs” will confer the equitable fee where the intention to do so is sufficiently indicated on the face of the instrument. *Tringham's Trusts, In re; Tringham v. Greenhill*, 73 L. J. Ch. 693; [1904] 2 Ch. 487; 91 L. T. 370; 20 T. L. L. 657—Joyce, J.

Scoble, the Court would in such a case rectify the deed by the insertion of the word “heirs,” if necessary, in order to effectuate the obvious intention of the settlor. *Prugh v. Drew* (17 W. R. 988) followed. *Ib.*

—Omission of Word “heirs”—Absolute Interest.]—Where a settlor by deed conveys an equitable estate in fee-simple to trustees without words of limitation, in order that the equitable fee-simple may pass to them, it is necessary that the settlor should either refer to other words in that or some other deed which shew an intention that the absolute interest is to pass to them, or that he should use words which shew that the trustees

are to take all the estate and interest that the settlor had. *Irwin, In re; Irwin v. Parkes*, 73 L. J. Ch. 832; [1904] 2 Ch. 752; 53 W. R. 200—Buckley, J.

A settlor by a post-nuptial settlement assigned to trustees, without the words "and their heirs" (*inter alia*), certain freehold property to which he was entitled for an equitable estate in fee-simple, upon trust for sale and investment and to pay the income to the settlor's wife for life and then to the settlor and then for their children. The settlement contained no words referring to any gift of an absolute interest nor any words to shew that the settlor was disposing of his whole estate:—*Held*, that on the death of the settlor and his wife their children were only entitled to the property during the joint lives of the trustees and the life of the survivor. *Hudson, In re; Kühne v. Hudson* (72 L. T. 892), followed. *Ib.*

Equitable Estate in Fee—Words of Limitation.]

—By a voluntary settlement executed in 1870, lands held in fee-farm were conveyed to trustees and their heirs in trust, after the death of the settlor, to pay his wife out of the rent and profits a clear annuity of 100*l.* for her life, and to apply the balance for the maintenance of the settlor's children during their minority. In case the settlor's eldest son T. should die or marry without prescribed consent before attaining twenty-one, his share of the land was to go to the younger son G.; and it was provided that after the death of the settlor's wife, "her 100*l.* a year, or half the rents and profits of" the lands, should be paid to G. On G.'s death or marriage without consent under twenty-one, his "share and proportion of" the lands was to go to T., and if both sons died, or married without consent under twenty-one, the lands were to belong to the settlor's daughters, their heirs and assigns, as tenants in common:—*Held*, first, that G. was entitled to a rentcharge of 100*l.* a year in any event, with the superadded right of taking half the rents and profits whenever the rental exceeded 200*l.* a year; and secondly, that G. took an estate for life only in the rentcharge. *Bennett's Estate, In re*, [1898] 1 Ir. R. 185—Kennedy, J.

Power of Jointuring—Appointment of Jointure on First Marriage—Divorce—Appointment to Second Wife—Public Policy.]—By a resettlement of family estates a tenant for life was empowered "at any time or times either before or after his marriage with any woman by any deed or deeds . . . to appoint to any woman whom he may so marry for her life or for any less period any yearly rentcharge or rentcharges by way of jointure," not exceeding in the events which happened the yearly sum of 2,500*l.*, and it was declared that the power of jointuring might be exercised as often as he should marry. The tenant for life under this power appointed a yearly sum of 2,500*l.* to a lady whom he married in 1869. She obtained a divorce from him in 1883, and he married a second wife in 1888, and purported to appoint to her under the same power a yearly sum of 2,500*l.* On the death of the tenant for life the validity of the jointure of the second wife was disputed:—*Held*, that the appointment of the second jointure was authorised by the power in the resettlement, and that that power was not

invalid as being against public policy, notwithstanding that it enabled the tenant for life to appoint a jointure after a dissolution by divorce of his first marriage. *Cartwright v. Cartwright* (22 L. J. Ch. 841; 3 De G. M. & G. 982) distinguished. *Marlborough (Dowager Duchess) v. Marlborough (Duke)*, 70 L. J. Ch. 244; [1901] 1 Ch. 165; 83 L. T. 578; 49 W. R. 275—C.A.

"Income"—Outgoings—Tithe—Rentcharges—Repairs.]—The plaintiff, a married woman, was entitled, under a deed dated in 1867, to the surplus rents and profits of certain estates for her life for her separate use without power of anticipation, but subject to a proviso that if she should succeed to an income in her own right of 8,000*l.* or more per annum for her separate use, then her life interest in the estates should absolutely cease and determine, and the property should be held upon trust for her husband:—*Held*, that in estimating the income the amount coming to the married woman for her own benefit after payment of all proper charges must be ascertained as fairly as possible; that the tithes, rentcharges, and reasonable abatements of rent were properly deducted; that the occupation rent of unlet farms and the mansion-house in which the married woman lived could not be regarded as income; and the defendant had not made out that the plaintiff had succeeded to an income in her own right of 8,000*l.* or more per annum. *Bateman (Lady) v. Faber*, 83 L. T. 7; 48 W. R. 625—C.A.

Failure of Trusts—Marriage Portion—Resulting Trust.]—A father, on the marriage of his daughter C., paid over to the trustees of the settlement a sum of 800*l.* upon trust for the husband and his wife C. for their lives and the survivor for life, with remainder to the children of the marriage; and if the wife should die leaving the husband surviving, and there being no children, to pay said sum to the husband. The father also covenanted, after securing to each of his children not yet provided for a like sum of 800*l.*, to dispose of the residue of his property so that on the death of himself and his wife it should be divided equally among his surviving children, and the share of the said C. should be and enture to the like trusts, intents, and purposes as were expressed concerning the said sum of 800*l.* In the event of the husband not surviving C. and there being no issue (which happened), there was no trust expressly declared in the settlement concerning the trust property. By his will the father bequeathed the residue of his property in accordance with the terms of the covenant:—*Held*, that the 800*l.* should be regarded as a marriage portion, given by the father to his daughter C. on her marriage, as a provision for her, and that C. took both the 800*l.* and the share of her father's residue absolutely, there being a resulting trust in her favour. *Doyle v. Crean*, [1905] 1 Ir. R. 252—Barton, J.

9. INVESTMENT.

Authorised Security—Depreciation—Tenant for Life and Remainderman—Apportionment of Loss—Period of Account.]—In the case of a loss arising from the depreciation of an authorised security of trust funds, in order to apportion

the loss between the tenant for life and the remainderman, an account should be taken from the date when it is first ascertained that the security is insufficient to the time when the security was realized, the tenant for life bringing into hotchpot any sums which he has received as interest between these dates. *Phillimore, In re*; *Phillimore v. Herbert*, 72 L. J. Ch. 591; [1903] 1 Ch. 942; 88 L. T. 765—Swinfen Eady, J.

Investment on Mortgage—Insufficient Security—Tenant for Life and Remainderman.—*See* MORTGAGE, col. 1701.

10. PROTECTOR.

Owner of Prior Estate—Void Accumulation Clause—Persons Deprived of Accumulations—Heir—Disentailing Deed.—Land was devised to trustees during the lives of A, B, and C and the survivors and survivor, upon trust out of the rents and profits to pay annuities to them and accumulate the surplus till the death of the last survivor for the benefit of testator's grandchildren, and on the determination of the trustees' estate the land was devised to J. in tail, with remainders over. After twenty-one years, the trust for accumulation having become void under the Accumulations Act, 1800, the heir took the surplus rents till the death of the surviving annuitant:—*Held*, that the heir was not protector of the settlement under the Fines and Recoveries Act, 1833, because excluded by section 27 of that Act, nor could the grandchildren be considered as persons "who would have been entitled if no absolute disposition had been made" within the meaning of section 22 of that Act, because the effect of the Accumulations Act, 1800, was not to make but to avoid a disposition. Consequently there was no protector, and a disentailing deed executed by J. was effectual. *Hughes, In re*, 75 L. J. Ch. 784; [1906] 2 Ch. 642; 95 L. T. 379—Swinfen Eady, J.

Disentailing Assurance—Consent of Protector Given after Death of Tenant in Tail—Separate Assurance—Enrolment.—Where a tenant in tail effects a disentailing assurance under the provisions of the Fines and Recoveries Act, 1833, it is immaterial that the consent of the protector of the settlement be given by his execution of the same assurance after the death of the tenant in tail, provided that he gives it before the end of the six months within which the assurance must be enrolled. *Piers' Estate, In re* (14 Ir. Ch. 452), applied. *Whitmore-Searle v. Whitmore-Searle*, 76 L. J. Ch. 576; [1907] 2 Ch. 332; 97 L. T. 160—Kekewich, J.

Office of—Survivorship.—Where a settlor under section 32 of the Fines and Recoveries Act, 1833, nominates two or three persons to be protectors of an entail, the office is one which (in the absence of any expression of a contrary intention) survives on the death or retirement of any of the persons nominated. *Bell v. Holby* (42 L. J. Ch. 266; L. R. 15 Eq. 178) approved. *Bailey, Worthington & Cohen's Contract, In re*, 77 L. J. Ch. 1; [1903] 1 Ch. 26; 98 L. T. 143—C.A.

11. TENANT FOR LIFE AND REMAINDERMAN.

Several Estates—Several Charges—Interest Accrued during life Tenancy—Sale of Part of Settled Estates—Proceeds Applied in Payment off of Charges and Arrears of Interest—Liability to make good Arrears out of Subsequent Income.—Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent of and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing during the same life tenancy—*Revel v. Watkinson* (1 Ves. sen. 93), *Tracy v. Hereford (Lady)* (2 Bro. C.C. 128), and *Caulfield v. Maguire* (2 Jo. & Lat. 141). *Honywood v. Honwood*, 71 L. J. Ch. 174; [1902] 1 Ch. 347; 86 L. T. 214—Byrne, J.

Where several estates are included in the same settlement, the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates—*Freuen v. Law Life Assurance Society* (65 L. J. Ch. 787; [1896] 2 Ch. 511) and *Hotchkys, In re*; *Freke v. Calmady* (55 L. J. Ch. 546; 32 Ch. D. 408). *Ib.*

Upon principle the tenant for life of several estates included in the same demise remains liable as between himself and the remaindermen to make good arrears of interest accrued during his life tenancy and paid out of capital out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of a part of the property. *Tewart v. Lawson* (43 L. J. Ch. 673; L. R. 18 Eq. 490), *Norton v. Johnstone* (55 L. J. Ch. 222; 30 Ch. D. 649), and *Green, In re*; *Baldock v. Green* (58 L. J. Ch. 157; 40 Ch. D. 610), distinguished. *Ib.*

Railway Bonds—Cumulative Interest—Payment out of Net Earnings of any Year Remaining Available—Deficiency of Earnings—Arrears of Interest—Sale of Bonds—Apportionment of Proceeds as between Capital and Income.—Bonds of a company were settled on trust for one for life, with remainders over. They contained a proviso for payment of interest "accumulative" at a rate per cent. twice in each year "as and when earned out of any net earnings of any year remaining after" certain other payments, "and if in any year the net earnings so remaining available . . . shall not be sufficient to pay such interest in full . . . any deficiency shall . . . be paid . . . out of the net earnings of any subsequent year or years as and when there shall be any net earnings available for such purpose." Coupons attached stated interest to be payable "only as and when earned out of any net earnings available." There were never sufficient earnings to pay the interest in full. The bonds were sold in the lifetime of the tenant for life for a sum not sufficient to pay both principal and arrears of interest:—*Held*, as between tenant for life and remainderman, that the sum was not apportionable between capital and income, but

must be treated wholly as capital. *Taylor, In re*; *Matheson v. Taylor*, 74 L. J. Ch. 419; [1905] 1 Ch. 734; 92 L. T. 558; 53 W. R. 441—Buckley, J.

Apportionment of Trust Fund—Tenant for Life—Remaindermen—Mortgage—Arrears of Interest—Sale—Deficient Security—Interest and Capital.]—Trust funds vested in the trustees of a marriage settlement included a mortgage of leasehold property. The mortgage interest fell much into arrear, and finally the security was sold at a considerable loss:—*Held*, that the amount recovered must be apportioned between capital and income, represented by the remaindermen and the tenant for life, in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal; as between successive tenants for life, the amount attributed to interest being apportioned in proportion to the arrears due to them respectively. *So held*, following *Moore, In re* (54 L. J. Ch. 432), and *Lyon v. Mitchell* (34 L. J. N.C. 135; W. N. (1899), 27). *Alston, In re*; *Alston v. Houston*, 70 L. J. Ch. 869; [1901] 2 Ch. 534—Kekewich, J.

— **Reversionary Fund.]**—The rule in *Howe v. Dartmouth (Earl)* (7 Ves. 137), and the corollary established in *Chesterfield's (Earl) Trusts, In re* (52 L. J. Ch. 958; 24 Ch. D. 643), respecting the apportionment between tenant for life and those absolutely entitled in remainder of a reversionary fund which falls into possession, has no application where the fund is subject to the trusts of a marriage settlement. *Van Straubenzee, In re*; *Boustead v. Cooper*, 70 L. J. Ch. 825; [1901] 2 Ch. 779; 85 L. T. 541—Cozens-Hardy, J. *And see* ESTATE, col. 795, and TENANT FOR LIFE AND REMAINDERMAN.

12. TENANT IN TAIL.

Mortgage by—Proviso for Re-conveyance on Redemption to Uses of Original Settlement—Absolute Bar of Estate Tail.]—Under a settlement of real estates made in 1831, A, in 1884, was tenant for life in possession, B first tenant in tail, and C second tenant in tail in reversion. B being a lunatic, C, with the consent of A, disentailed his interest and re-settled the estates, with a power to charge the same, which was exercised. In 1893 B, who was then tenant in tail in possession, acting by C as his committee, mortgaged the estates with a proviso that on redemption they should be "reconveyed by the mortgagees to the uses, upon the trusts and with and subject to the powers and provisions in and by the settlement (of 1831) declared and contained":—*Held*, that, notwithstanding that the estate tail was barred by virtue of section 21 of the Fines and Recoveries Act, 1833, the proviso for redemption in the mortgage of 1893 was valid and operative, so that the uses created by the settlement of 1831 were revived subject to the re-settlement of 1884. *Oxenden's Settled Estates, In re*; *Oxenden v. Chapman*, 74 L. J. Ch. 234—Kekewich, J. *And see* col. 798 and TENANT FOR LIFE AND REMAINDERMAN.

13. WIFE'S PROPERTY.

Ultimate Trust for Wife's Next-of-Kin—"Die without having been married"—Infant Child.]

By a marriage settlement a sum of money to which the wife was entitled on the death of her mother was settled upon trust to pay the income to the husband for life, then to the wife for life, and after the death of the survivor in trust for the children and remoter issue as the husband and wife or the survivor should appoint, and in default of appointment to the children equally, if sons on attaining twenty-one, or if daughters on attaining that age or marrying. In default of issue attaining vested interests, the fund was to be held in trust for the wife absolutely if she survived her husband, but if she predeceased him, then upon such trusts as she should by will appoint, and in default of appointment in trust for the person or persons who, under the statutes for the distribution of the effects of intestates, would on the decease of the said wife have been entitled thereto, if she had died possessed thereof intestate and without having been married. There were three children of the marriage, all of whom died under age and unmarried. No appointment was made by husband or wife. The wife predeceased her husband, leaving him and two of the three children surviving, and her only next-of-kin other than the children being her mother and two brothers. The husband survived his wife's mother and his two children, and married again. By his will he left all his property to his second wife, and appointed her executrix. On his death the fund became distributable:—*Held*, that the fund went to the persons who would have been entitled thereto if the first wife had died a spinster, and not to her infant children. *Stoddart v. Saville* (63 L. J. Ch. 467; [1894] 1 Ch. 480) distinguished. *Deane's Trusts, In re*; *Dudley v. Deane*, [1900] 1 Ir. R. 332—M.R.

— **"Die unmarried"—Widow's Settlement.]**

—By a settlement executed prior to the second marriage of M. (then a widow) a fund, which was her property, was assigned to trustees in trust for herself for life for her separate use with power of appointment after her death. In default of appointment the income was to be paid to W. (the intended husband) for life, and after his death the principal was to go to such child or children of M. by W., or by her former husband, in equal shares, as should be living at the death of W. In case there should be no child or other issue of M. entitled under the previous provisions of the settlement, there was an ultimate trust in favour of "such person or persons as would, under the Statute of Distributions, be entitled to the personal estate of M. in case she had died intestate and unmarried." M. did not exercise the power given her by the settlement. She had no child by W. She had one son by her first marriage, who survived her, but died before W., without leaving issue:—*Held*, that "unmarried" in the ultimate trust of the settlement meant "discovered at the time of death," and that consequently the representatives of the deceased son of the first marriage were entitled to the fund. *Woodhouse's Trusts, In re*, [1903] 1 Ir. R. 126—M.R.

Children Dying before taking Vested Interests

—**Ultimate Trust—"Die without ever having been married"—Absence of Context.]**—By a marriage settlement a wife's trust funds were, in the event of her death in her husband's life-

time and in default of children living to attain a vested interest therein under the previous trusts, directed to be held upon trust for such person or persons of the blood and kindred of the wife as under the Statutes for the Distribution of the Estates of Intestates would have been the next-of-kin of the wife in case she had died intestate and without ever having been married. The wife died in her husband's lifetime. None of the children of the marriage lived to attain a vested interest, but some of them survived their mother:—*Held*, that the words of the ultimate trust were clear and unambiguous, that they must therefore be construed according to their ordinary and natural meaning, and that the children were accordingly excluded. *Smith, In re; Wilkins v. Smith*, 72 L. J. Ch. 184; [1903] 1 Ch. 373; 87 L. T. 740; 51 W. R. 217—Swinfen Eady, J.

Wilson v. Atkinson (33 L. J. Ch. 576; 4 De G. J. & S. 455) was a decision upon the context of a particular instrument, and does not lay down any general rule for the construction of all marriage settlements, irrespective of the nature of the provisions in them. *Ib.*

Conveyance by Wife of all her Property Acquired during Marriage—Policy of Insurance taken out by Intended Husband, in Anticipation of Marriage, on his Life, Payable to Wife if Living.]—By ante-nuptial contract of marriage C D, the intended wife, conveyed to trustees, for the purposes specified, "all and sundry lands and heritages, goods and sums of money, and generally the whole property and estate, heritable and moveable, now belonging or which shall belong to her during the subsistence of the marriage." A B, in anticipation of his marriage with C D (which took place two days later), took out a policy of insurance on his own life, payable at his death to C D if then alive, if not, to his executors. The policy gave A B a right to change the beneficiary, but this clause was deleted after the marriage at his request. A B was under no obligation to keep up the policy. A B predeceased C D:—*Held*, that the sum due under the policy was not property which pertained or belonged to the wife during the subsistence of the marriage, and that it was therefore payable to the widow absolutely and not to the trustees under the marriage contract. *Coulton's Trustees v. Coulson*, 3 F. 1041—Ct. of Sess.

Widow's Share under Intestates' Estates Act, 1890—Marriage Settlement Executed Before Act—Provision in Bar of Share of Husband's Estate.]—A provision for a wife in a marriage settlement executed before the passing of the Intestates' Estates Act, 1890, in discharge of all claims by her on the estate and effects of her husband, bars her right to the sum of 500*l.* given by the Act to a widow out of her husband's assets in the event of his dying intestate and without issue, as well as to the share of his assets to which she is entitled under the Statute of Distributions. *Hogan, In re; Hogan v. Hogan*, [1901] 1 Ir. R. 168—M.R.

14. AFTER-ACQUIRED PROPERTY.

Covenant to Settle—Annuities.]—Where the words in a covenant to settle the after-acquired

property of a wife are wide enough to include annuities, the question whether they will be caught by the covenant depends upon whether the annuities fit the trusts which are declared, and whether their inclusion will not be inconsistent with the general intention of the parties in making the settlement. *White v. Briggs*, (22 Beav. 176*n.*) and *Townshend v. Harrowby* (27 L. J. Ch. 553; 4 Jur. (n.s.) 353) followed. *Schofield v. Spooner* (53 L. J. Ch. 777; 26 Ch. D. 94) distinguished. *Dowding's Trusts, In re; Gregory v. Dowding*, 73 L. J. Ch. 194; [1904] 1 Ch. 441; 90 L. T. 82; 52 W. R. 293—Keke-wich, J.

Income to Separate Use of Person Agreeing to Settle—Investment of Savings.]—An agreement in a marriage settlement to settle after-acquired property of the wife does not bind investments made by her with the savings of her separate income. *Finlay v. Darling* (66 L. J. Ch. 348; [1897] 1 Ch. 719) followed. *Bendy, In re; Wallis v. Bendy* (64 L. J. Ch. 170; [1895] 1 Ch. 109), not followed. *Clutterbuck's Settlement, In re; Bloxam v. Clutterbuck*, 73 L. J. Ch. 698; [1905] 1 Ch. 200; 53 W. R. 10—Buckley, J.

Exception of Business Assets—Enforcing Covenant.]—A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not too vague and uncertain to be enforced. *Lewis v. Madocks* (6 Ves. 150; 17 Ves. 48) followed. *Reis, In re; Clough, ex parte*, 73 L. J. K.B. 929; [1904] 2 K.B. 769; 91 L. T. 592; 53 W. R. 122; 11 Manson, 229; 20 T. L. R. 547—C.A. See s.c. in H.L., *sub nom. Clough v. Samuel*, BANKRUPTCY, col. 85.

Separate Legacies each below Limited Amount, but together above it—Aggregation—Deduction of Legacy Duty.]—By a marriage settlement the wife covenanted that if at any time during the continuance of the marriage she should "at one and the same time and from one and the same source" become entitled to any real or personal property of the value of 500*l.* and upwards, she would cause the same to be settled. Under two successive codicils to a will of a testatrix the wife became entitled to two legacies, each for the sum of 500*l.*, one payable out of the general estate of the testatrix and the other out of the proceeds of certain lands directed by the testatrix to be sold. The legacies were subject to duty at the rate of 10 per cent., reducing them to 450*l.* each:—*Held*, that the legacies, so far as the beneficial receipt by the legatee was concerned, were reduced to 450*l.* each, and were therefore separately not bound by the covenant, but that the legatee, having become entitled to them "at one and the same time"—namely, the death of the testatrix; and "from one and the same source"—namely, the testatrix—the legacies must be aggregated, and were together bound by the covenant. *Scott-Chad's Settlement, In re; Scott-Chad v. Pares*, 70 L. J. Ch. 426; [1901] 1 Ch. 708; 84 L. T. 385—Buckley, J.

Vested Reversionary Interest—"Shall become entitled."]—A marriage settlement contained a covenant that all property to which the wife during her then intended coverture "shall become entitled" should be settled. At the date of her marriage the wife was

entitled to a vested reversionary interest in certain property expectant upon the death of tenants for life:—*Held*, that the words "become entitled" meant entitled "in interest" and not "in enjoyment," and that even if the reversionary interest in question fell into possession during the coverture it would not become subject to the trusts of the settlement. *Bland's Settlement, In re; Bland v. Perkin*, 74 L. J. Ch. 28; [1905] 1 Ch. 4; 91 L. T. 681—Kekewich, J.

— **Property Acquired "during the marriage"** — **Reversionary Interest—Judicial Separation—Property Subsequently Acquired.**—An antenuptial settlement made in 1868 contained a covenant by the husband and wife with the trustees to settle all real and personal estate to which the wife or the husband in her right should at any time "during the said intended marriage" become beneficially entitled in possession or reversion. At the date of the marriage the wife was entitled to a reversionary interest under her grandfather's will expectant on her mother's death. In 1875 she obtained a decree for judicial separation against the husband. In 1900 the wife's mother died, having by her will bequeathed a share of her estate to the wife:—*Held*, that the reversionary interest to which the wife was entitled at the date of the settlement and which fell into possession on her mother's death was bound by the covenant. *Held* also, that the property to which the wife became entitled under her mother's will after the date of the decree for judicial separation was not property acquired "during the said intended marriage" within the meaning of the covenant, that the marriage there contemplated was a marriage involving the usual marital relations which would enable the husband to obtain control over the property, and did not extend to the case of a judicial separation where the husband had no such rights. *Davenport v. Marshall*, 71 L. J. Ch. 29; [1902] 1 Ch. 82; 85 L. T. 340; 50 W. R. 39—Buckley, J. And see *Lloyd v. Pritchard*, 77 L. J. Ch. 183; [1908] 1 Ch. 265; 97 L. T. 904—Parker, J.

— **After-acquired Real Estate of Wife—Covenant by Husband Alone that Wife's Future-acquired Property should be Settled—Settlement Executed by Wife—No Recitals in Settlement—Liability of Wife.**—Where a marriage settlement, which was executed by husband and wife, contains a covenant by the husband alone that all property which shall be acquired by the wife or the husband in her right shall be forthwith settled, real estate to which under her father's will the wife has become entitled during the coverture is bound by the covenant. *Haden, In re; Coling v. Haden*, 67 L. J. Ch. 428; [1898] 2 Ch. 220—Stirling, J.

— **Married Woman—Estate Tail.**—By a marriage settlement the husband and wife covenanted that if during the coverture the wife, or the husband in her right, should at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property, except as therein mentioned, for any estate or interest in possession, remainder, or expectancy, then and in every such case he and she would convey, assign, settle, and assure the said real and per-

sonal estate unto or otherwise cause the same to be vested in the trustees of the settlement upon the trusts thereof. The wife during the coverture became entitled in possession as tenant in tail to certain estates:—*Held*, that the covenant was not applicable to an estate tail. *Hilbers v. Parkinson* (53 L. J. Ch. 194; 25 Ch. D. 200) approved and followed. *Dunsany's Settlement, In re; Nott v. Dunsany (Baroness)*, 75 L. J. Ch. 356; [1906] 1 Ch. 578; 94 L. T. 361—C.A.

— **Bonus Percentage under the Irish Land Acts, 1903 and 1904.**—Under the will and codicil of her father, H. Viscount C., Lady A. at the date of her marriage with Lord A. in 1884 was tenant in tail in remainder, expectant on the death of her brother, H. G. Viscount C., without issue (which event happened), to extensive Irish estates. Under two settlements which practically comprised all her property real and personal then executed, and disentailing deeds, Lady A. became tenant for life of the Irish realty with divers remainders over to her husband and their issue. The settlement of personalty contained a covenant to settle real and personal property to which Lady A. was then, or during the intended marriage should, at one and the same time and from one and the same source, become entitled, besides the real estates subject to the will and codicil of her father, her interest in which was settled by the other settlement of realty. Property of less value than 1,000*l.* was (*inter alia*) specifically excepted from the operation of this covenant. By numerous contracts made with occupying tenants portions of nine "separate estates" in Ireland subject to the realty settlement had been agreed to be sold under the Irish Land Act, 1903, and Lady A., as limited owner of them, became entitled to bonus percentage exceeding 40,000*l.* under section 3, subsection 1 of the Irish Land Act, 1904. The amount due as bonus on each "estate" sold, except one, exceeded 1,000*l.*, but on no single contract did it amount to that sum. On the question whether Lady A. was entitled to the bonus for her own use and benefit,—*Held*, that the bonus percentage, although being property to which Lady A. became entitled during the coverture, came within the terms of the covenant to settle after-acquired property, yet it fell also within the exception in the personalty settlement of interests in real estates settled by the realty settlement, and so, not being caught by the covenant, Lady A. was entitled to it. Observations in *Ely's (Marquis) Estate, In re* ([1904] 1 Ir. R. 66), as to the nature of bonus under the Irish Land Acts, discussed and applied. *Annaly's (Lady) Trusts, In re; Annaly v. Bourke*, 92 L. T. 13; 53 W. R. 150—Kekewich, J.

— **Bequest to Married Woman—Restraint on Anticipation—Marriage Settlement.**—A testator bequeathed certain freehold property and a legacy of 5,000*l.* to his daughter, a married woman, for her sole and separate use, independent of any husband she might marry, without power of anticipation. The settlement executed on the marriage of his said daughter contained an "after-acquired" property clause. Testator nominated executors of his will, but did not appoint trustees:—*Held*, that as there was no intention expressed in the will that the executors

were to act as trustees and retain the fund, the fund should be paid over to the testator's daughter free from restraint, and that it was captured by the "after-acquired" clause in her marriage settlement. *Russell v. Lawder*, [1904] 1 Ir. R. 328—Barton, J.

— **Jus Relictæ—Separation Deed—Covenant by Husband to Indemnify Wife.**—An ante-nuptial settlement, made in 1873, contained a covenant by the husband and wife that if during the coverture the wife or husband in her right should become entitled to any personal property which should amount to 200*l.* for any estate or interest whatsoever, they would respectively assure the same to the trustees upon the trusts of the settlement. The husband and wife separated, and by a separation deed made in 1894 the husband, who was a domiciled Scotchman, agreed that in the event of his death in the lifetime of the wife her rights in his means and estate should not be less than she would have been entitled to by the law of Scotland if he had been a domiciled Scotchman at the date of his death. The husband died, leaving net personal estate of 16,000*l.*, to one-third of which the wife would by the law of Scotland have been entitled under her *jus relictæ*:—*Held*, that the equivalent share to which the wife was entitled under the separation deed was not bound by her covenant to settle her after-acquired property. *Simpson, In re*; *Simpson v. Simpson*, 73 L. J. Ch. 53; [1904] 1 Ch. 1; 89 L. T. 542; 52 W. R. 310—C.A.

— **Gift from Husband to Wife.**—By a marriage settlement dated November 9, 1883, it was agreed that if the intended wife then was, or if during the intended coverture she or her intended husband in her right should, at one time and from one source, become entitled to property of the value of 100*l.* or upwards, except jewels, &c., the intended husband and wife would do all things necessary for vesting the same in the trustees of the settlement, upon the trusts thereby declared of certain property of the intended wife. In 1903 the husband, for a nominal consideration, transferred certain shares, exceeding 100*l.* in value, in a limited company to his wife:—*Held*, that these shares were not bound by the settlement. *Coles v. Coles* (70 L. J. Ch. 324; [1901] 1 Ch. 711) followed and applied. *Kingan v. Matier*, [1905] 1 Ir. R. 272—Barton, J.

Income to Separate Use of Covenantor—Investment of Savings.—A covenant in a marriage settlement to settle after-acquired property of the wife does not bind investments made by her with the savings of her separate income. *Lewis v. Madocks* (8 Ves. 849; 17 *id.* 48) explained. *In re Bendy*; *Wallis v. Bendy* (64 L. J. Ch. 170; [1895] 1 Ch. 109), differed from. *Finlay v. Darling*, 66 L. J. Ch. 348; [1897] 1 Ch. 719—Romer, J.

— **Power of Appointment—Appointment to Self.**—A daughter, by her marriage settlement in 1881, covenanted to settle after-acquired property to the value of 200*l.* or over. Under her mother's will, dated in 1888, she had a general power of appointment over her mother's own property (which might exceed 200*l.*) and in default of and until such appointment it was given to her for her separate use. Under

a codicil to the will a sum of 500*l.* out of her mother's marriage settlement funds was given in trust for the daughter, with a direction to hold it so that the daughter should have a general power of appointment over it, and that in default she should have it for her separate use. The mother had expressed her intention in both will and codicil that the daughter by exercising the powers of appointment might be enabled to defeat the operation of her covenant:—*Held*, that, as the gift over was to the donee of the power, and not to a stranger, the several funds were all bound by the covenant to settle after-acquired property. *Steward v. Poppleton* (W. N. (1877), p. 29) followed. *Bower v. Smith* (40 L. J. Ch. 194; L. R. 11 Eq. 279) distinguished. *Townshend v. Harrowby* (27 L. J. Ch. 553) and *Gerard (Lord), In re*; *Oliphant v. Gerard* (58 L. T. 800), dissented from. *O'Connell, In re*; *Mawle v. Jagoe*, 72 L. J. Ch. 709; [1903] 2 Ch. 574; 89 L. T. 166; 52 W. R. 102—Kekewich, J.

— **Marriage of Englishwoman with Foreigner—Restraint on Anticipation—Covenant to Settle After-acquired Property—Construction—Legacy—Property in England—Domicil—Decree of Foreign Court for Separation.**—By a settlement in English form executed in 1878 in contemplation of a marriage between a domiciled Italian and an Englishwoman, it was agreed that the trustee should hold a sum of money secured upon an English mortgage upon trust to invest in English securities and to hold the same upon trust for the benefit of the wife and husband and their issue. The settlement contained a covenant to settle after-acquired property of the wife. The marriage took place in Italy, where the husband and wife continued to reside. In 1898 a decree for the voluntary separation of the husband and wife was made by the Italian Court, and they had since lived apart from each other. In 1881 the wife's father died, having by his will bequeathed to the wife certain legacies subject to his widow's life interest therein. The will contained a declaration that all money payable to any female should during coverture be paid to her for her separate use without power of anticipation. The widow died in 1899:—*Held*, that, assuming English law to be applicable, the restraint on anticipation lasted only until the date of payment—namely the death of the widow—and that the legacies were therefore bound by the covenant. *Bown, In re*; *O'Halloran v. King* (53 L. J. Ch. 881; 27 Ch. D. 411), and *Holmes, In re*; *Hallows v. Holmes* (67 L. T. 335), followed. *Curry, In re*; *Gibson v. Way* (55 L. J. Ch. 906; 32 Ch. D. 361), distinguished. *Bantles, In re*; *Reynolds v. Ellis*, 71 L. J. Ch. 708; [1902] 2 Ch. 333; 87 L. T. 432; 50 W. R. 663—Buckley, J.

Assignment of Wife's Property and Fortune "present and expectant or future"—**Gift from Husband to Wife—Intention of Parties.**—By the settlement made previously to her marriage the defendant's wife conveyed and assigned to the trustee thereof "all and singular" her "property and fortune whatsoever both present and expectant or future vested or contingent" upon trust, after the solemnisation of the marriage, for herself for life, and after her death upon trusts in favour of the children of the marriage. During the coverture the defen-

dant gave his wife a sum of 280*l.*:—*Held*, adopting the ground of MALINS, V.C.'s decision in *Dickinson v. Dillwyn* (39 L. J. Ch. 266; L. R. 8 Eq. 546), that the assignment never could have been intended to apply to a gift from the husband to the wife, and that therefore the sum of 280*l.* was not bound by the settlement. *Coles v. Coles*, 70 L. J. Ch. 324; [1901] 1 Ch. 711; 84 L. T. 142—Joyce, J.

15. COVENANT TO PAY MONEY.

Policies Effected under Married Women's Property Act, 1870—Double Portions—Satisfaction.—By an indenture of marriage settlement in 1864, C. covenanted to pay to the trustees of the deed 2,000*l.* upon trusts in favour of his wife and children, including his children by a former marriage. In 1873 C. effected two policies for 1,000*l.*, each on his own life under the provisions of section 10 of the Married Women's Property Act, 1870. By his will dated in 1902, C. gave the residue of his personal estate to trustees upon trusts, after payment of debts, in favour of his third wife, and certain only of the above-mentioned children:—*Held*, that the covenant in the settlement had not been satisfied by the effecting of the policies, and was therefore enforceable. *Cartwright, In re; Cartwright v. Cartwright*, 72 L. J. Ch. 622; [1903] 2 Ch. 306; 88 L. T. 854; 51 W. R. 666—Kekewich, J.

Covenant to Pay if Marriage be "solemnised"—Nullity of Marriage—Effect of Decree Absolute.—By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his executors would, within twelve months from his death, pay 25,000*l.* to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his executors were directed to pay and did pay over the 25,000*l.*, being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Court declaring the marriage to have been and to be absolutely null and void on the ground of the impotence of the husband:—*Held*, that, inasmuch as the marriage had been declared null *ab initio*, it had never been "solemnised"; consequently the covenant to pay the 25,000*l.* never became operative, and the money in question must be repaid to the executors of the testator. *Garnett, In re; Richardson v. Greenep*, 74 L. J. Ch. 570; 93 L. T. 117—Kekewich, J.

Joint Covenants—Contribution—Evidence of Intention—Implied Contract—Inference from Circumstances.—The doctrine of contribution between joint covenantors is based on a broad principle of equity, or, as it has sometimes been expressed, on an implied contract, and depends on the intention of the parties contracting. Evidence of such intention is admissible after the death of one of such covenantors; and when a father, on the marriage of his son, had entered, together with the son, into a joint and several covenant with the trustees of the marriage settlement to pay a certain sum of money six months after his death and had specifically charged some of his own property with payment of the same, and the son, at the

date of his marriage, was possessed of a reversionary interest only which he brought into settlement, and, the father having died insolvent, the security had to be realised, the Court declined to infer, in the absence of express contract, an intention on the part of the father to reserve a right to his executors to sue his son for contribution. *Bentinck, In re; Bentinck v. Bentinck*, 80 L. T. 71—Stirling, J.

16. POWER OF APPOINTMENT.

General—Special—Exercise by Will.—By a marriage settlement in 1859 real estate was settled for the benefit of S. R. and her husband, W. R., for their lives, and then for the children of S. as she should by deed or will appoint, and, in default, to them in equal shares, and if no such child then for such persons as S. should by deed or will appoint, and in default for S., her heirs and assigns. And in the settlement was a covenant by W. that after-acquired property of S. should be conveyed to the trustees to be held by them upon the trusts of the settlement. W. and S. R. married, and had four children, one only of whom was now living. W. R. died in 1891. By her will made in that year S., "in pursuance of all powers and authorities in anywise enabling me thereto," directed, limited, and appointed her residuary estate as to a moiety for her son M. and his wife and children, and as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real and personal estate which was never conveyed to the trustee of the settlement:—*Held*, first, that the after-acquired property was not bound by the covenant in the settlement; secondly, that there was not sufficient evidence to shew an intention on the part of the testatrix to exercise her special power of appointment in favour of her son M. *Rickman, In re; Stokes v. Rickman*, 80 L. T. 518—Stirling, J.

Conveyance by Sole Object of Power—"Entitled"—Subsequent Appointment to Object of Power—Estoppel.—The only child of a marriage, being at the time the sole object of a power of appointment, and entitled, in default of appointment, to the property comprised in the marriage settlement, married, and after her marriage assigned by deed the interest to which she was "entitled under the indenture of settlement" upon certain trusts. Afterwards the donee of the power appointed the property to her absolutely:—*Held*, following *Sweetapple v. Horlock* (48 L. J. Ch. 660; 11 Ch. D. 745), that her interest under the appointment was not assigned by the deed, which comprised only her then existing interest under the settlement, and that the deed not being for value she was not estopped from claiming the property absolutely. *Lovett v. Lovett*, 67 L. J. Ch. 20; [1898] 1 Ch. 82; 77 L. T. 650; 46 W. R. 105—Romer, J. *And see* POWERS, col. 1867.

17. POWER OF JOINTURING.

Validity of Exercise—No Disentailing Deed—Statute—Private Act—Construction—Application of Later Act to Earlier.—By a private Act

of Parliament passed in 1535 certain manors and estates were settled upon tenants in tail, with a proviso that they should not alien, bargain, give or sell, the same, nor do any other thing to the hurt or disinheritance of their heirs, but only for the jointure of a wife, or for term of life of a husband, or for term of life of any other person or for years or at will after the custom of the manor, yielding the true and ancient rent, but that all other acts contrary to the true intent of the Act should be void. A tenant in tail who died in 1902 purported to exercise the power of jointuring in favour of his widow by a codicil:—*Held*, that, on the true construction of the Act, neither fine nor recovery, nor, since the Fines and Recoveries Act, 1833, any disentailing assurance, was necessary to the exercise of the power; and that it was well exercised by testamentary disposition, on the principle laid down in *Vernon's Case* (4 Co. Rep. 1a, 4a), though the Act was earlier in date than the statutes enabling land to be devised by will. *Bolton Estates Acts, In re; Russell v. Meyrick*, 72 L. J. Ch. 603; [1903] 2 Ch. 461; 88 L. T. 851; 52 W. R. 87—C.A. *And see col. 1887.*

18. FORFEITURE CLAUSE.

Life Interest Determinable on Alienation—Words of Futurity—Retrospective Effect.]—A trust in a settlement for payment of the income of a trust fund to A for life “or until he shall assign, charge, or incur, or affect to assign, charge, or incur” the same, though future in terms, has also a retrospective operation so as to include past acts. *Manning v. Chambers* (1 De G. & Sm. 282) and *Seymour v. Lucas* (1 Dr. & S. 177) followed. *West v. Williams*, 67 L. J. Ch. 213; [1898] 1 Ch. 488; 78 L. T. 147; 46 W. R. 362—Kekewich, J.

Life Interest Determinable on Bankruptcy—Trustees—Beneficiaries—Unnecessary Parties—Costs.]—In a successful action by the trustee in bankruptcy of a settlor against the trustees of his settlement, by which he had purported to settle his own property upon trust for himself for life, with a gift over on bankruptcy, the trustees of the settlement will be entitled to retain their costs, as between solicitor and client, out of the moneys in their hands, before paying over the balance; but the beneficiaries under the settlement, who have been made defendants by the plaintiff at the instance of the trustees, are not necessary parties, and will not receive their costs. *Merry v. Pownall*, 67 L. J. Ch. 162; [1898] 1 Ch. 306; 78 L. T. 146; 46 W. R. 487—Kekewich, J.

19. CONDITIONAL LIMITATION.

Trust for Wife “if she shall survive her now intended coverture” — Termination of Coverture by Divorce—Effect of Trust.]—By a marriage settlement the wife's father covenanted that his executors should within twelve months of his death, if the wife were then living, pay to the trustees 10,000*l.* on trust (in default of issue, which happened) for the wife absolutely “if she shall survive her now intended coverture, but if she shall die during her now intended coverture,” then

in trust for the father absolutely. The husband obtained an absolute decree for dissolution of the marriage, and the wife survived the father:—*Held*, that the wife had survived the coverture within the meaning of the settlement, and was therefore entitled to receive the 10,000*l.* from the trustees when paid to them. *Cranford, In re; Cooke v. Gibson*, 74*c* L. J. Ch. 22; [1905] 1 Ch. 11; 91 L. T. 683; 53 W. R. 107—Kekewich, J.

Seem, that, an order of the Divorce Court having dealt with the settled property as if the husband were dead, the husband must be considered as dead for the purpose of construing the settlement, and the coverture might be considered as terminated in this manner also. *Ib.*

Quere, whether under the Matrimonial Causes Acts, 1857, 1859, and 1878, the Divorce Court has power to interfere with the interests, rights, and liabilities of persons not parties to the suit—for example, a wife's father covenanting to settle a fund. *Ib.*

Post-nuptial Settlement — Trust for Wife during Cohabitation — Validity — Policy of the Law.]—By a post-nuptial settlement the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife the husband took an interest in the settled property. Some years after the date of the settlement the husband and wife separated by mutual consent, and they had not since cohabited:—*Held*, that the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, and that the trust in her favour determined upon her ceasing to live with her husband. *Cartwright v. Cartwright* (3 De G. M. & G. 982) and *II. v. W.* (3 K. & J. 382) distinguished. *Hope-Johnstone, In re; Hope-Johnstone v. Hope-Johnstone*, 73 L. J. Ch. 321; [1904] 1 Ch. 470; 90 L. T. 253; 20 T. L. R. 282—Kekewich, J.

20. HOTCHPOT CLAUSE.

Appropriation.]—A testator directed his executors and trustees to convert his whole estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. In the case of his son, he had covenanted with the trustees of the son's marriage settlement that his executors would pay to them 10,000*l.* to be held upon trust for the son for life, with remainder to the son's wife for life, with remainder as to the capital for the children of the marriage, and in case of there being no child the capital was to be in trust for the testator absolutely. By a hotchpot clause in the will, any sum given “to or with any child” on his or her marriage was to be taken in or towards satisfaction of the share of such child and brought into hotchpot. The son died without issue:—*Held*, that the testator's trustees must specifically appropriate and allot to the son's share under the will the testator's contingent reversionary interest in the 10,000*l.*, not under the hotchpot clause, but under the

directions in the earlier part of the will, as the only way to effect an equal division as directed between the son and the daughter. *Wheeler v. Humphreys*, 67 L. J. Ch. 499; [1898] A.C. 506; 78 L. T. 799; 47 W. R. 17 H.L. (E.)

21. NEXT-OF-KIN.

Ultimate Trust for Wife's Next-of-Kin—"Died without having been married"—Child.—An only son who survives his mother, but dies an infant, is entitled as her next-of-kin to property settled by her marriage settlement upon an ultimate trust in the event of her death in her husband's lifetime and in default of any son attaining twenty-one, "for such person or persons as under or by virtue of the Statute for the Distribution of Intestates' Effects should or would have been entitled to her personal estate in case she had died intestate without having been married." *Mare, In re; Mare v. Howey*, 71 L. J. Ch. 649; [1902] 2 Ch. 112; 87 L. T. 41—Kekewich, J.

The only object of such a trust is to exclude the husband, and this general principle will be applied in construing such a trust, notwithstanding that the application results in the acquisition of the whole fund by the husband as sole next-of-kin of his infant son. *Ib.*

Wilson v. Atkinson (83 L. J. Ch. 576; 4 De G. J. & S. 455) followed. *Deane's Trusts, In re; Dudley v. Deane*, [1900] 1 Ir. R. 332, not followed. *Ib.* Overruled. See next case.

—**Death "without having been married"—Children Dying under Twenty-one—Collaterals.**—The case of *Wilson v. Atkinson* (83 L. J. Ch. 576; 4 De G. J. & S. 455) does not lay down any hard-and-fast rule applicable to all marriage settlements as to the meaning of the words "without having been married," and the usual ultimate trust of the wife's property in favour of the wife's statutory next-of-kin as if she had died "intestate and without having been married," will (at any rate where the settlement contains the usual express trusts in favour of children) be construed according to the natural meaning of the words so as to exclude not only the husband, but also infant children living at the death of the wife, who afterwards die without attaining a vested interest. *Smith, In re; Wilkins v. Smith* (72 L. J. Ch. 184; [1903] 1 Ch. 373), approved. *Mare, In re; Mare v. Howey* (71 L. J. Ch. 649; [1902] 2 Ch. 112), overruled. *Brydone's Settlement, In re; Cobb v. Blackburne*, 72 L. J. Ch. 523; [1903] 2 Ch. 84; 88 L. T. 614; 51 W. R. 497—C.A.

Trust for Persons who would have been Entitled as Wife's Next-of-Kin if Wife had Survived Husband—Survivorship of Husband—Time for Ascertaining Next-of-Kin.—Under the ultimate trust in a marriage settlement trustees were directed to hold certain funds "in trust for the person or persons who, under the statutes made for the distribution of intestates' personal estates, would then be entitled to the personal estate of A.P." (the wife) "in case she having survived" her husband "had died possessed of the said stocks, funds, and securities, and to be paid and divided accordingly." The husband

survived the wife:—*Held*, following *Pinder v. Pinder* (28 Beav. 44), that the persons entitled were the wife's next-of-kin at the time of the husband's decease. *Pierson's Settlement, In re; Cayley v. De Wend*, 88 L. T. 794; 51 W. R. 519 Byrne, J.

22. ASSIGNMENT OF SHARE.

Subsequent Bequest of Property to be Held on Trusts of Settlement—General Words—Accretion.—The assignment by a person of his share under a settlement and all other his interest in the trust funds for the time being subject to the trusts of the settlement does not pass his interest under a subsequent appointment of property afterwards bequeathed, and directed to be held upon the trusts of the settlement. *Walpole's Settlement, In re; Thomson v. Walpole*, 72 L. J. Ch. 522; [1903] 1 Ch. 928; 88 L. T. 419; 51 W. R. 587—Joyce, J.

Semble, such subsequent bequest does not operate as an accretion to the fund originally settled, but merely creates a new referential settlement on similar trusts. *Ib.*

23. RECTIFICATION.

Mistake—Limitation of Real Estate without Words of Inheritance—"In tail."—By a marriage settlement executed in 1859, lands belonging to the sister of the husband were, subject to her life estate, limited to the husband for life, with remainder (in default of exercise of a power of appointment given to him), if there should be only one child of the marriage, to such child "in tail." The only interest limited back to the settlor was a general power of appointment in default of issue of the marriage. A power of sale and a leasing power were given to the trustees exercisable during the respective lives of the two tenants for life, with their respective consents, and during the minority of any child of the marriage. There was no evidence of the intention of the parties apart from the settlement itself, the instructions on which it was prepared not being forthcoming, and the solicitor who prepared it, as well as the parties to it, being dead. There was only one child of the marriage, the plaintiff, who sought as against the heir-at-law of the settlor and the trustees to have the deed reformed by the insertion of proper words of limitation, so as to confer on her an estate tail in the lands:—*Held*, that the deed itself afforded evidence of the intention of the parties sufficient to enable the Court to rectify the mistake and to reform the settlement by the introduction of technical words of limitation, so as to confer an estate tail on the plaintiff. *Bird's Trustees, In re* (3 Ch. D. 214), approved and followed. *Fitzgerald v. Fitzgerald*, [1902] 1 Ir. R. 477—C.A. And see DRED, cols. 686-7.

24. OTHER MATTERS.

Avoidance of Settlement.—See BANKRUPTCY, col. 127, and col. 873.

13 Eliz. c. 5.—See FRAUD AND MISREPRESENTATION, col. 873.

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Forfeiture on Conditions.—See **CONDITION**, col. 490.

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Maintenance of Children.—See **INFANT**, col. 1004.

Restraint on Anticipation—Validity.—See **PERPETUITIES**, col. 1818.

Reversionary Share—Legacy Duty.—See **REVENUE**, col. 2092.

Sale or Investment—Power of.—See **TRUST AND TRUSTEE**.

Setting Aside—Defeating Creditors.—See **FRAUD**, col. 873.

Settlement Estate Duty.—See **REVENUE**, col. 2082.

Title-deeds—Custody of.—See **TRUST**.

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1. STATUTES.

Anchors and Chain Cables.—62 & 63 Vict. c. 23 is the *Anchors and Chain Cables Act*, 1899.

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Negligence of Shipowners.—5 Edw. 7 c. 10 is the *Shipowners' Negligence (Remedies) Act*, 1905.

Tonnage.—7 Edw. 7 c. 52 amends the *Law in respect to the deduction of the space occupied by propelling power in ascertaining the tonnage of a ship*.

2. REGISTRATION.

Fishing-boat Register—Limitation of Liability.—A British fishing boat registered only in the *Fishing-boat Register* under Part IV. of

the Merchant Shipping Act, 1894, and not under Part I. of the Act, is a British ship "registered under the Act" within the meaning of section 2, and consequently its owner is entitled to the limitation of liability for injury caused by the fault of the vessel conferred by section 503. *Couper v. MacKenzie*, 8 F. 1202—Ct. of Sess.

3. SHIPOWNER.

Disbursements on Authority of Managing Owner—Contracts for Sale of Shares by Registered Owner—Subsequent Mortgage by Registered Owner—Purchaser not Paying Price in Full—Purchaser of Moiety of One Sixty-fourth Share—Purchaser Paying in Full, but not before Registration of Mortgage—Foreign Purchaser Receiving Bill of Sale—Liability of Purchasers as Equitable Owners.]—The managing owner of a ship, who was the registered holder of shares therein, entered into contracts with several persons for the sale to them of shares, the price to be paid by instalments. He afterwards mortgaged all his shares to a bank, who eventually registered their mortgage. Subsequently, on his authority as managing owner, the plaintiffs made disbursements at a foreign port in respect of the ship. The plaintiffs brought an action for these disbursements against the defendants, as the only registered owners from whom there was a prospect of recovering them, and obtained judgment. The defendants claimed contribution from the persons who had entered into the contracts already mentioned for the purchase of shares. Of these persons, all of whom had received dividends on the earnings of the ship, several had purchased one sixty-fourth share each and had not paid the price in full; one had purchased only half a share and paid in full before the date of the mortgage to the bank; one had purchased two shares and paid in full, but not before the bank had registered their mortgage; and one, a foreigner, had purchased one share, paid in full after the date of the mortgage, but before it was registered, and had alone received a bill of sale:—*Held*, that of these persons none was an "owner" of the ship either at law or in equity except the last mentioned, who was an owner in equity and therefore liable to make good to the defendants one-half of the amount which they had paid under the judgment. *Von Freeden v. Hull*, 75 L. J. K.B. 359; 94 L. T. 849; 10 Asp. M.C. 247; 22 T. L. R. 358—Phillimore, J.

On appeal this decision was reversed on a question of fact, the Court holding that the respondents to the appeal had given authority to the managing owner to sail the ship and pledge their credit, and that they were therefore liable to contribute to the loss incurred in proportion to their interests. *Von Freeden v. Hull*, 76 L. J. K.B. 715; 96 L. T. 590; 10 Asp. M.C. 394; 23 T. L. R. 335—C.A.

Duty to Cargo-owner—Perishable Cargo—Port of Refuge—Discharge of Cargo by Master—Repairs—Transshipment—Abandonment of Voyage.]—Where a ship is damaged and obliged to put in to an intermediate port for repairs, it is the duty as well as the right of the shipowner, if he can repair his ship without un-

reasonable sacrifice and within a reasonable time, to repair his ship and carry the goods to their destination. This is the purpose for which he has been entrusted with the cargo, and this purpose he is bound to accomplish by every reasonable and practicable method. If he so determines to fulfil his contract, it is his duty, whilst the repairs are being done, to take all reasonable means to preserve the cargo from deterioration. If, on the other hand, the circumstances are such that the shipowner is justified in not repairing his ship, or are such that, even if the ship is eventually repaired, it is not, with a due regard to his own interest and the interest of the owner of the cargo, reasonably practicable, owing either to the length of time which the repairs will take, or the perishable nature of the cargo, or to the expense involved, or all or any such reasons, that the carriage of the cargo should be completed in the ship when repaired, then the shipowner is at liberty to tranship and carry the cargo to its destination in another bottom and so earn his freight. He is not bound to employ another vessel to complete the voyage at his own loss. But if he chooses, because he deems it best and for his own advantage, to pursue this course, he must, where he has been entrusted with a perishable cargo, which is daily incurring on shipboard an increase of deterioration, use all reasonable promptitude in procuring the transshipment, and take all reasonable means to prevent, or at least to minimise, the deterioration of the cargo until the transshipment is effected. Lastly, if the shipowner decides neither to repair nor to tranship, it is his duty, with the greatest dispatch which the circumstances reasonably considered admit, to inform the owner of the cargo, or his agents on the spot, in order that he or they may not be unreasonably hindered in the protection of his interests, and the perishable cargo may not be unnecessarily damaged by the lapse of time before the owner or his agents have it placed at his or their disposition. If, instead of promptly transshipping a perishable cargo, which is daily deteriorating on shipboard, he prefers to negotiate for a *pro rata* freight to which he is not entitled, he can only do it by incurring the expense involved in discharging the cargo from the ship's hold. The absence of definite instructions from the cargo-owners or underwriters on cargo does not relieve the shipowner from the duty of doing one or other of the above things. *Hanson v. Dunn*, 11 Com. Cas. 100; 22 T. L. R. 458—Kennedy, J.

Damage to Cargo—"By reason of fire"—"Actual fault or privity"—Implied Warranty of Seaworthiness.]—Cargo taken on board a ship was damaged partly by fire, partly by water used to put out the fire, and partly by the taint of the smoke, all arising from the negligence of the crew in overheating a stove in the fore-castle. The plaintiffs, owners of the cargo, claimed to recover from the shipowner, who relied on section 502 of the Merchant Shipping Act, 1894, under which a shipowner is not liable for damage "by reason of fire" occurring "without his actual fault or privity" to goods put on board his ship. The plaintiffs alleged that the defendant was liable notwithstanding the section—first, because the section was subject to an implied exception in case of unseaworthiness of the ship, and here the stove

was in an improper condition when the vessel started on her voyage, and the vessel was thereby unseaworthy; secondly, because the defendant knew of the improper condition of the stove, and therefore the damage occurred with his "actual fault or privity," and he was not protected; thirdly, as regards the damage by water and smoke, because this was not damage "by reason of fire":—*Held*, that section 502 of the Merchant Shipping Act covered the case, and the action failed. The stove was perfectly safe as it was, and the vessel was seaworthy. The damage occurred "without the actual fault or privity" of the defendant; and the damage by water and smoke was damage "by reason of fire" within the meaning of the section. *The Diamond*, 75 L. J. P. 90; [1906] P. 282; 95 L. T. 550; 10 Asp. M.C. 286—Bargrave Deane, J.

Sale of Ship by Owner of Majority of Shares in Possession—Maritime Liens Paid off—Cancellation of Onerous Charterparty—Position of Mortgagee of other Shares.—The payment of money by the owner of a majority of the shares in a ship, who is in possession and acting as managing owner, to free the ship from maritime liens attaching to her in respect of matters for which he is not personally liable, and to procure the cancellation of an onerous charterparty, does not, *ipso facto*, entitle him in law to claim a proportionate part of such payments as against a mortgagee of other shares in the ship. *The Ripon City* (No. 2), 67 L. J. P. 30; [1898] P. 78; 78 L. T. 296; 46 W. R. 586; 8 Asp. M.C. 391—Jeune, P.

Nor, *semble*, can a mortgagee of a majority of shares, who has taken possession under his mortgage, recover from the mortgagees of other shares a proportionate part of similar payments which he has made without their request. *Ib.*

Bill of Lading Signed by Charterers for Captain and Owners.—*Tillmans v. Knutsford Steamship*, 77 L. J. K.B. 135; [1908] 1 K.B. 135.

4. MASTER.

"Wages"—"Emoluments"—Bonus—Maritime Lien.—Where the master of a ship has earned a bonus which the owners arranged to pay to him if he remained in the ship and otherwise satisfied them, such bonus is "wages" or "emoluments" within sections 167 and 742 of the Merchant Shipping Act, 1894, and the master therefore has a maritime lien for the recovery thereof. *The Elmville*; *Goodrich v. Owners of SS. Elmville* (No. 1), 73 L. J. P. 120; [1904] P. 422; 91 L. T. 330; 10 Asp. M.C. 23; 20 T. L. R. 783—Jeune, P.

Disbursements—Costs of Defending Action on Bill of Exchange.—Where the master of a ship had drawn a bill of exchange on his owners in payment for coals and ship's disbursements, and his owners had dishonoured the bill, and he had been sued as drawer and at the request of his owners had defended, but judgment had been recovered against him thereon with costs, —*Held*, that the costs incurred by the master in the action on the bill of exchange were not "liabilities properly incurred by him on account

of the ship" within section 167 of the Merchant Shipping Act, 1894, and therefore could not be recovered by him in an action *in rem* against the ship. *The Elmville* (No. 2), 74 L. J. P. 69; [1904] P. 422; 53 W. R. 287—Jeune, P.

Claim—Liabilities Incurred on Account of Ship—Appointed by Persons Allowed to Remain in Possession and to have Control of Vessel by Owners—Owners not Personally Liable—Maritime Lien.—The master of a ship, appointed by persons who are not the real owners, but who have been allowed by the real owners to remain in possession and to have the control of the vessel for the purpose of using her in the ordinary way, may have a maritime lien on the ship for his disbursements and liabilities properly incurred by him on account of the ship, although the owners may not be personally liable for the disbursements or the matters in respect of which the liabilities have been incurred. *The Castlegate* (62 L. J. P.C. 17; [1893] A.C. 38) and *The Orienta* (64 L. J. P. 32; [1895] P. 49) distinguished. *The Ripon City* (No. 1), 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M.C. 304—Gorell Barnes, J.

Board of Trade Enquiry—Suspension of Certificate—Duty of Board of Trade to Express Opinion—Appeal to High Court—Costs.—On a Board of Trade enquiry, when a formal investigation is being held under section 466 of the Merchant Shipping Act, 1894, and when the evidence has been given and the questions are put to the Court, and there is a liability for the master or other officer of the ship to have his certificate suspended, the Board of Trade should state whether in their opinion such certificate should be suspended or not. *The Carlisle*, 75 L. J. P. 97; [1906] P. 301; 95 L. T. 552; 22 T. L. R. 709—D.

In a case where the Board of Trade had not adopted this course, but had declined to say whether the certificate should be suspended or not, and the Court of enquiry had suspended the master's certificate, and the master appealed,—*Held* (after reversing the judgment of the Court of enquiry and deciding that the certificate should be restored), that, on the question of costs, the case must be treated as if the Board of Trade had invited the Court of enquiry to suspend the certificate, and that the Board of Trade must pay the costs incurred by the master. *Ib.*

Alien—Stowaway—Ship in which Alien has been Brought to the United Kingdom—Liability of Master for Expenses of Deportation.—The master of the ship in which an undesirable alien has been brought into the United Kingdom is liable under section 4, sub-section 2 of the Aliens Act, 1905, for the expenses of the deportation of such alien, following upon an expulsion order, although the alien, having been a stowaway, was brought into the United Kingdom involuntarily on the part of the master. *Att.-Gen. v. Sutcliffe*, 76 L. J. K.B. 991; [1907] 2 K.B. 997; 97 L. T. 373; 23 T. L. R. 711—Bray, J.

* 5. SEAMEN.

Protection from Imposition—Going on Board before Discharge of—Crimping—Right of Offender

to Trial by Jury.]—By section 680 of the Merchant Shipping Act, 1894, an offence under the Act punishable with imprisonment for any term not exceeding six months "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts." By section 218 a person going, without permission of the master, on board a ship arriving or arrived at the end of her voyage before the seamen lawfully leave the ship is liable to imprisonment for a term not exceeding six months:—*Held*, that a person charged with an offence under this section is entitled to demand trial by jury under section 17 of the Summary Jurisdiction Act, 1879. *Ree v. Goldberg*, 73 L. J. K.B. 970; [1904] 2 K.B. 866; 91 L. T. 490; 68 J. P. 554; 20 Cox C.C. 699; 10 Asp. M.C. 2; 20 T. L. R. 683—D.

— Foreign Seaman — Foreign Ship "having arrived at the end of her voyage."—By section 218 of the Merchant Shipping Act, 1894, a person going without permission of the master on board a ship arriving, about to arrive, or having arrived at the end of her voyage, before the seamen lawfully leave the ship or are discharged, is liable to a fine or imprisonment. By section 219 the Crown is in certain events empowered by Order in Council to declare that the provisions of section 218 shall apply to the ships of a foreign country, and have effect as if the ships of that country "arriving, about to arrive, or having arrived at the end of their voyage" were British ships:—*Held*, that, having regard to the repealed section 6 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, a foreign ship arriving at a British port in the course of a voyage to that port and further was a ship "having arrived at the end of her voyage" within the meaning of section 219. *Ree v. Abrahams*, 73 L. J. K.B. 972; [1904] 2 K.B. 859; 91 L. T. 493; 68 J. P. 546; 20 Cox C.C. 715; 10 Asp. M.C. 5; 20 T. L. R. 684—D.

Engagement by Unlicensed Agent — Foreign Ship—Conviction—Punishment.]—A person acts in contravention of section 111 of the Merchant Shipping Act, 1894, who, not being qualified as therein mentioned, engages or supplies a seaman to be entered on board a foreign ship in the United Kingdom. *Reg. v. Stewart: Olsen, Ex parte*, 68 L. J. Q.B. 582; [1899] 1 Q.B. 964; 80 L. T. 660; 47 W. R. 445; 63 J. P. 547; 8 Asp. M.C. 534—D.

The fine imposed by sub-section 4 of the section for such contravention is a punishment for an offence, and is not a civil debt. Therefore a conviction which imposes imprisonment in default of sufficient distress for an offence committed under the section is good, proof of means to pay being unnecessary. *Id.*

Duty of Owners towards Seamen—Seaworthiness—Negligence in Loading Cargo—Shifting of Cargo.]—A ship belonging to the defendants was chartered to carry a cargo of maize in bulk from Liverpool to Galway, and by the charter-party the charterers were to supply sufficient bags for stowage of the cargo, if required. The cargo, 632 tons, was loaded in bulk under the direction of a stevedore, and 111 bags were placed in coamings under the forward hatch. The vessel left Liverpool on June 12, and

arrived in Lough Swilly at 6 A.M. on the 13th, having had fine weather all the way. It was found at Lough Swilly that the ship had a list to port, as to the extent of which the evidence varied from five to twenty degrees. Nothing was done to correct the list, and she left about eight in the evening and proceeded on her voyage. The list increased, and a gale of wind having sprung up, the vessel foundered. Seven of the crew were drowned. In an action under Lord Campbell's Act the jury found that all the necessary and reasonable precautions had not been taken to prevent the cargo from shifting as regards bagging and stowage, and that the vessel became unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly; that the list was caused by the cargo shifting by reason of the omission of proper precautions:—*Held*, that there was evidence to sustain the verdict that the cargo was not properly loaded at Liverpool, and also that there was evidence to shew that the ship was not seaworthy when she left Lough Swilly. *Cunningham v. Frontier Steamship Co.*, [1906] 2 Ir. R. 12—C.A.

Crew Space — Lascars.] — Lascars shipped under agreements in the form and with the provisions approved by the Governor-General of India in Council, as part of the crew of vessels registered in the United Kingdom trading between England and India, and China and Australia, are seamen within section 210 of the Merchant Shipping Act, 1894; and their accommodation, in the matter of crew space on board, is regulated by the provisions of that section, and not by the Merchant Seamen's (Indian) Act, No. 1 of 1859, ss. 70 and 118, as amended by the Indian Merchant Seamen's Act, No. 13 of 1876, so that owners of such vessels are bound to appropriate to the use of Lascars the accommodation for seamen specified in section 210 of the Merchant Shipping Act, 1894, and the Sixth Schedule as part of that section. *Peninsular and Oriental Steam Navigation Co. v. Regem*, 70 L. J. K.B. 845; [1901] 2 K.B. 686; 85 L. T. 71; 9 Asp. M.C. 228—Mathew, J.

Injury Sustained by Seaman on Board Ship—Expense of Surgical and Medical Attendance after Arrival at Home Port—Liability of Shipowner.]—A shipowner is not liable under section 207, sub-section 1 of the Merchant Shipping Act, 1894, for the expense of providing surgical and medical advice and attendance and medicine to the master or a seaman or apprentice who has been injured in the service of his ship, after such master, seaman, or apprentice has been brought back to a home port. *Anderson v. Dayner*, 72 L. J. K.B. 292; [1903] 1 K.B. 589; 88 L. T. 313; 51 W. R. 369; 9 Asp. M.C. 385—C.A.

Discharge at Foreign Port—"Passage home."]—Where the service of a seaman belonging to a British ship terminates at any port out of her Majesty's dominions, the master of the ship does not comply with section 186, sub-section 2(c) of the Merchant Shipping Act, 1894, by providing him with a passage to any port in the United Kingdom, but is bound, if he elects to "provide him with a passage home" under that clause of the sub-section, to provide him with a passage to the port in her Majesty's

dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman. *Purves v. Straits of Dover Steamship Co.*, 63 L. J. Q.B. 925; [1899] 2 Q.B. 217; 81 L. T. 35; 47 W. R. 630; 8 Asp. M.C. 566—C.A. Affirming, 8 Asp. M.C. 446—Mathew, J.

— **Expenses of Maintenance and Passage Home.**—Section 186 of the Merchant Shipping Act, 1894, which provides that where the service of any seaman belonging to any British ship terminates at any port out of her Majesty's dominions, the master, besides paying the wages to which the seaman is entitled, shall, as one of several alternatives, "(d) deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home," imposes upon the consular officer the duty of determining the amount to be deposited; and where the master has deposited the amount fixed by the officer, no further claim can be made against the ship-owner under the section for any expenses incurred by the seaman. *Edwards v. Steel, Young & Co.*, 66 L. J. Q.B. 690; [1897] 2 Q.B. 327; 77 L. T. 297; 45 W. R. 689; 8 Asp. M.C. 323—C.A.

"**Passage home.**"—"Home" in the section means the port at which the seaman was originally shipped, or such other port in the United Kingdom as he agrees to go to. *Ib.*

"**Voyage**"—"End of Voyage"—"Such port as may be required by the master"—**Final Port of Discharge.**—A "voyage," within the meaning of section 115, sub-section 5 of the Merchant Shipping Act, 1894, is the passing of a vessel from home to a given port and back again to home; and it is consistent with the vessel both on the passage out and the passage back going to more than one foreign country to unload or load and trade, before finally loading for her return home. The end of a "voyage," within the meaning of the said sub-section, is the place at which the cargo brought home is finally discharged. *The Scarsdale*, 74 L. J. P. 135; 21 T. L. R. 488—Bargrave Deane, J.

Where, under the agreement with the crew, a seaman shipped "on a voyage not exceeding one year's duration to any ports or places within the limits of 75° North and 60° South Lat., commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe within home-trading limits as may be required by the master," and the vessel having proceeded on her voyage returned home to a port in the United Kingdom, where the homeward cargo was discharged, and the seaman there claimed his wages, but the master refused them on the ground that he required the seaman under the agreement to go on in the ship to a certain other port in the United Kingdom,—*Held*, that the agreement being "for a voyage" within section 115, sub-section 5 of the Merchant Shipping Act, 1894, the voyage ended at the port at which the homeward cargo was discharged; and that the master by accepting the charter of his homeward cargo to this port had exercised his power under the agreement so as to require this port to be the end of the voyage,

and that the seaman was entitled to his discharge and wages at this port. *Ib.*

Wages—Agreement for Ordinary Voyage—Discovery by Crew that Cargo is Contraband of War for Belligerent Port—Refusal to Proceed on Voyage—Termination of Service—Claim for Wages.—

A seaman signed articles to serve on board a British ship for a voyage not exceeding two years to ports in the East, proceeding to Hong-Kong and thereafter trading to ports in any rotation and ending at a port in the United Kingdom. War then existed between Russia and Japan, and coal had been declared contraband of war. The vessel left with a cargo of coal to Hong-Kong or Shanghai as might be ordered at Singapore. On the voyage to Singapore the cargo was sold for Nagasaki in Japan, and on the arrival of the ship at Singapore the master received orders from the owner to go to Nagasaki instead of Hong-Kong. At Singapore it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong-Kong. They refused to proceed to Nagasaki on account of the increased risk and danger in going to a belligerent port with contraband of war. It was then arranged by the master that the crew should remain at Singapore and that he would call for them on his way back. He took another crew on board, went to Nagasaki, delivered the coal, and left that port, but on her way back the ship was driven ashore, was got off, and was taken to Hong-Kong. It was not proved that she became a wreck. The seaman was sent home with the rest of the crew, and arrived in London. He claimed his wages up to the date of his arrival in London, upon the ground that the agreement was broken by the owner when the ship was ordered to Nagasaki. When he made the agreement he had no knowledge that he would be required to sail with contraband of war to a belligerent port:—*Held*, that, there having been no wreck or loss of the ship which would terminate the service under section 158 of the Merchant Shipping Act, 1894, and there having been no termination by the discharge of the seaman under the provisions of the contract or under the provisions of the Act, either at home or abroad, the seaman was entitled to his wages up to the date of his arrival in London. *Lloyd v. Sheen*, 93 L. T. 174; 10 Asp. M.C. 75—D.

— **Obligation of Seamen under Articles—Enforcement of Agreement to Pay Increased Wages.**—

In an action by seamen to enforce an agreement made by the master with them abroad, while under articles, to pay additional remuneration in consideration of their remaining on board and working the vessel home after an accident, which had, in fact, not rendered the vessel unseaworthy,—*Held*, that in the absence of evidence that the risk of navigating the vessel in her then state was such as would have justified the crew breaking their articles abroad, the agreement was not one that could be enforced. *Hopkins v. M'Bride*, 50 W. R. 255—D.

— **Advance of—Seaman Shipped at Foreign Port.**—The restriction in section 140 of the Merchant Shipping Act, 1894, of advance notes to seamen to a sum not exceeding one month's wages is confined to agreements made between masters of ships and seamen conditional on

shipping at ports in the United Kingdom, and has not by the operation of section 124 been extended to agreements made at foreign ports conditional on shipping from such ports. *Ritchie v. Larsen*, 68 L. J. Q.B. 335; [1899] 1 Q.B. 727; 80 L. T. 259; 47 W. R. 413; 8 Asp. M.C. 501—D.

The restriction in section 140 of the Merchant Shipping Act, 1894, of advance notes to seamen to a sum not exceeding one month's wages is confined to the engagement of seamen at ports in the United Kingdom. Section 163 does not prohibit advances of more than one month's wages to seamen shipped at foreign ports; nor, where it is one of the terms of their engagement by the master of the ship at a foreign port that the seamen shall receive advances of more than one month's wages, is their indorsement of the master's advance notes to the crimp, who supplies them to the ship, an assignment within that section. There is no limit to advances made abroad; and section 7 of the Piracy Act, 1721, has no application to the terms of the engagement of seamen abroad. *Rowlands v. Miller*, 68 L. J. Q.B. 338; [1899] 1 Q.B. 735; 80 L. T. 290; 47 W. R. 687; 63 J. P. 407; 8 Asp. M.C. 508—D.

— **Advance Note—Assignment—Condition—Non-fulfilment—Liability of Owner.**—An advance note was given to A., a seaman, for a half month's wages. The note was in this form: "Five days after the ship W. leaves P. pay to the order of A. (provided he sails in the said ship and is duly earning his wages, according to his agreement)," &c. It was directed to B. & Co., the shipowners' agents at P., and there was a note upon it that it should at once be presented to B. & Co. for acceptance. A. transferred the note to C., who presented it to B. & Co., by whom it was duly accepted. Four days after the W. left P., A. was discharged. The master of the W. informed B. & Co. that A. had been discharged within five days of sailing, and directed them not to pay the note. B. & Co. paid the note. On action by B. & Co. against the shipowners for the amount of the note, —*Held*, that, as A. was not earning his wages at the end of five days after the W. left P., the condition of the note was not fulfilled, and that neither the shipowners nor B. & Co. as acceptors were liable upon it. *Bellamy v. Lunn*, 77 L. T. 396; 8 Asp. M.C. 348—D.

— **Ship Carrying Contraband of War—Order to Proceed to Belligerent Port—Refusal of Seamen to Proceed—Conviction and Imprisonment of Seamen—Action for Wages—Damages.**—Seamen engaged on an ordinary commercial voyage were required by the master at Hong-Kong to proceed to a belligerent port during the Japanese war, with a cargo which included contraband of war. The men refused and were imprisoned, and on their release were sent home as distressed seamen. In an action for wages and damages:—*Held*, that they were entitled to their wages, and also, by way of damages, to maintenance till the "final settlement" under section 134 of the Merchant Shipping Act, 1894, the final settlement being interpreted to mean the date of the Court of Appeal's judgment. THE HOUSE (LORD ATKINSON dissenting as to the amount of damages), after consideration, affirmed the decision of the

COURT OF APPEAL (76 L. J. K.B. 292; [1907] 1 K.B. 670). *Palace Shipping Co. v. Caine*, 76 L. J. K.B. 1079; [1907] A.C. 386; 97 L. T. 587; 13 Com. Cas. 51; 23 T. L. R. 731—H.L. (E.). Affirming, 10 Asp. M.C. 380—C.A.

— **Non-disclosure that Cargo is for Belligerent Port—Refusal by Seamen to Proceed.**

—A seaman signed articles at Glasgow for a voyage on the British steamship G. of "not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, via the Bristol Channel, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master." The vessel proceeded to Cardiff, where she was loaded with a cargo of coal. At the time the articles were signed a state of war existed between Russia and Japan, and both Powers had declared coal to be contraband of war. The master knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the crew. Sasebo was within the limits prescribed by the articles. Upon arrival at Hong Kong the seaman discovered the port of destination, and refused to proceed in the vessel. He remained at Hong Kong until she returned, when he rejoined her and returned to Cardiff:—*Held*, that the seaman was entitled to wages and maintenance while he was waiting at Hong Kong. *Caine v. Palace Steam Shipping Co.* (76 L. J. K.B. 292) followed. *Sibery v. Connelly*, 96 L. T. 140; 10 Asp. M.C. 330; 23 T. L. R. 257—C.A. Affirming, 70 J. P. 145—D.

— **Increase of Risk—"Loss" of Ship—Conditional Release.**—A conditional release signed by a seaman is not a "release" within the meaning of section 136 of the Merchant Shipping Act, 1894. The plaintiffs agreed to serve as seamen on board the defendants' ship on a voyage from Cardiff to Kiau Chiu and any ports within certain limits and home again. At this time war had broken out between Russia and Japan. The plaintiffs subsequently discovered that the ship was engaged in carrying contraband of war for Russia. When in the Far East on a voyage to Saigon, a port within the above limits, she was destroyed by an explosion. The plaintiffs were rescued and were sent home to Cardiff as distressed seamen, and at Cardiff they signed a conditional release without prejudice to their claim for damages and wages. The plaintiffs claimed wages down to the time of "final settlement," and damages for loss of their kit and for the hardship suffered. The defendants contended that the plaintiffs were only entitled to wages down to the date of the destruction of the ship, and were not entitled to damages, —*Held*, that there had not been a "loss" of the ship within section 158 of the Merchant Shipping Act, 1894, and that the plaintiffs were entitled to wages under section 134 (c) down to the time of "final settlement"—namely, the judgment in the action; and that they were entitled to damages for the loss of their kit and for the hardship suffered. *Collins v. Simpson Steamship Co.*, 23 T. L. R. 241—Sutton, J. Reversed in part, 24 T. L. R. 178—C.A.

— **Dock Dues—Right to Detain Ship for Unpaid Dues.**—The maritime lien of the master and crew of a vessel for wages does not take priority over the right given by section 253 of the Mersey Dock Acts Consolidation Act, 1858, to the Mersey Docks and Harbour Board to detain the vessel for unpaid dock dues. The right given by that section to detain a vessel until all dock and harbour rates have been paid is absolute. *The Emilie Millon*, 75 L. J. K.B. 81; [1905] 2 K.B. 817; 93 L. T. 692; 10 Asp. M.C. 162—C.A.

— **Foreign Ship—Lien—Priorities—Lex Fori.**—In actions *in rem* by masters of foreign ships for wages and disbursements, questions of lien and of priorities are to be decided by the *lex fori*. *The Tagus*, 72 L. J. P. 4; [1903] P. 44; 87 L. T. 598; 9 Asp. M.C. 371—Phillimore, J.

Section 167 of the Merchant Shipping Act, 1894, giving remedies to a master for his wages, disbursements, and liabilities, applies to masters of foreign ships notwithstanding the provisions of section 260. *The Milford* (Sw. 362) discussed and followed. *Ib.*

— **Voyage “to end at such port in the United Kingdom . . . as may be required by the master”**—Discharge of Cargo at Home-trade Port—Ship Required by the Master to go to another Port in Ballast within Home-trading Limits—“Voyage.”—By an agreement a crew was engaged on a voyage within specified limits of time and space, which was to end “at such port in the United Kingdom or the Continent of Europe within home-trading limits as may be required by the master.” Within the prescribed limits the ship arrived at Southampton, where she discharged her cargo. The master required the crew to take her on to Cardiff in ballast. One of the seamen claimed his discharge and wages at Southampton, on the ground that the voyage had ended there:—*Held*, that he was not entitled to his discharge at Southampton. *The Scarsdale*; *Board of Trade v. Baxter*, 76 L. J. P. 147; [1907] A.C. 873; 97 L. T. 526; 23 T. L. R. 729—H.L. (E.)

— **Desertion—Forfeiture—Criminal Matter—Private Arrangement—Deduction—Payment—“Through or in presence of” Mercantile Marine Superintendent.**—By the Merchant Shipping Act, 1894, s. 131, a seaman when discharged shall receive his wages “through or in presence of a superintendent” of mercantile marine, unless a competent Court otherwise direct. A master paying a seaman’s wages in the absence of a superintendent is liable to penalties. By section 221, a seaman deserting from his ship when abroad is liable to forfeit the wages he has earned and those which he may earn until his return to the United Kingdom, and also to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged at a higher rate of wages. By section 232, any wages forfeited for desertion are to be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement are to be paid into the Exchequer and carried to the Consolidated Fund:—*Held*, that the liability to forfeiture of wages on desertion is a liability of a criminal

nature, and cannot be compromised by a private arrangement between masters or owners and seamen. *Keslake v. Board of Trade*, 72 L. J. K.B. 829; [1903] 2 K.B. 453; 89 L. T. 534; 52 W. R. 127; 67 J. P. 356; 9 Asp. M.C. 491—D.

A seaman deserted abroad from his ship. The master of the ship engaged a substitute at a higher rate of wages. The seaman engaged himself for a homeward voyage on another ship. In pursuance of an arrangement between the seaman, the master of the first ship, and the master of the second ship, the latter, on the seaman’s return to the United Kingdom, deducted from his wages earned on the second ship the excess which the master of the first ship had paid to the substitute, and offered to the seaman in presence of the mercantile marine superintendent the balance after making such deduction. The superintendent refused to sanction the payment and withdrew, and the master of the second ship in his absence paid to the seaman the amount offered:—*Held*, that the superintendent was justified in withdrawing, that the amount was therefore paid in his absence, and that consequently the master was liable to a penalty under section 131. *Ib.*

— **Dismissal by Naval Court held in Foreign Country—Jurisdiction to Declare Wages Forfeited.**—Where a Naval Court, held in a foreign country, under sections 480 to 485 of the Merchant Shipping Act, 1894, discharges a seaman who is found guilty by the Court of an offence under section 225 of the Act from his employment on board a ship, and forfeits his wages, the seaman cannot, after such discharge, recover any wages from the shipowner in respect of his employment on the ship, inasmuch as the order and decision are within the jurisdiction of the Naval Court, and bind the seaman under section 483, sub-section (1), clauses (c) and (d), and sub-section (2). *Hutton v. Ras Steamship Co.*, 94 L. T. 645; 54 W. R. 182; 11 Com. Cas. 66; 22 T. L. R. 103—Lord Alverstone, C.J.

— **Termination of Service at Foreign Port—Sending Home—“Port in the United Kingdom agreed to by the seaman.”**—By section 186 of the Merchant Shipping Act, 1894, where the service of any seaman belonging to any British ship terminates at any port out of her Majesty’s dominions the master shall besides paying the wages to which the seaman is entitled, either “(a) provide him with adequate employment on board some other British ship bound to the port in her Majesty’s dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or (b) furnish the means of sending him back to some such port.” Seamen agreed to serve on a British ship on a voyage from Newport, Mon., to Malta, and to end at a final port of discharge in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive; and it was agreed that when the seamen were discharged on the Continent as above the master should furnish the means of sending them back to the nearest port in the United Kingdom served by regular steamers, and the seamen agreed to such nearest port as the port in the United Kingdom to which they might be so sent back. The

voyage ended at Hamburg and the crew were discharged, and the master paid the expense of sending them to Hull, which was the nearest port served by regular steamers. The seamen claimed that they were entitled to the expense of conveyance to Newport, the port of shipment:—*Held*, that "the port agreed to by the seaman" meant a particular defined home port, and not one of several ports which the master might select by terminating the voyage at a particular port on the Continent; that the agreement therefore contained a stipulation which was inconsistent with the provisions of section 186, and the stipulation was void under section 156 of the Act; and that the seamen were entitled to the expense of being sent back to Newport. *Att.-Gen. v. Fargrove Steam Navigation Co.*, 23 T. L. R. 230—Bray, J.

— **Termination of Service before Date contemplated—Capture of Vessel while carrying Contraband—"Loss" of Vessel—Change of Risk.**—Where a seaman's service terminates before the date contemplated by his agreement, he is not precluded by section 158 of the Merchant Shipping Act, 1894, from claiming wages beyond the date of the actual termination of the service on the ship, where such termination has been brought about by the wilful act of the captain and owners, as, for example, by engaging in the business of carrying contraband of war, which has led to the capture and condemnation of the vessel. In such a case the Court can also award damages to the seaman for breach of the agreement with him. *Austin Friars Steamship Co. v. Strack*, 74 L. J. K.B. 683; [1905] 2 K.B. 315; 93 L. T. 169; 53 W. R. 661; 10 Asp. M.C. 70; 21 T. L. R. 556—D.

Termination of Agreement of Service by "Loss" of Ship—Capture by Belligerent State—Subsequent Destruction.—The destruction of a British ship by one of two foreign Powers at war with each other following upon her capture by that Power is a "loss" of the ship within the meaning of section 158 of the Merchant Shipping Act, 1894, and consequently a seaman whose service has terminated before the date contemplated in the agreement by reason of such destruction is entitled to wages only up to the time of such destruction. *Sivewright v. Allen*, 75 L. J. K.B. 476; [1906] 2 K.B. 81; 94 L. T. 778; 54 W. R. 604; 70 J. P. 290; 11 Com. Cas. 167; 10 Asp. M.C. 251; 22 T. L. R. 482—D.

The capture of the ship of itself would not in such a case be a "loss" within the meaning of the section. (*DARLING, J.*, dissenting.) *Ib.*

Fishing-boat's Agreement—Order to be on Board at Specified Time—Failure to be on Board—Wilful Disobedience—Liability to Imprisonment.—A seaman engaged to serve on a fishing-boat was, when on board the boat in dock, ordered by the foreman manager of the owners, acting on behalf of them and of the master, to be on board at a specified hour on the following day, when the boat was to start on a fishing voyage. He did not go on board at all on that day. He was thereupon charged under section 376, sub-section (1), clause (d) of the Merchant Shipping Act, 1894, with the offence of "wilful disobedience," which was punishable by imprisonment. The Justices

found as a fact that he had disobeyed the order wilfully and without excuse. On behalf of the seaman it was contended that he was wrongly charged under clause (d) of the sub-section, as the boat was in port, and it was not proved that an order had been given to him on board by the master; and that if he had committed any offence it was that of desertion under clause (a) or absence without leave under clause (b), neither of which was punishable by imprisonment. The Justices came to the conclusion that he had committed the offence charged, no matter whether he had or had not also committed an offence under clause (a) or clause (b), and they accordingly convicted him, and sentenced him to imprisonment:—*Held*, that the conviction and, consequently, the sentence were justified. *Edgill v. Awarad*, 71 L. J. K.B. 690; [1902] 2 K.B. 239; 87 L. T. 121; 66 J. P. 760; 9 Asp. M.C. 341; 20 Cox C.C. 302—D.

Conspiracy—Intimidation—Necessity for Actual Employment.—Persons who follow the sea as a calling are not "seamen" within the exception contained in section 16 of the Conspiracy and Protection of Property Act, 1875, unless they are actually employed or engaged on board ship within the meaning of the definition of "seaman" contained in section 2 of the Merchant Shipping Act, 1854 (re-enacted by section 742 of the Merchant Shipping Act, 1894). An indictment for intimidation under section 7 of the Conspiracy and Protection of Property Act, 1875, will therefore lie against persons not so employed or engaged. *Reg. v. Lynch*, 67 L. J. Q.B. 59; [1898] 1 Q.B. 61; 77 L. T. 568; 46 W. R. 205; 8 Asp. M.C. 363; 18 Cox C.C. 677—C.C.R.

"Distressed seaman"—Seaman Shipwrecked Abroad but in Receipt of Wages—Expenses Incurred in Relief of Seaman—Action by Board of Trade for Recovery of Expenses from Owner—Evidence of Expenses—Account of Relieving Authority—Proof of Payment by Board of Trade—"Sufficient evidence."—It is a question of fact in each case whether a seaman who has been shipwrecked and in distress abroad is a "distressed seaman" within the meaning of the Merchant Shipping Acts, 1894 and 1898. A seaman may, however, be a "distressed seaman" within the meaning of those Acts, and as such entitled to relief under the Acts, notwithstanding that he has been paid arrears of wages sufficient to cover his passage home and maintain him in the meantime. *Board of Trade v. "Glenpark" Sailing Ship*, 73 L. J. K.B. 315; [1904] 1 K.B. 682; 90 L. T. 360; 52 W. R. 646; 9 Com. Cas. 192; 9 Asp. M.C. 550; 20 T. L. R. 321—C.A.

Whether in section 193, sub-section 3 of the Merchant Shipping Act, 1894, the expression "sufficient evidence" means conclusive evidence—*quere. Ib.*

Expenses Incurred in Relief of Seaman—Action by Board of Trade for Recovery of Expenses from Owner—Evidence of Expenses—Account of Relieving Authority—Proof of Payment by Board of Trade—"Sufficient evidence."—Section 193, sub-section 3 of the Merchant Shipping Act, 1894, provides that in any proceeding by the Board of Trade for recovery from the owner of

a ship of expenses incurred in the relief of a distressed seaman who belonged to the ship, the production of the account (if any) of the expenses furnished in accordance with the Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be "sufficient evidence" that the expenses were incurred or repaid under the Act by or on behalf of the Crown:—*Held*, that the expression "sufficient evidence" means conclusive evidence. *Board of Trade v. Sailing Ship "Glenpark,"* 72 L. J. K.B. 697; [1903] 2 K.B. 824; 88 L. T. 693; 51 W. R. 554; 8 Com. Cas. 285; 9 Asp. M.C. 413—Bigham, J. See s.c. in C.A., *supra*, col. 2304.

Persuading Seamen to Desert—Foreign Ship neither Registered nor Owned in United Kingdom.]—The special provision in section 233 of the Merchant Shipping Act, 1894, Part II., is alone applicable to the case of desertion of seamen from foreign ships, and excludes the general provisions of Part II. of the Act relative to desertion of seamen, which are limited to desertion from British ships—that is, sea-going ships registered in the United Kingdom, or sea-going British ships registered out of the United Kingdom. Accordingly, it is no offence under section 236 to persuade a seaman to desert from a foreign ship, for such an offence, as well as harbouring a deserter from a foreign ship, is punishable only under section 238 when applied by Order in Council. *Poll v. Dambe*, 70 L. J. K.B. 721; [1901] 2 K.B. 579; 84 L. T. 870; 50 W. R. 28; 65 J. P. 774; 9 Asp. M.C. 220—D.

Offences of Seamen against Discipline—Complaint to Naval Court against Seamen—Powers of Naval Court—Jurisdiction to Dismiss from Ship and Forfeit Wages—Finality of Order of Court.]—Upon a complaint made to a naval Court, convened under section 480 of the Merchant Shipping Act, 1894, by the master against a seaman for offences against discipline under section 225, the Court is not restricted in its powers of punishment to the power conferred by section 483, sub-section 1, clause (h), but may exercise any of the powers conferred by the other clauses of that sub-section; and where the Court in such a case discharges the seaman and forfeits his wages under the powers conferred by section 483, sub-section 1, clauses (c) and (d), the order of the Court is by section 483, sub-section 2, a complete bar to a subsequent action by the seaman against the shipowner for wrongful dismissal and wages. *Hutton v. Ras Steam Shipping Co.*, 76 L. J. K.B. 562; [1907] 1 K.B. 884; 96 L. T. 515; 12 Com. Cas. 231; 10 Asp. M.C. 386; 23 T. L. R. 295—C.A.

6. CHARTERPARTY.

(a) Hire of Ship.

Breach of Contract—Measure of Damages.]—There is no difference between the law of England and that of Scotland in respect of the compensation recoverable for breach of contract. The respondents, by a charterparty, contracted with the appellants to provide a ship for the carriage from Sweden of wood pulp which the appellants were under obligation to supply to a firm of merchants. The respondents broke their contract, the firm had to buy pulp else-

where to replace that which ought to have been delivered, and received the price of it from the appellants, who thereupon sued the respondents for the loss thus sustained:—*Held*, that the proper measure of damages was the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. *Ströms Bruks Aktie Bolag v. Hutchinson*, 74 L. J. P.C. 130; [1905] A.C. 515; 93 L. T. 562; 10 Asp. M.C. 138; 11 Com. Cas. 13; 21 T. L. R. 718—H.L. (Sc.)

Freightment—Necessity for Charterparty.]—The contract of freightment does not require the execution of a charterparty for its constitution. *Rederi Aktiebolaget Nordstjernan v. Salvesen*, 6 F. 64—Ct. of Sess.

Previous Verbal Representation as to Carrying Capacity of Vessel—Breach of Warranty.]—During negotiations for the chartering of a vessel the owners' agents represented that the vessel had carried a certain quantity of cargo. The charterers acted on the representation, which in fact was untrue, and entered into a charterparty containing no reference to the previous cargo:—*Held*, that, the representation being untrue, the charterers could recover as for breach of a collateral verbal warranty. *Hassan v. Runciman*, 91 L. T. 808; 10 Com. Cas. 19; 10 Asp. M.C. 31—Channell, J.

Guarantee by Owners that Steamer shall Carry Named Dead Weight and Provide not Less than Defined Cargo Space—Liberty to Steamer to Carry Named Weight of Coal for Steaming Purposes—Breach of Guarantee.]—By the terms of a charterparty the freight to be paid for the hire of a vessel for a voyage was the lump sum of 10,000L., the ship to take on board at the port of loading all such goods and lawful merchandise as the charterers or their agents should tender alongside for shipment, including explosives and deck cargo not exceeding what she could reasonably stow and carry. The charterparty contained the following provision: "The lump sum is based on owner's guarantee that the said steamer shall carry a dead weight of 6000 tons of cargo when loaded according to Lloyd's rules, exclusive of 1100 tons of coal, which steamer may carry for steaming purposes, &c., of which about 800 to be carried in the hold, and the necessary stores for the steamer's use for the voyage, and also that the steamer shall place at the disposal of the charterers for cargo not less than 8450 tons of forty cubic feet cargo space grain measurement; failing which, a *pro rata* reduction shall be made." The cubic space of 8450 tons of forty cubic feet cargo space grain measurement in the vessel was placed at the disposal of the charterers; but if she had taken on board a cargo of 6000 tons dead weight it would have been necessary to limit the quantity of coals on leaving the port of loading to 728 tons in order to comply with Lloyd's rules as to freeboard. The charterers in fact loaded a cargo which filled all the available space, but did not weigh 6000 tons, and the master thereupon took on board 1,250 tons of coal for steaming purposes. The charterers deducted from the 10,000L., named in the charterparty as the lump sum freight, the sum of 523L. 18s. 10d., being the proportion of the 10,000L. correspond-

ing to the difference between 7,100 tons (6,000 + 1,100) and 6,728 tons, the total dead-weight capacity of the vessel, upon the ground that she was not of the guaranteed dead-weight capacity of 6,000 tons when loaded according to Lloyd's rules, exclusive of 1,100 tons of coal for steaming purposes. In an action by the shipowners to recover the 523*l.* 18*s.* 10*d.* so deducted,—*Held*, that the deduction had been rightly made by the charterers, and that the shipowners were therefore not entitled to recover. *Societa Anonima Ungherese di Armamento Marittimo Oriente v. Tyser Line*, 8 Com. Cas. 25—Kennedy, J.

Charter of Ship for Voyage—Full Cargo over "tackle, apparel, provisions and furniture"—Implied Condition that Ship should be Used for Charterers' Purposes Only—Loading More Coal than Necessary for Chartered Voyage—Expense of Lightening Ship—Liability of Shipowner.]—A charterparty provided that a ship should load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceed to two or three ports. On her arrival at her first port of discharge the shipowner loaded a larger amount of bunker coal (after allowing a reasonable margin) than was required for the chartered voyage. In consequence it became necessary to lighten the ship outside the next port of discharge to enable her to get into such port, and the charterers were put to considerable expense.—*Held*, that in a charterparty of this kind there was an implied condition that, subject to what was reasonably necessary for the seaworthiness of the ship on the chartered voyage and the due performance of such voyage, the ship should be used for the purposes of the charterers only, and that the shipowners by loading an excessive quantity of bunker coal had committed a breach of that condition, and were bound to repay the money expended by the charterers. *Darling v. Raeburn*, 76 L. J. K.B. 570; [1907] 1 K.B. 846; 96 L. T. 437; 12 Com. Cas. 262; 23 T. L. R. 354; 10 Asp. M.C. 499—C.A. Affirming, 10 Asp. M.C. 268—Kennedy, J.

Obligation of Shipowner to Supply Ballast for Ship.]—Where in a charterparty the responsibility for safe navigation is imposed on the owner, the provision of proper ballast to secure the stability of the ship, which is an incident of navigation, is the duty of the owner, whether or not there has been a demise of the vessel to the charterer. *Weir v. Union Steamship Co.*, 69 L. J. Q.B. 809; [1900] A.C. 525; 83 L. T. 91; 5 Com. Cas. 363; 9 Asp. M.C. 111—H.L. (E.)

Option of Charterers to Cancel on Non-Arrival of Vessel by Fixed Date—Impossibility of Arrival—Refusal to Proceed—Injunction.]—By a charterparty the shipowner agreed that his vessel should proceed to a named port and there load a cargo for the charterer, and it was provided that, if the vessel should not be at that port ready to load by a specified date, the charterer should be at liberty to cancel the charterparty. The vessel was then at another port unloading, and was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or

to promise to load the vessel if she proceeded to the agreed port, and said that if he did load, the rate of freight must be reduced, and he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there.—*Held*, that an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than those of the charterparty. *De Mattos v. Gibson* (28 L. J. Ch. 165, 498) and *Sevin v. Deslandes* (30 L. J. Ch. 457) distinguished. *Bucknall v. Tatem*, 83 L. T. 121; 9 Asp. M.C. 127—C.A.

Failure to Provide Ship "with all convenient speed"—Option to Charterers to Cancel Contract.]

—A charterparty for a voyage from Leith to London provided that "the s.s. *Alice* now trading and expected ready to load about March 3" should "with all convenient speed sail and proceed to" the loading berth at Leith and there load. It further provided that "in the event of . . . any mishap entailing delay in arrival at port of loading, beyond seven days of her expected readiness, charterers to have the option of cancelling the charter." The charterparty also contained a clause giving the shipowners the option of substituting for the *Alice* a sister ship called the *Douglas*. Neither the *Alice* nor the *Douglas* was ready to load within seven days of March 3, owing to the shipowners having, after entering into the charterparty, undertaken other engagements for these ships which rendered it impossible for them to be ready for loading by that date. The charterers thereupon despatched their goods by other vessels at increased rates. In an action of damages at the instance of the charterers,—*Held*, that, as the shipowners had by their own act put it out of their power to fulfil the contract, they were liable in damages. *Nelson v. Dundee East Coast Shipping Co.*, [1907] S.C. 927—Ct. of Sess.

Ship "to proceed immediately"—Deviation—Repudiation—Condition Precedent.]—By two charterparties of even date a steamer was chartered to proceed on successive voyages to a port in America and there load a cargo, and to proceed therewith to Rotterdam. The second charterparty contained a clause that on the completion of the first voyage the steamer should "proceed immediately" to fulfil that charterparty. On the completion of the first voyage the steamer left Rotterdam and went to Cardiff to coal, and thence proceeded to America, where she arrived before the cancelling date provided by the charterparty. The charterers refused to load the steamer under the charterparty on the ground that by reason of the steamer going to Cardiff there had been a breach of the above clause.—*Held*, that there had been no breach of the charterparty, it being the ordinary course of business for steamers proceeding from Rotterdam to America to go to Cardiff to coal. *Held*, also, that the above clause was not a condition precedent, the breach of which would entitle the charterers to repudiate the charterparty. *Forest Oak Steam Shipping Co. v. Richard*, 5 Com. Cas. 100—Bigham, J.

Breach of Warranty—Damages—Remoteness.]

—The plaintiff chartered a ship from the defendants for a single voyage. By the charterparty the defendants warranted that the vessel was

"in every way fitted for the voyage and service, and to be so maintained by the owners." During the currency of the charterparty a stevedore engaged on the ship in the work of unloading sustained injuries by reason of the defective condition of an iron ladder leading to the hold. The stevedore sued the charterer for damages. The charterer defended the action, and in so doing acted reasonably, and judgment was given against him for damages and costs on the ground that he had committed a breach of duty towards the stevedore in not making an inspection of the vessel before inviting the stevedore on board:—*Held*, that the charterer's liability to the stevedore was the natural consequence of the defendants' breach of warranty; and that the charterer was entitled to recover from the defendants the damages and costs paid by him to the stevedore, and his own costs, as between solicitor and client, incurred in defending the action. *Scott v. Foley*, 5 Com. Cas. 53—Bigham, J.

Mortgage—Charterparty whether Impairing Security of Mortgagee.—Mortgagors of a ship chartered her to the plaintiff for passenger and merchandise traffic between Liverpool and North Wales during the months of September and October. By the terms of the charter the plaintiff was authorised to sell such of the effects on board the ship as might be necessary for the service, and bring the proceeds into account. He was to keep an account of receipts for passage-money, freight on merchandise, sales of wines and other refreshments on board, payments of wages, stores and expenses of service; all such payments to be made out of receipts. Accounts were to be made up weekly. The mortgagors were to keep the ship properly insured against usual risks. The profits of the venture (if any) were to be divided in equal shares between the mortgagors and the plaintiff at the expiration of the charter. If the ship was found to be running at a loss the plaintiff was to be at liberty to discontinue or modify the charter. At the date of the charter the vessel was not fully insured, and it was anticipated that there would be default in payment of the mortgage debt:—*Held*, that the charter did not impair the security of the mortgagee. *The Heather Bell*, 70 L. J. P. 57; [1901] P. 272; 84 L. T. 794; 49 W. R. 577; 9 Asp. M.C. 206—C.A.

Sub-charterparty—Right of Shipowner to Sue Indorsee of Bill of Lading for Freight on Cargo Shipped under Sub-charterparty.—The owners of the *W.* chartered her to G. under a charterparty which provided that the master should sign bills of lading as presented, and that the charterers' liability should cease on shipment of the cargo, and gave the shipowners a lien for freight, dead freight, and demurrage. G. re-chartered the vessel to M. L., under a charterparty which contained provisions similar to the original charterparty. M. L., who had no notice of the original charterparty, shipped a cargo in pursuance of the second charterparty, and bills of lading were signed by the master as presented, by which the cargo was to be delivered to the order or assigns of the shippers on payment of freight without recourse to shippers as per the second charterparty:—*Held*, that the bills of lading were signed by the master as agent of the shipowners, and

that the shipowners were entitled to sue the indorsees of the bills of lading for the freight due thereon. *Wastwater Steamship Co. v. Neale*, 86 L. T. 266; 9 Asp. M.C. 282—D.

Spanish Export Tax—Liability to Pay.—By a charterparty a ship was chartered to proceed to a Spanish port and load a cargo of iron rails, "Spanish Customs dues on cargo to be paid by steamer not exceeding 1s. per ton." There was a Spanish export tax on iron rails:—*Held*, that the ship had to pay the export tax, which came within the words "Customs dues," up to 1s. per ton, and the charterers had to pay the balance. *Rea v. London Transport Co.; London Transport Co. v. Bessler, Waechter & Co.*, 23 T. L. R. 271—Channell, J. *Reversed*, 24 T. L. R. 133—C.A.

(b) Time Charter.

Captain under Direction of Charterer—Shipowner's Lien for Hire—Lien on Sub-freights—Sub-charter—Bill of Lading—Payment of Freight to Agent Nominated by Sub-charterer—Right of Shipowner to Freight—Right to Withdraw Ship—"Without prejudice to other rights"—Lien for Hire Due after Withdrawal.—In the case of a time charter in the ordinary form, not operating as a demise of the ship, the contracts contained in bills of lading are made with the shipowner and not with the charterer, notwithstanding that, by the terms of the time charter, the captain is to be under the orders and direction of the charterer as regards agency, employment, and other arrangements. *Wehner v. Dene Steam Shipping Co.*, 74 L. J. K.B. 550; [1905] 2 K.B. 92; 10 Com. Cas. 139; 21 T. L. R. 339—Channell, J.

Agents appointed by the charterer or his sub-charterers to collect freight due under bills of lading collect the same on behalf of all parties concerned, including the shipowner having a lien on cargoes and sub-freights for hire due and unpaid under the time charter. A shipowner having such a lien, who claims the freight from the agent before the latter has paid it to or allowed it in account with the charterers, has a right to have paid to him an amount equal to the amount of hire presently due to him and unpaid for which he has the lien. Any further sum received by him as freight from the agents he holds to the use of the charterers. *Ib.*

Seemle, that the shipowner who receives freight from the agent has no right to hold it as security for hire accruing due. *Gilkison v. Middleton* (26 L. J. C.P. 209; 2 C. B. (n.s.) 134) followed. *Marquand v. Banner* (25 L. J. Q.B. 313; 6 E. & B. 232) questioned. *Ib.*

By the terms of a time charter the hire of the ship was payable half-monthly in advance. In default of payment the owner was to have the faculty of withdrawing the ship from the service of the charterer without prejudice to any claim he might have against the charterer under the charterparty. The owner was also to have a lien upon all cargoes and sub-freights for any amounts due under the charter:—*Held*, that, after exercising his right of withdrawing the ship from the service of the charterer, the

owner could not exercise his lien on sub-freights to enforce payments of hire alleged to be due for the use of the ship after the date of the withdrawal. *Ib.*

Part of the time allowed for discharging was occupied in the reasonable and necessary process of ballasting the ship, and the discharge was delayed in consequence:—*Held*, that the time so occupied was not to be excluded from the time allowed for discharging. *Ib.*

Periodical Payments in Advance—Power Reserved to Owners on Default of Payment to Withdraw Vessel—Estoppel.—By a charterparty a ship was let for nine months, the charterers to pay for the hire of the ship at an agreed rate, fortnightly in advance, and in default of such payment the owners to have the faculty of withdrawing the ship from the service of the charterers. The owners were to pay the wages of captain and crew, but the charterers were to pay for coals, port charges, &c., and the captain was to be under their orders and directions as regarded employment. After the charterers had had the use of the ship for two months they made default in making the fortnightly payment due on June 21. The ship was then on a voyage to S., where she arrived on the 25th, and while there the captain telegraphed to H. to order the cargo to be ready. After lying two days at S. the ship started on the 27th for H. On the 28th the owners gave notice to the charterers of their withdrawal of the ship by reason of the charterers' default in the payment due on the 21st:—*Held*, that upon these facts there was no evidence of any waiver by the shipowners of their right to withdraw the vessel, nor of any conduct on their part estopping them from insisting on their right. *Tyler and Hessler, In re*, 86 L. T. 697; 7 Com. Cas. 166; 9 Asp. M.C. 292—C.A.

"Lien on sub-freights."—By the terms of a time charter the shipowner was to have a "lien on sub-freights" as security for payment of the hire of the ship:—*Held*, that this gave the shipowner a right to stop freight before it was paid to the time charterer or his agent authorised to receive it; and that when once the freight was so paid the shipowner's right to stop it was gone. *Tugart, Beaton & Co. v. Fisher*, 72 L. J. K.B. 202; [1903] 1 K.B. 391; 88 L. T. 451; 51 W. R. 599; 9 Asp. M.C. 381; 8 Com. Cas. 133—C.A.

Duty to Supply Ballast.—By a charterparty it was agreed that a vessel with officers and crew should be placed at the disposal of the charterers or their assigns for the conveyance of merchandise and (or) passengers between certain ports, the vessel being let for the sole use of the charterers, with liberty to sub-let, for three voyages commencing not later than a certain day when she was to be placed with clear holds at the charterers' disposal at New York, they having the whole reach or burden of the vessel, sufficient room being reserved to the owners for the officers, crew, and tackle, &c., of the ship. The vessel was not to be required to load more than she could reasonably stow and carry over and above her tackle, stores, &c. The captain was to be under the orders of the charterers as regards employment, agency, and other arrangements, and in case

of dissatisfaction of the charterers the owners agreed to make any necessary change in the appointment of the captain or crew. The freight payable by the charterers was a fixed monthly amount, and was payable until the charterers delivered up the vessel to the owners. The owners were to have a lien on the cargo and freight for arrears of hire, and the charterers were to have a lien on the ship for the freight payable in advance. The charterers sent the ship upon one of the voyages contemplated by the charterparty without any cargo. It consequently became necessary for the proper navigation of the ship to take on board some ballast in addition to her usual water ballast. In an action to decide at whose cost this extra ballast was to be supplied,—*Held*, that there was nothing in this charterparty which relieved the shipowners from the ordinary obligation of shipowners to supply the necessary ballast for the proper navigation of the ship. *Weir v. Union Steamship Co.*, [1900] 1 Q.B. 28; 81 L. T. 553—C.A.

Power of Extension for Completion of Voyage.—Under a charterparty a ship was hired within certain limits for "a term of about six calendar months" from the date when she was placed at the charterers' disposal. The charterparty provided that should the steamer be upon a voyage at the expiration of the term, the charterers were to have the use of the steamer at the same rate and conditions for such extended time as might be necessary for the completion of the contemplated voyage, and in order to bring the steamer to the port of redelivery. The steamer came on hire on May 12. On October 26 the charterers sent the steamer on a voyage within the prescribed limits, which it was obvious could not be completed so as to permit of the re-delivery of the steamer to the owners at the end of the period of about six months, and the steamer was, in fact, delivered to the owners nearly two months after the expiration of that period:—*Held*, that the charterers had not committed a breach of the charterparty. *Dene Steam Shipping Co. v. Bucknall*, 5 Com. Cas. 372—Bigham, J.

Duration of Hire—Completion of Voyage.—A steamer was chartered for twelve calendar months, payment of hire to be at a certain rate per month, and "at and after the same rate for any part of a month used to complete a voyage," hire to continue from the time specified for terminating the charterparty until delivery of the steamer to the owners at a port in the United Kingdom in the charterer's option. The twelve months expired on August 12. On August 18 the vessel finished discharging a cargo at Cronstadt, which had been carried under a sub-charterparty for a voyage from Cardiff to that port. The charterer intended that the vessel, after discharging at Cronstadt, should proceed to Lulea in ballast, load a cargo there, and proceed therewith to Rotterdam and thence to Gravesend, where the vessel would be delivered to the owners, according to reasonable calculations, before September 12:—*Held*, that to send the ship to Lulea would be to cause her to commence a fresh voyage, and that the owners were therefore entitled to have her re-delivered to them at Cronstadt. *Istok v. Steamship and Drughorn, In re*, 7 Com. Cas. 190—C.A.

Hire—Quarantine—"Restraint of princes and rulers."—A time charter contained a condition that payment of the stipulated hire should cease during loss of time occasioned by certain specified circumstances. Among these circumstances detention in quarantine was not mentioned. By a further clause "restraints of princes and rulers" were "mutually excepted." The vessel having been detained for some days in quarantine, the charterers declined to pay the hire for that period on the ground that quarantine fell within the exception of "restraints of princes and rulers":—*Held*, that the charterers were liable for the hire during the period the vessel was in quarantine. *Aktieselskabet Lina v. Turnbull*, [1907] S.C. 507—Ct. of Sess.

(c) *Warranty of Seaworthiness.*

Liability of Shipowners—Charterers Agreeing to Provide and Pay for all Coal—Insufficiency of Supply of Coal.—Where under a charterparty for a round voyage from Liverpool to the River Plate and back to the United Kingdom, the charterers are to provide and pay for all the coal, the shipowners are not relieved from responsibility to see that the ship is seaworthy at the commencement of each stage of her voyage by reason of there being a sufficient supply of coal on board. *McIver v. Tate Steamers, Lim.*, 72 L. J. K.B. 253; [1903] 1 K.B. 362; 88 L. T. 182; 51 W. R. 393; 8 Com. Cas. 124; 9 Asp. M.C. 362—C.A.

Division of Voyage into Stages for Coaling Purposes—Insufficient Equipment of Coal.—Where in an action by a cargo-owner against a steamship-owner upon a contract of affreightment the cargo-owner establishes that the ship was not seaworthy at the commencement of the voyage because she had not on board sufficient coal for the whole voyage, and that a loss was thereby caused to him, the shipowner may displace this cause of action by proving that by reason of the necessity of the case he had divided the voyage into stages for coaling purposes, and that at the commencement of each stage the ship had sufficient coal on board for that stage; but if he fails in this he fails in disproving a breach of the implied warranty of seaworthiness which *prima facie* attaches to a contract of affreightment. *Thin v. Richards & Co.* (62 L. J. Q.B. 39; [1892] 2 Q.B. 141) explained. *The Vortigern*, 68 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M.C. 523—C.A. An owner of a cargo-carrying steamship agreed by charterparty to carry a cargo from Cebu, in the Philippine Islands, to Liverpool, with liberty to call at any port in any order, the negligence, default, or error in judgment of the master, crew, and other servants of the shipowner excepted. From the necessity of the case a cargo-carrying steamship cannot start upon this voyage with sufficient coal for the whole voyage, and the shipowner therefore, in accordance with the ordinary course of business in that trade, divided the voyage into three stages for coaling purposes. The ship did not, at the commencement of the second stage, take in sufficient coal for that stage, and, in consequence, burnt a part of the cargo for fuel to carry the ship to the end of the stage. In an action by the cargo-

owner for non-delivery of the cargo burnt,—*Held*, that the implied warranty that the ship should be seaworthy for the voyage at the commencement thereof included a condition that the ship should, at the commencement of each stage, be seaworthy as to her equipment of coal for that stage, and that, as the warranty was not made good with regard to the second stage, the cargo-owner was entitled to recover, the negligence of the servants of the shipowner being no answer to the breach of warranty. *Id.*

Per COLLINS, L.J.—The subject-matter as to which, and the stages into which, the voyage is to be deemed to be divided for the purposes of the warranty of seaworthiness must be determined in each case by reference to the exigencies of the adventure contemplated by the parties, having regard to the ordinary course of business. *Id.*

Unseaworthiness from Improper Loading—Personal Negligence of Owner.—The owner of a chartered ship, in herself seaworthy, but rendered unseaworthy by the improper loading of cargo and ballast which is carried out under his orders, is liable for damage occasioned by his personal negligence. *City of Lincoln v. Smith*, 73 L. J. P.C. 45; [1904] A.C. 250; 91 L. T. 206; 9 Asp. M.C. 586—P.C.

Clause of Non-liability—"Provided all reasonable means have been taken to provide against unseaworthiness"—Negligence.—In a charterparty the owners stipulated that they should not be liable for, among other things, unseaworthiness, "provided all reasonable means have been taken to provide against unseaworthiness." In an action for loss caused by unseaworthiness, brought by the charterers, the jury found that such reasonable means were not taken, and judgment was entered for the plaintiffs for the damages sustained:—*Held*, on the construction of the clause as a whole, that the owners were not protected by the clause under which they claimed protection, the clause being contradictory and inconsistent in its terms. *Nelson Line v. Nelson & Sons (No. 2)*, 77 L. J. K.B. 82—H.L. (E.) Affirming, [1907] 1 K.B. 769; 96 L. T. 402; 10 Asp. M.C. 390; 12 Com. Cas. 210; 23 T. L. R. 302—C.A. And see *The Europa*, 77 L. J. P. 26; [1908] P. 84—D.

(d) *Exceptions.*

"All other accidents"—Spilling of Sugar in Bags—Bags Torn by Reckless and Improper Use of Hooks in Discharging Cargo.—The spilling of sugar, owing to the tearing of the bags in which it was contained by the reckless and improper use of hooks in discharging the cargo, held to be an "accident" within the meaning of the following clause in a charterparty under which the sugar was carried: "Act of God, fire, perils of the sea, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers and peoples; collisions, strandings, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management or navigation of the vessel or otherwise." *The Torbryan*, 72 L. J. P. 76; [1903] P. 194; 89

L. T. 265; 52 W. R. 40; 9 Com. Cas. 1; 9 Asp. M.C. 450—C.A.

Detention by Railways and Scarcity of Waggons.—A charterparty for a cargo of iron ore to be delivered to the charterer or his assignees free into trucks at Glasgow provided that the charterer was not to be responsible for "detention by railways, scarcity of waggons . . . or other causes beyond his control." The iron ore was not discharged until sixteen days after the ship was berthed, owing to the Caledonian Railway Co. (by whose line the consignees had directed the charterer to forward the ore) not having supplied waggons until the latter part of these sixteen days. In an action by the shipowners against the charterers for demurrage, the pursuers maintained that the defender ought to have forwarded the ore by the North British Railway Co.'s line, and in any view that the charterer was liable because the reason why the Caledonian Co. did not at first supply waggons was that the consignees were detaining too many of that company's waggons at their works:—*Held*, that the delay in discharging the cargo was due to detention by railways and scarcity of waggons beyond the defender's control, and that he was not liable in demurrage. *Mein v. Ottmann*, 6 F. 270—Ct. of Sess.

Specified Holidays — Unauthorised Holiday Taken by Men—Exception of "any time lost through riots, strikes, lock-outs, or any disputes between masters and men, occasioning a stoppage of pitmen"—Cause beyond Charterers' Control.]—A charterparty provided: "The cargo to be loaded in 130 running hours (excluding bunkering time, Sundays, Custom House, colliery and local holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas . . .) commencing when written notice is given of steamer being . . . ready to load"; and further: "Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the steamer is stemmed; or by reason of accidents to mines or machinery, obstructions on the railway or in the docks, or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time." The colliers belonging to the colliery from which the coal was taken gave notice that they would work on Good Friday, April 10, 1903, and the next day, but that they would take Easter Monday and the following Tuesday and Wednesday, April 13, 14, and 15, as holidays. The colliery owners had no voice in this matter. Notice of the steamer's readiness to load was given by the shipowners at 9 A.M. on Wednesday, April 15, on which day all work at the colliery was stopped and no coal raised:—*Held*, that the time lost by reason of the stoppage of the colliery on April 15 was within the exceptions in the charterparty, the words "or any cause beyond the control of the charterers," and that the shipowners were entitled to damages for detention. *Richardsons and Samuels & Co.*; *In re*, 66 L. J. Q.B. 863; [1898] 1 Q.B. 261; 77 L. T. 479; 8 Asp. M.C. 330—C.A.

Negligence Clause — Exemption of Owners

from Liability for Master's Negligence—Bill of Lading not Incorporating Negligence Clause—Loss of Ship and Cargo by Master's Negligence — Payment of Damages by Shipowners to Holders of Bills of Lading—Indemnity of Shipowners by Charterers.—Merchants chartered a ship by a charterparty, one of the terms of which was that the owners should not be liable for loss caused by the master's negligence. The charterers presented to the master, and the master signed, a bill of lading which did not incorporate this term of the charter. The ship and cargo were lost through the master's negligence, and the owners were compelled to pay to the holders of the bill of lading the damages sustained. The owners, by their action, claimed to be indemnified by the charterers:—*Held*, that they were entitled to be so indemnified. *Kruger v. Moel Tryvan Ship Co.*, 76 L. J. K.B. 985; [1907] A.C. 272; 97 L. T. 143; 13 Com. Cas. 1; 10 Asp. M.C. 465; 23 T. L. R. 677—H.L. (E.)

It is the charterers' duty to present for the master's signature such a bill of lading as is not inconsistent with and not to the prejudice of the charterparty. *Ib.*

Delay Caused by Collision without Shipowner's Default.—By the terms of a charterparty a ship was to proceed to Poti and there load a cargo for Baltimore or Philadelphia. All hours on demurrage over the running days were to be paid for. By the charterparty all causes beyond the control of the shippers, consignees, or the charterers which might prevent or delay the loading or discharging during the voyage were always mutually accepted. Subject to the exceptions, the charterers guaranteed cargo and quay berth from the time that written notice of free *pratique* having been received by the vessel had been given to charterers' agent. After the notice of receipt of free *pratique* had been given and the ship was on demurrage, and while she was waiting at Poti for a berth, a steamer, on March 4, came into collision with her, and in consequence she was obliged to proceed to Constantinople for repairs. No demurrage was claimed in respect of the time she was at Constantinople. Upon her return to Poti on April 19, owing to the number of steamers waiting to be loaded, a quay berth was not ready till June 2, and she completed her loading and sailed from Poti on June 10:—*Held*, that, there being no default on the part of the owners, the period of demurrage was resumed upon the return of the ship to Poti, and that the exceptions did not protect the charterers from liability to pay demurrage from April 19 to June 10. *Tyne Shipowning Co. v. Lecch*, 69 L. J. Q.B. 353; [1900] 2 Q.B. 12; 48 W. R. 500; 5 Com. Cas. 155—Kennedy, J.

Causes Operating before Shipment.—The defendants chartered the plaintiffs' vessel for the carriage of a cargo of ore from Poti in the Black Sea, the charterparty containing amongst the excepted perils which might prevent or delay the loading of the vessel, "floods, stoppages of trains, miners or workmen, accidents to railways and to mines or piers from which the ore is to be shipped." In the ordinary course the ore was brought from the mines to the pier by lines of railway and could not be brought in

any other way, and was not generally brought until it was wanted for shipment. The vessel arrived at Poti, but no cargo was or could be supplied to her in consequence of the breakdown of the railway communication between the mines and the pier, caused by storms and floods, and the vessel sailed away without cargo. In an action by the plaintiffs against the charterers for not supplying the cargo,—*Held*, that the exceptions in the charterparty applied not only to causes operating at the port of loading, but also to causes operating to prevent the ore being brought from the mines to the pier, and that the charterers were therefore protected by the exceptions. *Furness v. Forwood*, 77 L. T. 95; 8 Asp. M.C. 298—Mathew, J.

(e) *Cargo*.

"Full and complete cargo"—Wet Cargo in Frozen Condition—Broken Stowage.—A charterparty provided that the charterers should ship a full and complete cargo of "wet woodpulp which contains 50 per cent. water." During the shipment of the cargo a severe frost prevailed at the port of loading, which froze the bales of woodpulp, with the result that there was a large amount of broken stowage, and the cargo loaded, although as much as the ship could stow, was less than the cargo which the ship could have stowed had the bales been shipped in their ordinary flexible condition. It was proved that intense frosts existed at the port of loading at the period of the year contemplated by the charterparty for the shipment of the cargo, and that wet woodpulp is always shipped there in winter in a frozen condition:—*Held* (VAUGHAN WILLIAMS, L.J., *dissentiente*), that the charterers had shipped a full and complete cargo of "wet woodpulp which contains 50 per cent. water" within the meaning of the charterparty. *Isis Steamship Co. v. Bahr, Behrend & Ross*, 68 L. J. Q.B. 930; [1899] 2 Q.B. 364; 81 L. T. 241—C.A.

Loading "ex cars from alongside steamer"—Railway Seventy Feet from Ship—Custom of Port.—The charterparty provided that the cargo should be loaded "ex cars from alongside steamer at ship's expense." The charterers brought the cargo in cars upon rails near the ship, so that the nearest car was not nearer to the ship than seventy feet, and the others were further from the ship, and relied upon a custom that delivery in cars at the end of the nearest rail was at the port considered delivery alongside in cars:—*Held*, that the charterers had not delivered the cargo to be loaded "ex cars from alongside steamer," pursuant to the charterparty. *Ib.*

—Cargo in Frozen Condition.—A charterparty provided that a ship should load "a full and complete cargo of wet woodpulp which contains about 50 per cent. of water." Of this substance there are two kinds, one of which packs more closely than the other and is not liable to freeze, but there was no stipulation which of the two kinds was to be loaded. A cargo partly of one and partly of the other kind was loaded. Part of the cargo was frozen hard, and the result was that a much smaller cargo was loaded than might have been placed

in the ship if it had all been in an unfrozen condition. But it was admitted that as large a cargo was loaded as was possible in the frozen state of the pulp:—*Held*, that "a full and complete cargo" had been loaded within the terms of the charterparty. *Isis Steamship Co. v. Bahr, Behrend & Ross*, 69 L. J. Q.B. 660; [1900] A.C. 340; 82 L. T. 571; 5 Com. Cas. 277; 9 Asp. M.C. 109—H.L. (E.)

"A full and complete cargo not exceeding what she can reasonably stow and carry over her Tackle, Apparel, Provisions and Furniture"—"Lighten at receiver's expense"—Shipowner causing Charterer Expense of Second Lightening by Loading Subsequent to First Lightening more Coals than necessary for Chartered Voyage—Liability of Shipowner.—The essence of a contract to carry by sea from one port to another port or set of ports is, in the absence of agreement to the contrary, that the charterer shall have the full advantage of the ship subject to that which is necessary for seaworthiness, safety, and the fulfilment by the shipowner of his contract. *Darling v. Raeburn*, 75 L. J. K.B. 415; [1906] 1 K.B. 572; 95 L. T. 108; 11 Com. Cas. 147; 22 L. R. 465—Kennedy, J.

A charterparty provided that the vessel should load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her Tackle, Apparel, Provisions and Furniture," and proceed to a certain port and "there lighten at receiver's expense as much of the cargo as may be found necessary to allow Steamer to enter, at all times of high water, such Port." The charterer at a port lightened in anticipation of the difficulty in getting into the next port. The shipowner then loaded a larger amount of bunker coals (after allowing a reasonable margin) than was required for the chartered voyage. In consequence, a second lightening outside the port of discharge became necessary. The charterer, under threat by the shipowner of the exercise of his lien on cargo for the expense of the second lightening, paid the amount under protest:—*Held*, that the charterer was entitled to recover the amount paid from the shipowner. *Ib.*

Failure to Ship Cargo—Measure of Damages—Special Damages—Loss to Charterer by Inability to Implement Contract of Sale.—By a charterparty a shipowner became bound to load a cargo of wood pulp at Stocka, Sweden, "in August/September, owners' option," for carriage to Cardiff under conditions making the ordinary duration of the voyage twenty-one days. In an action by the charterer for damages for an admitted breach of this contract by the failure of the shipowner to send a ship to Stocka before the last day of September, it was proved that the shipment was intended for delivery at Cardiff in implement of a contract of sale between the charterer and a purchaser, bearing "mode and place of delivery—c.i.f., Cardiff. Time of delivery August/September 1900," but that no notice of this contract had been given to the shipowner. It was further proved that woodpulp had been brought in against the charterer by the purchaser on the non-arrival of the cargo in September, but after it had been ascertained that the cargo could not be shipped from Stocka before October 12 or 13. The pursuer paid to his customer the loss

resulting under the contract of sale—that is, the difference between the market price at Cardiff at which the goods had been bought in and the contract price. He claimed this sum as damages from the shipowner—first, in respect of his loss under this special contract; and secondly, as, apart from any special contract, the proper measure of damages caused by the defender's default:—*Held*, that the pursuer was not entitled to recover his loss under the contract of sale, in respect that the breach of this contract—which was to deliver at Cardiff by September 30—was not caused by the defender's breach of his contract to ship from Stocka by that date. *Held*, further, that, as no other special loss was proved, the pursuer was only entitled in respect of the admitted breach of contract to a random sum—assessed by the Court at 50*l.*—for storage and other charges caused by the delay. *Stroms Bruks Aktie Bolag v. Hutchison*, 6 F. 486—Ct. of Sess.

Penalty Clause.—A charterparty contained the following clause: "Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith":—*Held*, that the clause was inapplicable to a breach of contract by the shipowner. *Id.*

Charterer's Option to Carry Damaged Cotton on Deck—Shipowner's Right to Freight.—The Anglo-American Cotton charterparty provides that the charterer is to have the option of shipping damaged cotton on deck, consistent with the seaworthiness of the steamer, such to be at the shipper's risk and expense, and that the charterer is to fully insure the freight thereon. The charterparty contains no provision for the payment of freight on such deck cargo:—*Held*, that the shipowner is entitled to a reasonable freight upon cotton so shipped. *Ursula Bright Steamship Co. v. Ripley*, 8 Com. Cas. 171—C.A.

Coal Cargo—Charterers to Ship except in the Event of Strike.—"Subject in all respects to the colliery guarantee"—**Tender of Guarantee of Colliery on Strike.**—By a charterparty it was agreed that a ship should "proceed to such loading berth as freighters may name at Cardiff and . . . shall there load in the usual and customary manner a full and complete cargo of steam coals as ordered by charterers which they bind themselves to ship except in the event of . . . strike or lockout of shippers' pitmen . . . the vessel to be loaded as customary, but subject in all respects to the colliery guarantee in colliery working days as may be arranged, any claim for demurrage in loading to be settled with the colliery direct, no liability to attach to charterers in respect thereof." Shortly after the charterparty was made the charterers made a contract with a colliery for the purchase, subject to the usual strike clause, of coal which they intended for the ship, "loading to be mutually arranged in accordance with the usual colliery guarantee." More than two months later, the arrival of the vessel being shortly expected, the charterers sent to the shipowners the guarantee of the colliery, which was then on strike, but the shipowners refused to accept it. The ship remained until the end of the strike, and the owners then claimed damages from the charterers for the delay in

the loading of the vessel:—*Held*, that the shipowners were not entitled to recover, the charterers being protected by the exception of strikes in the charterparty, and not being bound, in the circumstances, to furnish any other guarantee than that which they sent, or to load the ship from a colliery which was not on strike. *Dobell v. Green*, 69 L. J. Q.B. 454; [1900] 1 Q.B. 526; 82 L. T. 314; 9 Asp. M.C. 53; 5 Com. Cas. 161—C.A.

— **Ship Damaged and Coals Wetted on Voyage—Port of Refuge—Discharge of Cargo—Repairs—Subsequent Refusal to Re-ship Cargo.**

—A ship loaded a cargo of coals under a charterparty, but having met with bad weather on the voyage was compelled to put into a port of refuge for repairs, which necessitated the discharge of the cargo. The cargo, which had been considerably wetted with sea-water, was upon discharge placed in covered sheds, where the action of drying gradually proceeded, but at the time the repairs to the ship were completed and she was again ready to go to sea the cargo was still in an unfit state for re-shipment, owing to the danger of spontaneous combustion. The master refused to carry on the cargo. In an action brought by the owners of the cargo against the owners of the ship for breach of contract, —*Held*, that, the cargo being unfit for re-shipment at the time of the commencement of the action, and there being nothing at that time to shew how long a time must elapse before it would be in a condition to be re-shipped with safety, the master was justified in so refusing. *Held*, further, that the time which would be occupied in reconditioning the cargo, and the cost of so doing, were elements to be taken into consideration by the master at the time when he had to make up his mind whether or not he should carry on the cargo. *The Savona*, 69 L. J. P. 95; [1900] P. 252; 49 W. R. 303—Gorell Barnes, J.

Grain Cargoes—London Corn Trade Association Contract—Number of Days Allowed for Discharge.—The London Corn Trade Association Contract, No. 22, provided as to the discharge of grain cargoes from vessels, "Sufficient days to be left for unloading," and, by clause 4, "Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2,800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced)," but in no case were less than five days to be allowed:—*Held*, upon the construction of this clause, that for all vessels of whatever size the time to be allowed for discharging the cargo was one day for every 400 tons of cargo up to 2,800 tons, and one day for every 500 tons above 2,800 tons, subject in every case to the minimum of five days; and that consequently, in discharging a grain cargo of 3,800 tons, one day was to be allowed for every 400 tons up to 2,800 tons—that is, seven days—and one day for every 500 tons for the excess above 2,800 tons—namely, 1,000 tons—making in all nine days. *Turner, Brightman & Co. v. Bannatyne*, 91 L. T. 618; 9 Com. Cas. 306; 10 Asp. M.C. 1; 20 T. L. R. 782—C.A.

Shipowner's Liability to Cargo-owners for Negligence—Insurance against, to Limited Amount—Sue and Labour Clause—Applicability to Subject-matter of Insurance.—Shipowners

effected a policy of marine insurance to cover their liability of any kind to the owners of a cargo up to a specified sum (which was about half the value of the cargo) owing to the omission of the negligence clause in the contract of affreightment. A printed form was used as the basis of the policy, which form contained a clause authorising the assured to sue, labour, and travel for and about the defence, safeguard, and recovery of the said goods, merchandises, and ship. The ship stranded owing to the negligence of the master, and became a total loss. The shipowners incurred expenses in saving part and attempting to save the rest of the cargo, and sought to recover these expenses from the insurers under the suing and labouring clause:—*Held*, that that clause was not applicable to the subject of the insurance, and the expenses could not be recovered under it. *Cunard Steamship Co. v. Marten*, 72 L. J. K.B. 754; [1903] 2 K.B. 511; 89 L. T. 152; 52 W. R. 39; 9 Com. Cas. 9—C.A. Affirming, 9 Asp. M.C. 342—Walton, J.

(f) *Loading.*

Arrival at Port—Customary Place of Loading—Demurrage.—Where a charterparty provides that a ship is to proceed to a certain port and there load, no specific place therein being named, she is an arrived ship when she reaches a usual loading place in that port, although under a general obligation to proceed to a specific place in it to load the charterer's goods. *Leonis Steamship Co. v. Rank*, 76 L. J. K.B. 342; [1907] 1 K.B. 344; 96 L. T. 458; 12 Com. Cas. 173; 10 Asp. M.C. 398; 23 T. L. R. 215—Channell, J.

The terms of the charterparty must be consulted in order to determine whether the time occupied in getting to the actual loading berth is to be treated as part of the lay days, or part of the time before she is an arrived ship. *Sanders v. Jenkins* (66 L. J. Q.B. 40; [1897] 1 Q.B. 93) discussed. *Ib.*

Time for—Stoppage by Strike—"Stoppage for six days from time of vessel being ready to coal"—**Right to Cancel Charter.**—By a charterparty it was agreed that a ship of the appellants should load a cargo of coal for the charterers "to be loaded in 140 running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load." The charterparty also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage." Due notice was given that the ship was ready to load, and, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, and continued for six days. No cargo had been shipped, and the charterers gave notice that the charterparty was cancelled:—*Held*, that the charterparty contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period. *Steel, Young*

& Co. v. *Grand Canary Coal Co.*, 90 L. T. 729; 9 Com. Cas. 275; 9 Asp. M.C. 584; 20 T. L. R. 542—H.L. (E.)

No Time Fixed for Loading—Reasonable Time Implied.—Where by the terms of a charterparty there is no fixed time within which the charterer has agreed to load a ship, the law implies upon the charterer an obligation to load within a reasonable time, and that obligation is performed if he loads within a time which is reasonable under the circumstances existing when the agreement must be performed, provided that such circumstances, in so far as they involve delay, are not caused or contributed to by the charterers. *Ardan Steamship Co. v. Weir*, 6 F. 294—Ct. of Sess.

Charterer's Obligation to have Cargo Ready—Custom of Port—Knowledge of Parties at Time of Contract.—Under a charterparty dated May 30, 1900, which did not fix the time within which the ship was to be loaded, the s.s. *Ardandearg* was bound to proceed to Newcastle, New South Wales, and there load a cargo of Australian coals "in the usual and customary manner, as ordered by the charterers, which they bind themselves to ship (except in the event of riot, strikes, &c. . . . or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle, of which both parties were aware, a loading berth could not be procured until a coaling order from a colliery was produced. These coaling orders were issued in regular turn. There were no facilities for storing coal at the harbour. The charterers ordered a cargo of coal from the Lambton Colliery, in the neighbourhood of Newcastle, ten days after the ship was chartered. On July 14, when the *Ardandearg* arrived, two other ships having coaling orders from the same colliery had arrived before her. In consequence of the colliery having only an output of 350 tons per day, the loading of these ships was not completed till August 13. The *Ardandearg*, having then obtained a colliery order and a berth, completed her loading on August 23, and sailed the following day:—*Held*, that the charterers were not liable in damages to the shipowners for the detention of the ship, on the grounds—first, that there was no absolute obligation on the charterers to have a cargo ready when the *Ardandearg* arrived; and secondly, that the delay was due to the custom of the port, which was known to both parties, and to circumstances existing at the time of arrival over which the charterers had no control. *Ib.*

Per LORD KINNEAR.—Where a contract is made for loading or discharging a ship at a particular port, such contract must be construed with reference to the customs of that port, whether or not the parties to the contract were aware of them. *Ib.*

Ship to Load as Customary always Afloat—Draught Insufficient to Complete Loading.—By a charterparty a ship was to proceed to B. or so near thereto as she could safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent might direct, a certain cargo. Owing to her draught the ship could not have

ded fully at the berth at the jetty, but according to the custom of the port she would move when partly loaded from the jetty to anchorage to complete loading:—*Held*, that the lay days did not begin to run until the ship was at the jetty or anchorage the charterers' agent directed, and that the fact that she could not fully load there made no difference, and did not prevent the charterers requiring her to come to the jetty and claiming that the lay days did not commence until she was at the jetty. *Stieselskabet Ingledwood v. Millar's Karri and rrah Forests*, 88 L. T. 559; 8 Com. Cas. 196; 1 Asp. M.C. 411—Kennedy, J.

Obstacles to Loading caused by Charterers.—[a ship is prevented from going to the loading-place which the charterer has a right to name]—obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load and would but for such obstacles or engagements begin to load at such place. *Ib.*

Ship to Load "always afloat as and where ordered by charterers"—[Insufficiency of Water Detention of Ship.]—Shipowners, equally with charterers, must be taken to know the natural conditions as to the depth of water in the dock at a named port, and where a charterparty provided that the ship should go to a particular dock, or as near thereto as she could safely get, and there load a cargo "always afloat as and where ordered by the charterers," and the ship went there, but after partially loading left because the period of spring tides had so far elapsed that it had become impossible to complete the loading of the ship before the return of the neaps, and she would have taken the ground,—*Held*, that the only obligation on the charterers was to load within a reasonable time, and not to find a berth where the ship could load immediately, and that, in the circumstances, the obligation was discharged. *Carlton Steamship Co. v. Castle Mail Packets Co.*, 67 J. Q.B. 795; [1898] A.C. 486; 78 L. T. 661; 1 W. R. 65; 8 Asp. M.C. 402—H.L. (E.)

To Ship Coal Ordered by Charterers—Strike of Colliery—Refusal to Accept Guarantee—Each.—[By a charterparty made on January 1 between the plaintiffs, the owners, and the defendants, the charterers, the *Curzon* was to discharge her inward cargo at Liverpool, proceed to Cardiff to such loading berth as the charterers should name, and there load a cargo of stean coal as ordered by the charterers which they bound themselves to ship except in the event of a strike of shippers' pitmen. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee in working days as may be arranged. Any claim for demurrage in loading to be settled with the colliery direct, no liability attaching to the charterers in respect thereof." On February 3 the defendants bought a cargo of Hood's forthyr Colliery coal for the *Curzon*. On April 6 Hood's Colliery stopped owing to the strike, and on April 26 the defendants procured from the colliery the usual guarantee whereby they undertook to load in twenty days, subject to the usual exception as to strikes. The ship's agents refused to accept this guarantee, and the colliery was on strike, and required to

be furnished by a colliery that was working, 15 per cent. about not being on strike:—*Held*, that the defendants were not bound to furnish any other guarantee, and that the plaintiffs could not recover damages for a breach of the charterparty. *Dobell v. Green*, 80 L. T. 19; 8 Asp. M.C. 473—Bigham, J.

"Strikes, lock-outs, accidents to railway"—**"Other causes beyond charterers' control"**—**Discharge of Workmen in Consequence of Accident to Railway—Absence of Workmen after Railway Re-opened.**—[By charterparty it was agreed that the ship should load from charterers' agents a cargo of petroleum in cases, lay days for loading to commence twenty-four hours after the receipt by the charterers' agents of written notice of steamer's readiness in berth to receive, strikes, lock-outs, accidents to railway, . . . or other causes beyond charterers' control, excepted. The railway which brought the oil in tanks to the port of loading being partially destroyed by floods, the charterers' agents dismissed the men employed at their factory in packing the oil in cases. On the re-opening of the railway, sufficient supplies of oil were received at the factory, but owing to the absence of men the production of filled cases was delayed. The charterers' agents also, in accordance with the practice of shippers at the port, deferred the loading of the ship until they had loaded other ships which had arrived previously, and been delayed in loading by the same causes. The lay days having been exceeded,—*Held*, that the lay days commenced to run as soon as sufficient oil had arrived to enable the work of filling cases to be resumed; that the failure to load the ship within the lay days was not owing to "strikes, lock-outs, accidents to railway, . . . or other causes beyond the charterers' control," within the meaning of the charterparty; and being perfectly capable of being taken as *ejusdem generis* with "riots, strikes, and lock-outs." *Allison and Richards, In re*, 20 T. L. R. 584—C.A.

"Cargo to be taken from alongside, always within reach of ship's tackle"—**"Custom of port to be observed"**—**Custom of Port of Belfast—Expense of Chaining and Rafting Timber.**—[By a charterparty a ship was to deliver cargo, as customary, at such place as the consignees might direct, always afloat; cargo to be taken from alongside at port of discharge, always within reach of ship's tackle and at merchant's risk and expense, vessel always lying afloat; the custom of each port to be observed in all cases where not specially expressed. The cargo consisted of log timber, to be delivered at port of Belfast, and a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and it had been measured by the official measurer:—*Held*, that the consignee, and not the shipowner, was liable to pay the expense of such rafting. *Held*, also, that as the measuring was for the benefit of both shipowner and consignee, the latter was not entitled to waive the chaining and measuring and insist on the timber being delivered log by log over the vessel's side. *Northmoor Steamship Co. v. Harland & Wolff*, [1903] 2 Ir. R. 657—K.B. D.

Loading "in regular turn"—Overcrowding of

Port—Delay—Liability of Charterers.]—The defendants chartered a sailing ship to proceed to Newcastle, New South Wales, and “in the usual and customary manner load in regular turn” coal from a certain named colliery or any other colliery the charterers might name. By the regulations and custom of the port vessels could only load on a loading order from the colliery for which they were chartered, and the practice was to load in order of their arrival after the colliery order had been lodged. Owing to the number of ships chartered for the particular colliery selected by the defendants, and waiting to load, considerable delay was caused, and the ship was detained for some time at the port:—*Held*, that “in regular turn” in the charterparty meant regular colliery turn, and not port turn, and that as the plaintiffs must have been aware at the date of the charterparty of the circumstances of the port and the possibility of delay occurring in obtaining their turn for loading, and the defendants had not acted unreasonably, the plaintiffs could not recover damages for the delay, although less delay might have occurred if the defendants had selected some other colliery. *Quilpué (Barque) v. Brown*, 73 L. J. K.B. 596; [1904] 2 K. B. 264; 90 L. T. 765; 9 Com. Cas. 13; 9 Asp. M. C. 596—C.A.

Cargo Loaded “at charterers’ risk”—Exceptions—Liability of Shipowner—Negligence of Persons for whose Acts Shipowners are Responsible—Improper Loading by Stevedores—Seaworthiness.]—A charterparty provided that the steamer was “to be provided with a deck load at full freight at charterers’ risk . . . accidents to hull . . . always excepted, even when occasioned by the negligence . . . of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible.” While the vessel was lying at anchor taking in the cargo, through want of proper care on the part of the stevedores a quantity of cargo on the bridge deck pressed so severely on the uprights which were placed against the stanchions to keep the cargo in position that the stanchions gave way and a part of the cargo was lost:—*Held*, that the loss was not due to the unseaworthiness of the ship, but to an accident to the hull occasioned by the negligence of persons for whose acts but for the exceptions clause the owners would be responsible, and that the owners were therefore protected by that clause. *Semble*, the owners were also protected by the words “at charterers’ risk.” *Wade v. Cockerline*, 53 W. R. 420; 10 Com. Cas. 115; 21 T. L. R. 296—C.A.

Ship to Proceed to Port to “loading place as ordered” for Cargo—Order to Ship to go to Particular Loading Wharf at Port—Commencement of Lay Days.]—A charterparty made between the plaintiffs and defendants provided that the plaintiffs’ steamship was to proceed to Santander, excluding San Salvador old tip, “to a loading place as ordered,” and there take on board a full and complete cargo. The merchants were to be allowed one working day for loading every 400 tons of cargo. The period for loading was “not to commence . . . until after a true written notice has been given . . . that the vessel is wholly unballasted . . . and in every other respect ready to load . . . and that she has been duly entered inwards at the

Custom House and is in free *pratique*.” It was also provided that the charterers were to be advised of the steamer’s departure from the last port within twenty-four hours of sailing for Santander if proceeding direct; or, should the steamer take outward cargo to a port on the way, the captain to telegraph from such port to the shippers at Santander the probable date the steamer would be there ready to load; and further, if she should not have arrived in Santander and be ready to load within twenty-seven days of the date of the charterparty, the charterers were to have the option of cancelling the charterparty. The ship arrived at Santander on November 18, and notice under the charterparty of free *pratique* was given on November 19, but in consequence of having, by the custom of the port of Santander, to wait her turn until a berth was ready for her the ship did not arrive at the loading berth to which she was ordered till December 7, 1900:—*Held*, that the lay days began to run from the time she reached the loading berth to which she was ordered, and not from the time notice of free *pratique* was given, inasmuch as the place described in the charterparty as that at which she would be arrived for the purpose of being at the charterer’s disposal was not merely the port of Santander, but the port of Santander and the loading place at that port. *Modesto, Pinciro & Co. v. Dupre*, 86 L. T. 560; 7 Com. Cas. 105; 9 Asp. M.C. 297—Kennedy, J.

A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship and then claim for the detention of the ship. *Id.*

Contract to Load “cargo of say about 2,800 tons.”]—Where a charterparty provides that the ship shall load “a cargo of ore say about 2,800 tons, not exceeding what she can reasonably stow and carry,” 2,880 tons being the amount she can reasonably carry, the charterer fulfils the obligation imposed upon him by providing a cargo of 2,840 tons. *Morris v. Levison* (45 L. J. C.P. 409; 1 C.P. D. 155) distinguished. *Miller v. Borner*, 69 L. J. Q.B. 429; [1900] 1 Q.B. 691; 82 L. T. 258; 48 W. R. 588; 9 Asp. M.C. 31; 5 Com. Cas. 175—D.

Loading Coal—Trimming Charges.]—The Trimming Committee at Cardiff have jurisdiction to decide that a ship is a self-trimmer, and their decision is final. *The Swindon*, 51 W. R. 119—C.A.

(g) Discharging.

Ship to be Discharged “with all dispatch as customary”—Duty to take Delivery—Delay at Port of Discharge—Pressure of Work.]—Where a charterparty provides that the ship is to be discharged “with all dispatch as customary,” the obligation of the holder of a bill of lading embodying the terms of the charterparty is to take delivery of the cargo with all reasonable dispatch, having regard to the circumstances which actually exist at the port of discharge and in particular to the customs of that port. *Lyle Shipping Co. v. Cardiff Corporation*, 69 L. J. Q.B. 889; [1900] 2 Q.B. 638; 83 L. T. 329; 49 W. R. 85; 5 Com. Cas. 397; 9 Asp. M.C. 128—C.A.

By the custom of a port cargoes were discharged into railway waggons, and it was usual for consignees of cargo to contract with some one railway company for their supply. Consignees of cargo, under a bill of lading providing for discharge "with all dispatch as customary," made a contract with a railway company for the supply of waggons, but, owing to pressure of work on the railway, the company could not supply sufficient waggons, and the discharge of the ship was thereby delayed:—*Held*, that the consignees were not liable for the detention of the ship. *Postlethwaite v. Freeland* (49 L. J. Ex. 630; 5 App. Cas. 855) and *Hick v. Raymond* (62 L. J. Q.B. 98; [1893] A.C. 22) followed. *Wright v. New Zealand Shipping Co.* (4 Ex. D. 165) observed upon. *Ib.*

"With all dispatch as fast as steamer can deliver, as customary"—**Alternative Methods—Duty of Receiver of Cargo.**—A charterparty provided that a cargo of Danzig oak logs should be discharged at Millwall Dock "with all dispatch as fast as steamer can deliver, as customary." The more usual method at that dock is to discharge such a cargo into railway trucks, but it is practicable to discharge into lighters:—*Held*, that it was the duty of the receivers of the cargo, if railway trucks could not be obtained, to discharge into lighters. *Rodenacker v. May & Hassell*, 6 Com. Cas. 37—Mathew, J.

Cargo to be Discharged "as fast as steamer can deliver"—Strike Clause Included—Unavoidable Delay—Liability for Delay.—A stipulation in a charterparty that the cargo is to be discharged "with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours, according to the custom of the respective ports," is not equivalent to an absolute stipulation to discharge within the time in which a ship could discharge in the ordinary course of things, without regard to the exceptional circumstances which may exist at the time. The stipulation is fulfilled if the discharge is effected with the utmost despatch possible in all the circumstances, not being circumstances brought about by or under the control of the person whose duty it is to take delivery. *Hultthen v. Stewart*, 72 L. J. K.B. 917; [1903] A.C. 389; 89 L. T. 702; 8 Com. Cas. 297; 9 Asp. M.C. 403—H.L. (E.) Affirming, 50 W. R. 538—C.A.

The construction of the stipulation is not affected by there being a clause in the charterparty relieving the charterer from liability in the event of a strike, lock-out, or epidemic. *Ib.*

Discharge According to Custom of Port—Rate of Discharge—Unreasonableness of Custom—Altered Circumstances since Origin of Custom.—A bill of lading (incorporating conditions of a charterparty) provided "Time for discharging at destination shall be according to the custom of the port for steamers at port of discharge, demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day." An alleged custom was set up to the effect that the consignee could not be required to take delivery at a faster rate than about five hundred tons per day at the port of Bristol for River Plate grain cargoes. A vessel discharged a grain cargo, under the above bill of lading, at Avonmouth Dock, Bristol. The

alleged custom had been a matter of dispute for years. The facilities of discharge as regards ships and the three docks in the port of Bristol had increased since the origin of the alleged custom. The rate of discharge, in fact, was often in excess of five hundred tons per day:—*Held*, that no such custom now existed at Bristol for grain steamers generally or for River Plate grain steamers. The charterparty must be read as "custom, if any, at the port of discharge."

Where a custom relates directly to the obligations of parties under certain circumstances, it must, in order to be valid and to be binding on parties who do not know of the existence of the custom as a fact, be reasonable. The custom was quite inapplicable to the state of things at present existing, and that there was no such settled and established practice in the port as to satisfy the words of the charterparty. If the custom applied to the altered circumstances, it was unreasonable. Contracting out of a custom may become so general as to destroy the custom. When a custom becomes the exception and not the rule, there is no longer a custom. *Ropner v. Stote*, 92 L. T. 328; 10 Com. Cas. 73; 10 Asp. M.C. 32; 21 T. L. R. 245—Channell, J.

Custom—Port of Sharpness—Wood Trade—Discharge of Steamer at Average Rate of 90 Standards per Weather Working Day—Reasonableness.—There is no proved custom at the port of Sharpness that a steamer with a cargo of wood under a Baltic Steam Bristol Channel charterparty (containing provisions that "Cargo to be loaded and discharged with the customary steamer dispatch of the port, and in the ordinary working hours thereof" and "The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed") is properly discharged if the cargo is discharged at an average rate of 90 standards per weather working day. Such a custom would be unreasonable. *Sea Steamship Co. v. Price, Walker & Co.*, 8 Com. Cas. 292—Kennedy, J.

Demurrage—Discharging Subject to Lien—Reasonable Conduct of Shipowner.—The consignees of a cargo, loaded under a charterparty which provided that the cargo should be discharged "in the manner and at the rate customary at each port," did not take any steps before the arrival of the ship to secure an unloading berth. When the vessel arrived, all the usual places for unloading such a cargo were occupied; but, after a delay of eight days, the discharge was commenced at a place not before used for the purpose. A usual place could not have been secured any earlier if the consignees had applied before the arrival of the ship. After the discharge had commenced, the shipowners refused to continue the discharge until the freight was paid; and, after a delay of eight days, the cargo was landed subject to a lien for freight and demurrage, under the provisions of the Merchant Shipping Act, 1894. The Judge held that the shipowners were entitled to substantial damages for the earlier delay, and to demurrage at the agreed rate for the later delay:—*Held* (varying that judgment)—first, that the shipowners were entitled only to nominal damages for the earlier delay; and secondly, that they had in the circumstances of the case acted reasonably in not landing the cargo subject to lien at an

earlier date than they did, and were therefore entitled to demurrage for all the later delay. The Court of Appeal expressed no opinion upon the point of law decided by the Court below upon the construction of sections 493 and 494 of the Merchant Shipping Act, 1894. *Smailes v. Hans Dessen*, 95 L. T. 809; 10 Asp. M.C. 319; 12 Com. Cas. 117—C.A.

— **Port of London—Grain Cargo in Bags—Discharge over Side—Liability of Consignee to Pay Dock Company's Charges for Weighing.**—The plaintiffs, shipowners, alleged that, by a custom of the Port of London, where a grain cargo in bags was discharged over side, it was the duty of the consignee to give an order to the dock company to weigh the cargo on board and to pay the dock company's charges for so doing.—*Held*, that there was no such custom as alleged. *Marwood v. Taylor*, 6 Com. Cas. 178—C.A.

Delay in Procuring a Discharging Berth—Harbour Regulations—Liability of Charterers for Delay—Cargo to be delivered "as customary where and as directed by consignee."—Under a charterparty the defendants, in fulfilment of a contract for the sale of Spanish ore, shipped a cargo of ore on board a steamship, to be delivered at Maryport, as customary, where and as directed by consignee. At Maryport, by the harbour regulations, consignees having one vessel already discharging for them cannot have another vessel berthed to discharge for them if a vessel of any other consignee is awaiting a berth. The defendants, on the arrival of the ship, had four other vessels chartered by them, with cargoes of ore for the same purchasers, who were treated by the harbour authorities as the consignees, awaiting a berth, and many vessels for other consignees were also waiting. The ship was consequently unable to get a berth for twenty days after the arrival.—*Held*, that the delay was not the fault of the charterers, and that where, under such a charterparty, the delay complained of is such as ought to have been in the contemplation of both parties at the time of the contract, the shipowner has no cause of action against the charterer. *Ashcroft v. Crow Orchard Colliery Co.* (43 L. J. Q.B. 194; L. R. 9 Q.B. 540) and *Ogmore Steamship Co v. Borner* (6 Com. Cas. 104) considered. *Harrowing v. Dupré*, 7 Com. Cas. 157—Bigham, J.

Grain Cargoes—London Corn Trade Association Contract—Number of Days Allowed.—The London Corn Trade Association Contract, No. 22, provided as to the discharge of grain cargoes from vessels, "Sufficient days to be left for unloading," and, by clause 4, "Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2,800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced)," but in no case were less than five days to be allowed.—*Held*, upon the construction of this clause, that for all vessels of whatever size the time to be allowed for discharging the cargo was one day for every 400 tons of cargo up to 2,800 tons, and one day for every 500 tons above 2,800 tons, subject in every case to the minimum of five days; and that consequently, in discharging a grain cargo of 3,800 tons, one day was to be allowed for

every 400 tons up to 2,800 tons—that is, seven days—and one day for every 500 tons for the excess above 2,800 tons—namely, 1,000 tons—making in all nine days. *Turner v. Brightman & Co. v. Bannatyne*, 91 L. T. 618; 9 Com. Cas. 306; 20 T. L. R. 782—C.A. Affirming, 9 Asp. M.C. 495—Walton, J.

Consignees to Take Cargo "from alongside ship"—Custom for Ship to Place Cargo in Lighters.—A custom in the wood trade in the Port of London which imposes an obligation on a shipowner to discharge a cargo of long lengths of timber into lighters, is not inconsistent with a clause in a charterparty under which the cargo is to be taken from alongside the ship at merchant's risk and expense. *Aktieselskab Helios v. Ekman*, 66 L. J. Q.B. 538; [1897] 2 Q.B. 83; 76 L. T. 537; 8 Asp. M.C. 244—C.A.

Delivery of Cargo at Named Wharf—Wharf under Control of Purchasers of Cargo—Responsibility for Delay.—The plaintiffs' steamship was chartered to the defendants, who sold a cargo *ex ship*, R. Dock. The purchasers of the cargo were lessees of a wharf in the R. Dock, and had sole control over the wharf and the berthing of vessels there. The charterparty provided that the vessel should proceed to the purchasers' wharf, and there deliver her cargo, "Time for discharge to count from 6 A.M. after ship is in every respect ready in berth." The vessel arrived in R. Dock on February 8, and was then ready to discharge. Other vessels, which arrived at the dock after the plaintiffs' vessel, were given preference to suit the business arrangements of the purchasers, who did not give the plaintiffs' vessel a berth until February 14. By a contract between the charterers and the purchasers the cargo was to be discharged at the rate of 300 tons per working day from the time when the ship was ready to discharge, otherwise the purchasers were to pay demurrage as per charterparty.—*Held*, that the lay days did not begin to run until 6 A.M. on February 15, and that the charterers were not responsible for the delay in getting into berth, though they did not insist on their rights under their contract with the purchasers. *Watson v. Borner*, 5 Com. Cas. 377—C.A.

Charterers' Option as to Port of Delivery.—A charterparty was expressed to be for "about six calendar months"; hire to be paid per month or part of a month, and to continue until re-delivery of the steamer to the owner at a port in the United Kingdom or the United States. If the vessel was upon a voyage at the expiration of the named period, the charterers were to have the use of steamer until completion of the voyage and in order to bring her to a port of re-delivery. If the charterers re-delivered the steamer in the United Kingdom they were to pay a penalty of 500*l.* At the expiration of six calendar months the vessel was on a voyage to a port in the United States.—*Held*, that the owner was entitled to re-delivery of the steamer on completion of her voyage to such port, and that charterers were not entitled to send her on a fresh voyage to, and to re-deliver her in, the United Kingdom. *Bucknall v. Murray*, 5 Com. Cas. 312—Mathew, J.

Non-delivery—Bill of Lading specifying Quan-

titles of Each Class of Timber Cargo—Conclusiveness of Bill of Lading—Short Delivery in certain Classes of Timber and Over-Delivery in other Classes—Calculation of Freight—Damages for Short Delivery.]—A cargo of timber was consigned to the defendants under a charterparty, by which freight was to be paid on deals, battens, &c., at the rate of 2*l.* 12*s.* 6*d.* per St. Petersburg standard hundred of 1,980 superficial feet, and on deal-ends at the rate of 1*l.* 15*s.* per the like hundred, nine feet and under. Freight was payable on the intake measure of quantity delivered as ascertained at port of discharge, less value of cargo short delivered (if any). It was also provided by the charterparty that the bill of lading should be conclusive against the owners as establishing the quantity delivered to the ship. The bill of lading described the four classes of timber, of which the cargo consisted, as deals, scantlings, deal-ends, and boards, and specified the number of pieces in, and the measurement in superficial feet of, each class, besides giving the total number of pieces and the measurement of the cargo over all. At the port of discharge it was found that there was a shortage in the number of deals and deal-ends, while there was an over-livery of scantlings and boards:—*Held*, that the bill of lading was conclusive as to the number of pieces in, and the measurement of each class of, timber, and that therefore the defendants were entitled to damages in respect of the pieces short delivered, and also to deduct from the freight payable by the charterparty an amount proportionate to the freight attributable to the shortage. *Mediterranean and New York Steamship Co. v. Mackay*, 72 L. J. K.B. 147; [1903] 1 K.B. 297—C.A.

Cost of Discharging Cargo from Ship's Rail into Barges—"Taken from alongside"—"At charterer's risk and expense, any custom of the port to the contrary notwithstanding."—A charterparty provided that the ship, being loaded with a timber cargo, should therewith proceed to the Port of London and deliver the same, "the cargo to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding":—*Held*, that the charterparty excluded the custom of the Port of London, by which, in the case of a timber cargo, the duty of a shipowner under an obligation to deliver alongside is to deliver into barges or on to a quay, and that the duty of the shipowner was completely performed by delivery over the ship's rail. *Brenda Steamship Co. v. Green*, 69 L. J. Q.B. 445; [1900] 1 Q.B. 518; 82 L. T. 66; 48 W. R. 321; 9 Asp. M.C. 55; 5 Com. Cas. 195—C.A.

(h) Lay Days.

"Working day."—A charterparty provided that the ship was to be loaded in nine "working-days," and to be discharged as customary "per like working day . . . loading time to count from 6 A.M. after the ship is at the Custom House and ready . . . Demurrage over and above the said lying-days at 16*s.* 8*d.* per hour. . . . The steamer to work day and night, if required to do so" at the port of discharge:—*Held*, that the "working day" at the port of

loading was a day of twelve hours from 6 A.M., and not a day of twenty-four hours, and consequently that the ship was on demurrage from 6 P.M. of the last lay-day. *Mein v. Ottmann*, 6 F. 276—Ct. of Sess.

"Working day of twenty-four consecutive hours."—A charterparty provided that the ship was to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted":—*Held*, that a "working day of twenty-four consecutive hours" meant a period of twenty-four actually consecutive hours (that is, including the hours of night), and not an artificial period made up of twenty-four working hours (that is, excluding the hours of night). *Turnbull, Scott & Co. v. Cruickshank & Co.*, 7 F. 265—Ct. of Sess.

"Seven weather working days"—"Sundays and holidays excepted"—Loading on Holidays—"Sundays saved in loading."—A charterparty provided: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading," and that for any time beyond these periods the charterers should pay to the owners demurrage at a certain rate per day. Loading took place on two holidays, but there was no evidence as to the terms upon which the parties worked:—*Held* (FLETCHER MOULTON, L.J., dissenting), that the inference to be drawn from the fact that the holidays were worked upon was that the parties had agreed to treat them as working days, and that therefore they should be included in the lay days. *Branchelow Steamship Co. v. Lamport* (76 L. J. K.B. 534*n.*; [1907] 1 K.B. 787*n.*) applied. *Nelson v. Nelson Line* (No. 3), 77 L. J. K.B. 97; [1907] 2 K.B. 705; 23 T. L. R. 656—C.A. Affirming, 12 Com. Cas. 185—Channell, J.

A charterparty provided: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" Loading was completed before the expiration of seven weather working days, and the period between the completion of loading and the expiration of such days comprised a Sunday:—*Held* (FLETCHER MOULTON, L.J., dissenting), that the charterers were not entitled to despatch money in respect of that Sunday. *The Glendevon* (62 L. J. P. 123; [1893] P. 269) followed. *Ib.*

"Working days of twenty-four hours."—The appellant shipowners agreed by charterparty to provide the respondents with ships for the carriage of iron ore during a period of twelve months. The charterparty contained a clause as follows: "Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . to count from 6 A.M. of the day following the day when steamer is reported, unless she be reported before noon. . . . Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." *Held*, that the charterers were entitled to twenty-four hours in which to load or discharge each 350 tons. *Forest Steamship Co. v. Iberian*

Iron Co., 81 L. T. 563; 9 Asp. M.C. 1; 5 Com. Cas. 83—H.L. (E.). Affirming *Rhymney Steamship Co. v. Iberian Iron Ore Co.*, 79 L. T. 240; 8 Asp. M.C. 438—C.A.

—By a charterparty, shipowners agreed to provide the charterers with ships for the carriage of fifty thousand tons of iron ore during a period of twelve months. In the charterparty there was a clause as follows: "Charterers or their agents to be allowed three hundred and fifty tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging, . . . and to count from 6 A.M. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness. . . . Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used":—*Held*, that the charterers were entitled to have twenty-four working hours to load or discharge each three hundred and fifty tons. *Rhymney Steamship Co. v. Iberian Iron Ore Co.*, 79 L. T. 240—C.A.

"Thirty-six running hours on terms of usual colliery guarantee."—By a charterparty between the plaintiffs and defendants it was provided that the plaintiffs' vessel should proceed to Grimsby, and there load a cargo of coal, in the usual manner according to the custom of the place, from such colliery as the charterers might direct; and that the loading time should be thirty-six running hours "on terms of usual colliery guarantee." The vessel arrived at the usual loading dock at Grimsby, and was ready to load on July 19. Owing to the coal strike in South Wales, a very large number of vessels were waiting to load coal at Grimsby, and the plaintiff's vessel was unable to get a berth at a coal tip until July 29, when she was loaded within thirty-six hours. The coal was loaded from collieries at which no "colliery guarantee" was in use:—*Held*, that the defendants were not liable to pay demurrage, because there was a "usual colliery guarantee" in use at Grimsby, by which the time for loading did not commence until the vessel came under a coal tip. *Shamrock Steamship Co. v. Storey*, 81 L. T. 413; 8 Asp. M.C. 590; 5 Com. Cas. 21—C.A.

"Sundays and holidays excepted"—Sunday and Holiday Used for Loading—Time Occupied in Shifting Ports—Demurrage—"Port charges"—Pilotage Dues.]—Charterers by clause 8 of a charterparty were "to have the option of using one or two additional neighbouring loading ports or places in Smyrna district, paying all port charges, and time shifting ports to count as lay days"; and by clause 9: "Thirteen running days, Sundays and holidays excepted, are to be allowed . . . for loading the cargo as above, to commence when the steamer is moored and ready, having received pratique, and so reported by the master, and the time so employed, part days counting as part days, to be agreed by the master and charterers or their agents." The vessel on arriving at Smyrna was ordered to a neighbouring port before she was "moored and ready, having received pratique, and so reported by the master." Subsequently at the request of the charterers loading proceeded on a Sunday and also on a local holiday:—*Held*, that

the exceptions in clause 9 could not be read into clause 8, and that therefore the time occupied in shifting the vessel must be reckoned in the lay days, and also the Sunday and holiday on which work proceeded, as an agreement must be inferred between the parties to treat those days as working days. *Whittall v. Rahtkens Shipping Co.*, 76 L. J. K.B. 538; [1907] 1 K.B. 783; 96 L. T. 885; 12 Com. Cas. 226; 23 T. L. R. 346—Bray, J.

Held, further, that the dues paid for pilotage in shifting ports could not be recovered from the charterers, as they did not fall within the term "port charges." *Ib.*

Fractions of Day to be taken into Account.]

—A charterparty provided that the cargo should be "discharged at the average rate of not less than 210 tons per working day, weather permitting; the time to commence in accordance with the custom of the port; Sundays and all holidays and time lost through strikes or lock-outs of workmen, accidents, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignee of the cargo not to count as discharging time"; "Demurrage to be paid at the rate of 4d. per net register ton per day, and *pro rata* employed beyond the time allowed for discharging." At the average rate of 210 tons per working day the time occupied in discharging the cargo would have been 11½ days. The charterers contended that, being entitled according to the terms of the charterparty to break into the twelfth day, they were entitled to the whole of the day as a lay day, and that demurrage did not begin to run until midnight of that day:—*Held*, that upon the true construction of the charterparty fractions of a day were to be taken into account, and that demurrage began to run upon the expiration of the 11½ days. *Yeoman v. Regem*, 73 L. J. K.B. 904; [1904] 2 K.B. 429; 52 W. R. 627; 9 Com. Cas. 269; 20 T. L. R. 524—C.A.

"Two weekly service at intervals of fourteen days"—Sailings at Irregular Intervals—Periods of Twenty-four Hours.]—A charterparty of the steamers of two lines for the carriage of frozen meat from the River Plate to Liverpool provided that: "The owners engage as from the date when their respective vessels arrive in the River Plate and are ready to load outwards to place the vessels of the line . . . from time to time sailing in the lines . . . or other vessels of equal capacity at the disposal of the charterers for the carriage [in their insulating chambers] . . . of . . . frozen meat. . . . And the charterers agree to ship in each vessel so much frozen meat and offal as will fill such insulating chambers. . . . The service of the lines hereunder is, subject as hereinafter provided, to be a two weekly one . . . having the sailings at intervals of 14 days . . . and to last for one year. . . . On arrival of each steamer at her loading berth in the River Plate notice shall be given to the charterers or their agents in writing of their readiness to load. . . . Twelve hours after the receipt of such notice the lay days of the steamer shall commence, provided the . . . temperature of 22 degrees Fahrenheit shall have been maintained in the insulated chambers . . . since the beginning of such

notice or as soon thereafter as the temperature may have been maintained at that temperature for a period of twelve hours. As soon as each steamer is loaded the captain shall proceed with all convenient speed (subject to any exceptions or liberties contained in this charter) to her port of discharge. . . . The charterers hereby covenant and agree that during the continuance of this contract they . . . will not directly or indirectly ship or cause to be shipped . . . otherwise than by the owners' steamers under this contract":—*Held* (FLETCHER MOULTON, L.J., dissenting), as to the provision relating to the sailing intervals, that a strict observance of the intervals mentioned was not a condition precedent to the charterers' obligation to load, but that an approximate and substantial observance of those intervals was sufficient; and therefore that, where a steamer arrived within fourteen days after the preceding steamer, the charterers were not entitled to refuse to load her until that period had elapsed. *Ib.*

Discharge—Fractions of a Day—Sundays used in Discharging—Delays caused by Ballasting—Demurrage.—By the terms of a charterparty the ship was to discharge a cargo of 3,483 tons of coal at the average rate of not less than 120 tons per weather working day, Sundays and holidays excepted; and demurrage was to be paid at the rate of 4*d.* per net registered ton per running day. At the stipulated rate of not less than 120 tons per weather working day the cargo could have been discharged in twenty-nine and one-fortieth days:—*Held* (distinguishing *Yeoman v. Regem*, 73 L. J. K.B. 904; [1904] 2 K.B. 429), that the charterers were entitled to thirty lay days in which to discharge the cargo. *Houlder v. Weir*, 74 L. J. K.B. 729; [1905] 2 K.B. 267; 92 L. T. 861; 10 Com. Cas. 228; 10 Asp. M.C. 21; 21 T. L. R. 503—Channell, J.

On two Sundays cargo was in fact discharged:—*Held*, in the absence of any agreement between shipowners and charterers modifying the terms of the charterparty, that these Sundays were not to be counted as lay days. *Ib.*

Incorporated Colliery Guarantee—Strike at Colliery—"Colliery working day."—A charterparty provided that the chartered vessel should load a cargo of coal at a certain port subject to the conditions of the colliery guarantee in use at the colliery, and that demurrage should be "as per colliery guarantee." The guarantee contained a stipulation that any time lost through strikes should not be computed as part of the loading time, and provided that demurrage in accordance with a given scale was to be payable "per colliery working day." After the expiration of the lay days a strike occurred at the colliery which prevented the charterers from loading the vessel. In an action by the shipowners for demurrage,—*Held*, that the expression "colliery working day" did not exclude from the computation of demurrage ordinary working days on which in fact no work was done at the colliery by reason of the strike, and that the shipowners were therefore entitled to demurrage during the whole time of detention. *Saxon Steamship Co. v. Union Steamship Co.*, 69 L. J. Q.B. 907; 83 L. T. 106; 5 Com. Cas. 381; 9 Asp. M.C. 114—H.L. (E.) And see next column.

(i) Detention of Ship and Demurrage.

Obligation to have Cargo • Ready.—In a charterparty, in the absence of qualification, the undertaking of the merchant to furnish a cargo is absolute, and the mere existence of circumstances, beyond the control of the shipper, which make it impracticable for him to have his cargo ready will not relieve him from paying damages for breach of his obligation. *Arden Steamship Co. v. Weir*, 74 L. J. P.C. 143; [1905] A.C. 501; 93 L. T. 559; 11 Com. Cas. 26; 10 Asp. M.C. 135; 21 T. L. R. 723—H.L. (Sc.)

By a charterparty, which did not fix a date for the completion of the loading, a ship of the appellants was chartered by the respondents to proceed to a loading berth selected by the respondents, and then to load a cargo "in the usual and customary manner . . . as ordered by charterers, which they bind themselves to ship," subject to exceptions which did not arise. By the custom of the port a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. When the vessel arrived there was no cargo ready to load, and a month's delay intervened before a full cargo was loaded:—*Held*, that the respondents were liable in damages for the detention of the ship. *Ib.*

Charterer's Obligation to have Cargo Ready—Option to Name Colliery.—The defendants chartered the plaintiffs' vessel to load in the usual and customary manner in regular turn a cargo of coals at Newcastle, New South Wales, from a colliery to be named by the charterers, who named a particular colliery whose coal was in great demand. By the custom of the port a berth cannot be obtained until a coaling order from the colliery is produced. These facts were known to both parties, and no time for loading was fixed. Owing to the charterers not being able to obtain a berth earlier, a delay of some eighty days occurred. In an action by the shipowners for damages,—*Held*, that the obligation of the charterers to have a cargo ready was discharged if the vessel got her due turn from the particular colliery, and that under the charterparty and the circumstances within the knowledge of both parties at the date of the charterparty the charterers had not acted unreasonably and were not liable for the vessel's detention. *Little v. Stevenson* (65 L. J. P.C. 69; [1896] A.C. 108) followed. *Grant v. Coverdale* (53 L. J. Q.B. 462; 9 App. Cas. 470) distinguished. *Jones v. Green*, 73 L. J. K.B. 601; [1904] 2 K.B. 275; 90 L. T. 768; 9 Com. Cas. 20; 9 Asp. M.C. 600—C.A.

Detention by Ice—Breakdown of Steamer.—By a charterparty a steamship was let for two calendar months to be employed on a voyage to Spain, thence to the Baltic, and back to the United Kingdom; and it was provided that detention by ice should be for the account of the charterers, unless caused by breakdown of steamer. The ship proceeded to a port in Spain, where she loaded a cargo for St. Petersburg. On her voyage there she stranded in the Baltic, and put back to Copenhagen for repairs. When repaired she proceeded on her voyage, but put into Revel at the entrance to the Gulf of

Finland, and remained there, because she was unable to proceed further towards St. Petersburg by reason of ice. If she had not stranded and been damaged she could have reached St. Petersburg and got out again before that port was closed by ice:—*Held*, that the detention at Revel was a detention by ice caused by the breakdown of the steamer, and that the hire ceased during its continuance. *Rikard Nordraak & Lennard, In re*, 8 Com. Cas. 239—Ridley, J.

Ship to Proceed to Port to "loading place as ordered"—Order to Ship to go to Particular Loading Wharf at Port—Commencement of Lay Days.]—A charterparty made between the plaintiffs and defendants provided that the plaintiffs' steamship was to proceed to Santander, excluding San Salvador old tip, "to a loading place as ordered," and there take on board a full and complete cargo. The merchants were to be allowed one working day for loading every 400 tons of cargo. The period for loading was "not to commence . . . until after a true written notice has been given . . . that the vessel is wholly unballasted . . . and in every other respect ready to load . . . and that she has been duly entered inwards at the Custom House, and is in free *pratique*." It was also provided that the charterers were to be advised of the steamer's departure from the last port within twenty-four hours of sailing for Santander if proceeding direct; or, should the steamer take outward cargo to a port on the way, the captain to telegraph from such port to the shippers at Santander the probable date the steamer would be there ready to load; and further, if she should not have arrived in Santander and be ready to load within twenty-seven days of the date of the charterparty, the charterers were to have the option of cancelling the charterparty. The ship arrived at Santander on November 18, and notice under the charterparty of free *pratique* was given on November 19, but in consequence of having, by the custom of the port of Santander, to wait her turn until a berth was ready for her the ship did not arrive at the loading berth to which she was ordered till December 7, 1900:—*Held*, that the lay days began to run from the time she reached the loading berth to which she was ordered, and not from the time notice of free *pratique* was given, inasmuch as the place described in the charterparty as that at which she would be arrived for the purpose of being at the charterer's disposal was not merely the port of Santander, but the port of Santander and the loading place at that port. *Modesto, Pineiro & Co. v. Dupre*, 86 L. T. 560; 7 Com. Cas. 105—Kennedy, J.

Chance Vacancy at Loading Berth—Delay in Providing Cargo—Demurrage.]—Under a charterparty the s.s. *Avis* was bound to proceed to Methil, and there load a full cargo of coals "from such colliery or collieries as charterers may elect, steamer to be loaded in 72 running hours, commencing to count when ready to receive cargo, reported at Custom House, berthed, and written notice given to charterers' agents, . . . If longer detained, demurrage to be paid" at a certain rate per ton, "unless such delay is caused by general and colliery holidays, . . . idle days, strikes, lock-outs, idle time, or restriction of output at

the colliery or collieries with which the steamer is booked to load . . . or any other cause beyond the control of the charterers, whether specified herein or not, which may prevent the obtaining or providing of a cargo." The *Avis* arrived at Methil at 6 A.M. on July 28, and notice was given to the charterers' agent that she was ready to receive cargo. At the time of the arrival of the *Avis* ten vessels were before her, and none of the five crane berths was vacant. A chance vacancy occurred on July 29 at a berth at which the *Avis* could not have completed her loading, and another at a suitable berth at 12 noon on July 30, owing to the cargoes of earlier vessels not being forward. No cargo was ready for the *Avis*, and in consequence she was not berthed. Eventually she was berthed on August 3, loaded at 9 P.M. on August 5, and sailed on August 6. On July 18 the charterers had ordered a cargo for the *Avis* from the B. Coal Co. for delivery on July 28 and 29, but had been informed by the coal company that they could not book coal for July 28 or 29. To this the charterers replied that the *Avis* must "take her turn with the rest." July 28 was the last day of the miners' holidays, but very little work was done on July 29. On the 30th the output was reasonably normal, but the coal company had to supply earlier orders. In an action for demurrage on the assumption that the lay days commenced at 9 A.M. on July 28, the defenders contended—first, that they were entitled to assume that their vessel would only be berthed in regular turn, and were not bound to have the cargo ready for chance vacancies; and secondly, that if there had been undue delay in providing a cargo it was due to delay at the colliery, over which they had no control:—*Held*, first, that in the circumstances the charterers were bound to have considered the probabilities of chance vacancies in the loading berths, and to have had a cargo ready for the vacancy which occurred on July 30; and secondly, that the delay in the supply of coals from the colliery did not fall within the exceptions in the charterparty, as the charterers knew when they gave the order to the B. Co. that it could not undertake to supply the coal at the time required, and had therefore taken the risk of delay. *Little v. Stevenson* (65 L. J. P.C. 69; [1896] A.C. 108) distinguished. *Krog v. Burns & Lindemann*, 5 F. 1189—Ct. of Sess.

Despatch-money—Option to Average Days for Loading and Discharge.]—A charterparty provided that the charterers were to have "the option of averaging days for loading and discharging . . . despatch-money at the rate of ten shillings per hour to be paid for any time saved in loading or discharging, to be settled in loading or discharging ports respectively." The vessel was loaded in the time allowed, and the charterers claimed despatch-money for the days saved, and the amount so due to them was indorsed on the charterparty. At the port of discharge the lay days were exceeded, and the shipowners claimed demurrage:—*Held*, that the charterers could not exercise their option of averaging days of loading and discharge, because the question of how the time saved at port of loading was to be treated must be considered as closed when the vessel sailed from port, and therefore the shipowners were entitled to claim demurrage in full. *Oakville*

Steamship Co. v. Holmes, 48 W. R. 152; 5 Com. Cas. 48—Bigham, J.

Delay Owing to Consignee Having Other Vessels Discharging—Liability for Acts of Consignee.—A vessel was chartered to proceed to the S. dock, Maryport, and there unload her cargo. Owing to the fact that the consignee, who had bought the cargo from the charterers, had other vessels discharging in the dock at the time of her arrival, she was unable to get a berth and unload within the time agreed by the charterparty:—*Held*, that the charterers were not responsible for the delay. *The Deerhound*, 84 L. T. 360; 49 W. R. 511; 6 Com. Cas. 104; 9 Asp. M.C. 189—D.

Exceptions—"Stoppage of trains or any cause beyond the personal control" of Charterers—Delivery of Cargo "as customary."—By a charterparty the ship was bound to deliver the cargo consisting of iron ore "as customary" at the port of discharge where and as directed by the consignees. The charterers were exempt from liability for demurrage in case of delay, *inter alia*, through "stoppage of trains or any cause beyond the personal control" of the charterers. The time taken for loading and discharging having exceeded the lay-days, the shipowners brought an action for demurrage against the charterers, who pleaded the exemption clause. It was proved that the customary mode of discharging iron ore at Ardrossan, the port of discharge, when the cargo had been sold (as the cargo in question had been), was direct into railway waggons, although in special circumstances the harbour authorities might give permission for part of a cargo being discharged on the quay. It was also proved that delay in discharging the cargo had been caused by the railway company failing to supply a sufficient number of waggons per day. The charterparty took the ship bound to work at night if requested, but the charterers did not request the harbour authorities for permission to work at night:—*Held*—first, that the customary mode at Ardrossan of discharging a cargo of iron ore which had been sold was into railway waggons direct; secondly, that the charterers were not liable for demurrage in respect of ordinary working hours where the delay was caused by want of railway waggons; but, thirdly, that the absence of waggons during the hours of night did not exempt them from demurrage, as the railway company could not be expected to supply waggons at night without notice. *Turnbull, Scott & Co. v. Cruickshank & Co.*, 7 F. 265—Ct. of Sess.

Strike Clause—Discharge of Ship Thrown into Strike Period by Delay of Consignee—Right of Consignee to Set up Strike Clause.—A consignee sued for demurrage is not entitled to rely on a clause in the charterparty which provides that the time during which the discharge of the ship is prevented or delayed by strikes, lock-outs, or similar causes is not to be counted in reckoning the lay days, if by his own delay the discharging has been thrown into the strike period, except to the extent that the discharge would have been prevented or delayed by such strike, even had he not been in default. *Elswick Steamship Co. v. Montaldi*, 76 L. J. K.B. 672; [1907] 1 K.B. 626; 96 L. T. 845; 12 Com. Cas. 240; 23 T. L. R. 322—Bigham, J.

Fire—Exception Enuring for Benefit of Charterer.—A charterparty provided that a certain number of days should be allowed for loading and discharging the cargo, after which demurrage was to be paid at a specified rate per running day. The charterparty also contained an exception clause excepting, amongst other things, fire. While the vessel was discharging, a fire broke out in the cargo, and it became necessary to remove her for a time from her discharging berth. There was a necessary delay of seven days in consequence of the fire:—*Held*, upon the authority of *Barrie v. Peruvian Corporation* (2 Com. Cas. 50), that the exception of fire applied to the obligation of the charterers to discharge, and that they were excused from demurrage in respect of the seven days' delay caused by the fire. *Newman and Dale Steamship Co. and British and South American Steamship Co., In re*, 72 L. J. K.B. 110; [1903] 1 K.B. 262; 87 L. T. 614; 8 Com. Cas. 87; 9 Asp. M.C. 351—Bigham, J.

Stoppage "continuing for the period of six running days from the time of the vessel being ready to load"—Stoppage occurring after Ship on Demurrage—Repudiation—Breach.—A charterparty provided that in the event of any stoppage arising from certain causes, "continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage." Notice of readiness to load was given on August 8, and the loading time expired on August 15. Such a stoppage occurred on August 20 and continued for more than six running days, at the expiration of which time no cargo had been loaded:—*Held*, that the charterparty had become null and void as from August 26, without prejudice to any causes of action which had accrued prior to that date. *Steel, Young & Co. v. Grand Canary Coaling Co.*, 87 L. T. 321; 7 Com. Cas. 213—C.A.

Customary Discharge—Discharging Subject to Lien—When to be Exercised.—Where a charterparty provides for discharge "in the manner and at the rate customary at each port during the customary working hours, and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day," the shipowner cannot land the goods subject to lien under the provisions of the Merchant Shipping Act, 1894, until it is evident that the ship cannot be discharged within the time allowed. *Smailes v. Hans Dessen*, 94 L. T. 492; 54 W. R. 471; 11 Com. Cas. 74; 10 Asp. M.C. 225—Channell, J.

Part of the time allowed for discharging was occupied in the reasonable and necessary process of ballasting the ship, and the discharge was delayed in consequence:—*Held*, that the time so occupied was not to be excluded from the time allowed for discharging. *Ib.*

(j) Cesser Clause.

Detention by Ice caused by "breakdown of steamer"—Non-liability of Charterer during

Period of Detention.]—By a charterparty the charterers hired a steamship for two calendar months to be employed on a voyage to Spain, thence to the Baltic, and back to the United Kingdom or the Continent, as the charterers should direct. The charterparty provided that detention by ice should be for account of the charterers unless caused by breakdown of steamer. The steamer having proceeded to Spain, there loaded a cargo for St. Petersburg, and on her voyage there grounded in the Baltic, and put back to Copenhagen for the necessary repairs. Subsequently she proceeded on her voyage, and put into Revel, where she was detained in consequence of the port of St. Petersburg being closed by ice. If the ship had not grounded and received damage she could have reached St. Petersburg, discharged her cargo, and left the port before it was closed by ice:—*Held*, that the detention at Revel was a detention by ice caused by “breakdown of steamer,” and that upon the true construction of the charterparty the hire ceased during the period of such detention. *Rikard Nordraak (Steamship) and Lennard, In re*, 73 L. J. K.B. 553; [1904] 2 K.B. 377; 90 L. T. 407; 9 Com. Cas. 235; 9 Asp. M.C. 553; 20 T. L. R. 394—C.A.

Detention by Accident.]—A charterparty provided that, in the event of loss of time from “detention by average accidents to ship,” the payment of hire should cease for the time thereby lost. An average accident having occurred to the ship while on a voyage from Hamburg to New York, she put back to Queens-town for repairs. After being repaired the voyage was resumed:—*Held*, that the charterer was liable to pay hire during the time occupied after leaving Queens-town in arriving back at the place where the accident had occurred. *Vogemann v. Zanzibar Steamship Co.*, 7 Com. Cas. 254—C.A.

Incorporation of Terms of Charterparty in Bill of Lading—Arbitration Clause—Bill of Lading—Action by Shipowner against Charterer Holding Bill of Lading.]—The distinction between the position of a charterer who ships and takes a bill of lading and an ordinary holder of a bill of lading is that in the former case the underlying contract of the charterparty remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part, unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so; while, in the case of a holder of a bill of lading who is not the charterer, there is no presumption that he contracts in any terms but those of the bill of lading, and, if the bill of lading purports to import the charterparty, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods. *Temperley Steam Shipping Co. v. Smyth*, 74 L. J. K.B. 876; [1905] 2 K.B. 791; 93 L. T. 471; 54 W. R. 150; 10 Asp. M.C. 123; 10 Com. Cas. 301; 21 T. L. R. 739—C.A.

A charterparty by which a ship was chartered for the carriage of a cargo of wheat provided that all time on demurrage over and above the laying days allowed for loading should be paid for by charterers to the ship at a specified rate; and, by a further clause, that if the cargo could not be loaded by reason of any dispute

between masters and men occasioning a strike, the time lost was not to be counted as part of the lay days; and, should any dispute arise under this clause in the loading of the steamer, same to be settled by arbitration. There was also a cesser clause by which charterers' liability was to cease upon shipment of cargo, vessel to have a lien on cargo for recovery of bill of lading freight, dead freight, demurrage, and all other charges whatsoever. A bill of lading was signed whereby the goods were made deliverable to the charterers at the port of discharge, all the terms and exceptions contained in the charterparty being incorporated therewith and forming part thereof, the owner of the vessel to have an absolute lien and charge upon the cargo for the recovery of freight and demurrage and all other charges whatsoever. The lay days at the port of loading having been exceeded, the shipowners brought an action for a declaration that they had a lien on the cargo for demurrage. The charterers applied under section 4 of the Arbitration Act, 1889, that the action should be stayed in order that the dispute might be referred to arbitration under the arbitration clause in the charterparty, alleging that the delay in loading was due to a strike within the meaning of that clause:—*Held*, that, as between the shipowners and the charterers, the bill of lading did not annul the arbitration clause of the charterparty, which was still subsisting, and binding upon the parties. *Runciman v. Smyth* (20 T. L. R. 625) overruled. *Id.*

(k) Hire and Freight.

Payment in Advance—Breach—Right of Shipowner to Withdraw Vessel—Waiver.]—A steamer was chartered for about nine months, payment of hire to be made fortnightly in advance, and in default of payment the owners to have the right to withdraw the steamer from the service of the charterers. On June 21, during the currency of the charterparty, a fortnight's hire became due, but was not paid. At that date the steamer was on a voyage to Stockholm, where she arrived on June 25, and on June 27 proceeded to Helsingfors to load a cargo. On June 28 the owners gave notice to the charterers that, the hire not having been paid, they withdrew the steamer from the charterers' service:—*Held*, that the right of the owners to withdraw the steamer on the ground of non-payment of hire must be exercised within a reasonable time after the failure to pay; that it had not been so exercised, having regard to the fact that after the right to withdraw accrued the owners had permitted the charterers to incur expense in dealing with the steamer. *Nova Scotia Steel Co. v. Sutherland Steam Shipping Co.* (5 Com. Cas. 106) considered. *Tyrer & Hessler, In re*, 84 L. T. 653; 6 Com. Cas. 143; 9 Asp. M.C. 186—D.

—Liability—Termination of Hiring.]—By a charterparty it was provided that the charterer should pay freight “at the rate of 709L. per calendar month, . . . and at or after the same rate for any part of the month, hire to continue until her re-delivery to the owner, payment for the said hire to be made in cash monthly in advance.” It was also provided that the owner should have a lien upon cargoes and sub-freight for any amount due to him under the charter,

and that the charterer should have a lien on the ship for all moneys paid in advance and not earned:—*Held*, that the charterer was bound to pay the full freight in advance at the beginning of each month, although it might be probable that the hire would not continue for the whole month. *Tonnelier v. Smith*, 77 L. T. 277; 8 Asp. M.C. 327—C.A.

—Aliquot Part of Freight—Freight Payable on Fixed Tonnage—Destruction of Part of Cargo by Excepted Peril Before Advance Freight Payable—Basis of Calculation of Advance Freight.—A charterparty, by which the charterers agreed to load a full and complete cargo upon a ship, contained the following clause as to freight: "Freight for the said cargo to be paid on final discharge at the rate of . . . on the quantity to be delivered to the consignees. The freight to be due and paid as follows: Two-thirds in cash . . . three days after sailing . . . ship lost or not lost, and the balance on unloading and right delivery of the said cargo," and also a marginal clause that "in the event of charterers not loading vessel to her marks it is agreed that freight shall be paid on the basis of 4,350 tons, which the owners hereby guarantee to be vessel's capacity for the voyage, less *pro rata* freight on any quantity of cargo short delivered." When 1,478 tons had been loaded, they were destroyed by fire, which was a peril excepted by the charterparty. The charterers then shipped 2,590 tons more cargo, being, with the amount destroyed, 292 tons less than the agreed basis of 4,350 tons and insufficient to load the vessel to her marks. The ship then sailed, and after three days the shipowners claimed payment of advance freight on 4,350 tons:—*Held*, that the advance freight must be calculated on the basis of 4,350 tons, deducting therefrom the amount of cargo destroyed by the excepted peril. *Weir v. Girvin*, 69 L. J. Q.B. 168; [1900] 1 Q.B. 45; 81 L. T. 687; 48 W. R. 179; 9 Asp. M.C. 7; 5 Com. Cas. 40—C.A.

Punctual and Ready Payment—Breach—Waiver.—A steamer was chartered for three months at a monthly hire, payment to be made monthly in advance, and, "failing the punctual and regular payment of the hire," the owners were to be at liberty to withdraw the vessel from the service of the charterers. The second month's hire became due on July 12, but was not then paid. The vessel arrived on that day at Wabana, Nova Scotia, where she loaded a cargo, and sailed on July 14. The owners, on July 14, gave notice to the charterers that they withdrew the ship, the hire not having been paid. The charterers, on receipt of the notice, tendered the amount of the hire, which the owners refused to accept:—*Held*, there had been a punctual and regular payment of the hire, and, if not, that the act of the captain in taking cargo on board when the hire was due and unpaid amounted to a waiver by the owners of their right to withdraw the steamer. *Nova Scotia Steel Co. v. Sutherland Steam Shipping Co.*, 5 Com. Cas. 106—Bigham, J.

Overdue Hire—Withdrawal of Ship—Damages.—A charterparty contained a clause providing "Payment of the said hire to be made in cash monthly in advance, . . . and in default of such payment or payments as herein specified,

the owners shall have the faculty of withdrawing the said steamer from the service of the charterers." A month's hire became due on September 11. On October 1 it was still unpaid, and the owners gave notice that they withdrew the ship, which was at that time at sea. On October 2 the month's hire was paid, and on the same day the ship arrived in port. On October 4 the master, under instructions from the owners, withdrew the ship:—*Held*, that there was a breach of the charterparty for which the owners were liable in damages. *Langford Steamship Owners v. Canadian Forwarding Co.*, 96 L. T. 559—P.C.

Coal Cargo—Cost of Discharging Cargo.—Clause 1 of a charterparty provided that the steamer should "load a full and complete cargo of Lambton gas-coal, . . . and, being so loaded, shall therewith proceed . . . to Port de Bouc and there deliver her cargo . . . on being paid freight at the rate of 9s. per ton of 20 cwt. or 1,015 kilos, delivered, or on bill of lading quantity, less 2 per cent., at receivers' option." Clause 8 dealt with the discharge of the cargo, and contained the following: "Consignee to effect the discharge of the cargo." "Steamer paying one franc per ton of 20 cwt. or 1,015 kilos." The consignees elected to receive the cargo without weighing. In an action by the shipowners against the charterers to recover a balance of freight remaining unpaid, the defendants counterclaimed to be entitled (under clause 8) to be paid one franc per ton on the bill of lading quantity without deduction:—*Held*, that clauses 1 and 8 were to be read together, and that in ascertaining the number of tons upon which the shipowner was liable for the expense of discharging, a deduction of 2 per cent. must be made from the bill of lading weight. *The Hollinside*, 67 L. J. P. 45; [1898] P. 131; 46 W. R. 639—D.

Option to Pay Freight on Weight Delivered or Intake Weight—Time to Exercise Option.—By the terms of a charterparty cargo was to be delivered "on payment of freight at the rate of 6s. 3d. per ton delivered or intake weight less 2 per cent. at charterers' option." The shipowners not having required the charterers to declare their option as soon as the cargo was delivered, the latter elected to pay on the intake weight less 2 per cent.:—*Held*, that the charterers could elect to pay the lesser—that is, the intake-freight, as they were not bound to exercise their option until the time for payment of the freight had arrived, the shipowners having waived their right to require the charterers to declare their option as soon as the cargo had been delivered. *The Dowlais*, 51 W. R. 88—C.A.

Freight Payable at Certain Rate per Ton on Gross Weight Shipped on Right and True Delivery—Part of Cargo Lost—Whether Lump-sum Freight.—By the terms of a charterparty a vessel was to load at Fiume a full and complete cargo of sugar in bags, and proceed to Boston, and there deliver same agreeably to bills of lading on being paid freight "at the rate of ten shillings and sixpence per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo in cash." By another clause it was provided that "any difference between the charterparty and bills of

lading freight shall be settled at Fiume on clearance of vessel if required by master":—*Held* (ROMER, L.J., dissenting), that this was a contract not for a lump-sum freight, but for the payment of freight in the ordinary way—namely, on the cargo actually delivered, and therefore that no freight was payable in respect of a portion of the cargo which was lost on the voyage. *London Transport Co. v. Trechmann*, 73 L. J. K.B. 253; [1904] 1 K.B. 635; 90 L. T. 132; 9 Com. Cas. 133; 9 Asp. M.C. 518—C.A.

Pilot Paid by Charterers—Damage to Vessel Due to Pilot—Payment of Hire during Repairs.]

—The plaintiffs chartered the defendant's ship for the period of twenty-five years, with the option of purchase, the ship to be employed "between safe ports of the Continent of Europe where she may always safely lie." By the charterparty the charterers were to pay for pilotages, and in the event of loss of time from damage preventing the working of the vessel the payment of hire should cease until the vessel should be again in an efficient state to resume her services. The negligence of the pilot, master, mariners, and other servants of the owner was mutually excepted. While under charge of a pilot the ship grounded in getting to her berth in a harbour, and in consequence she was prevented working for three weeks. The berth was a safe berth, and the grounding was due to the negligence of the pilot:—*Held*, that the pilot, though paid by the charterers, was not their servant, and therefore the charterers were not bound to pay hire during the period that the ship was in dock undergoing repairs. *Fraser v. Bee*, 49 W. R. 336—Mathew, J. *And see PILOTAGE.*

Right of Master to Maintain Action for.]

The owner of a vessel chartered her to the defendants to bring a cargo of timber from Australia to London, the defendants undertaking to provide the cargo. The charterparty contained the usual exceptions, and the freight was to be paid on unloading and right delivery of the cargo. It was further provided that the master should sign bills of lading at the port of loading, and that the charterer's liability under the charter should cease on the vessel being loaded. The defendants loaded the cargo, and presented bills of lading to the plaintiff, who signed them as master of the vessel. They provided that the cargo should be delivered to the shippers or their assigns, "they paying freight for the same as per charterparty." On the arrival of the ship at the port of discharge, the cargo was delivered to the defendants against presentation of the bills of lading. In an action by the plaintiff to recover a balance due for freight,—*Held*, that the plaintiff, having signed the bills of lading merely as agent for the shipowner, was not entitled to maintain the action. *Repetto v. Millar's Karri and Jarrah Forests*, 70 L. J. K.B. 561; [1901] 2 K.B. 306; 84 L. T. 836; 49 W. R. 526; 6 Com. Cas. 129; 9 Asp. M.C. 215—Bigham, J.

Lien for Freight—Sums Due under Charterparty—Assignees of Charterer—Freight Received in Lump Sum before Whole Amount Due—Damages for Breach of Charterparty—Set-off and Counterclaim.]—On November 2, 1900, the defendants chartered their vessel to

one Perry for a term of 24 calendar months at the rate of 1,550*l.* (less 2½ per cent. commission) a month, payable in advance. The vessel came on hire on March 18, 1901, and was employed by the charterer to carry a cargo from the United States to Japan. The cargo was carried under a contract made between the shippers and the charterer. Under the bill of lading there was a lien against the shippers for the bill of lading freight payable at Nagasaki, in Japan, and by the charterparty the defendants had a lien upon cargoes and sub-freights for amounts due under the charterparty. On the arrival of the vessel at Nagasaki on June 9, 1901, there was due in respect of bill of lading freight 5,258*l.* 7*s.* 11*d.*, which the master, acting on the defendants' instructions, collected on June 15. That amount was paid to him in a lump sum. It was admitted that of that amount the defendants were entitled to retain the sum of 3,100*l.* for chartered hire due and unpaid upon the vessel's arrival, together with certain other small amounts for disbursements, &c. On June 18 a further month's hire, amounting to 1,511*l.* 5*s.*, became due. On June 26 the owners withdrew the vessel from the chartered service without prejudice to their claim against the charterer for breach of the charterparty, and it was agreed for the purposes of the case that the defendants were entitled to 3,000*l.* in respect of such breach. The plaintiffs, who were the equitable assignees of the freight, and stood in the shoes of the charterer, but who had not given notice of that fact before the receipt of the freight by the master either to the consignees or to the defendants, claimed that, of the 5,258*l.* 7*s.* 11*d.* collected by the master on June 15, the defendants were not entitled to retain the amount of chartered hire (1,511*l.* 5*s.*), which only became due on June 18, as they had no lien in respect of that sum, and further that the defendants were not entitled to set up against the plaintiffs their claim against the charterer for the 3,000*l.* damages:—*Held*, that the master was acting within his rights in receiving the 5,258*l.* 7*s.* 11*d.* from the consignees, who were at liberty to pay the freight in one sum instead of paying freight day by day as the cargo was discharged, and that although the plaintiffs had a right under the charterparty to call upon the defendants to account, the latter were entitled to bring into the account by way of set-off or counterclaim the 1,511*l.* 5*s.* and the 3,000*l.* *Samuel v. West Hartlepool Steam Navigation Co.*, 12 Com. Cas. 203—Walton, J.

(1) *Salvage.*

For Owners and Charterers' "equal benefit"—Division of Sum Awarded by Admiralty Court—Shipowners' Deduction of Losses Attributable to Salvage Services.]

—Where a chartered ship has succeeded in rendering salvage services to another ship, and has obtained from the Admiralty Court a salvage award, a clause in the charterparty that "all derelicts and salvage shall be for owners and charterers' equal benefit" entitles the shipowners, before dividing the salvage award with the charterers, to deduct sums spent in repairs to their ship attributable to salvage services and loss of hire whilst their ship is under repair. *Booker v. Pocklington*

Steamship Co., 69 L. J. Q.B. 10; [1899] 2 Q.B. 690; 81 L. T. 524; 9 Asp. M.C. 22; 5 Com. Cas. 15—Bigham, J. And see SALVAGE.

7. CARRIAGE OF PERSONS.

Passenger's Contract—"Passage broker"—Person who "receives money for or in respect of a passage in any ship."—A "passage broker" within the meaning of section 341, sub-section 1 of the Merchant Shipping Act, 1894, is one who sells or lets a passage in a named ship to commence at a definite time for a specified voyage. A person who, by way of business, agrees to place farm pupils in the colonies in consideration of a lump sum which includes ship's passage fare, but without specifying any particular ship, and who out of that sum subsequently pays for and obtains from a duly qualified passage broker a contract ticket for a second-class passage in a particular ship, is not a "passage broker" within the meaning of section 341, sub-section 1 of the Act of 1894; nor is he a person who "receives money for and in respect of a passage in any ship" within the meaning of section 320, sub-section 1 of the same Act. *Morriss v. Howden*, 66 L. J. Q.B. 264; [1897] 1 Q.B. 378; 76 L. T. 156; 45 W. R. 221; 61 J. P. 246; 18 Cox C.C. 501; 8 Asp. M.C. 249—D.

Money Paid for Steerage Passage—No Contract Ticket Given—Money not Stated to have been Received in Respect of a Specified Passage.—*Per* the LORD JUSTICE-GENERAL: Where money is paid to a person, who is not acting for or under the authority of the Board of Trade, in respect of a steerage passage or other passage in an emigrant ship to a port out of Europe and not in the Mediterranean, and no contract ticket in a form approved by the Board of Trade is at the same time supplied, an offence is committed under section 320 of the Merchant Shipping Act, 1894, by the person receiving the money, although the passage covenanted for is for a passage generally, without mention of the exact ship or time of voyage. *Morriss v. Howden* (66 L. J. Q.B. 264; [1897] 1 Q.B. 378) commented on. *Hart v. Hunter*, 8 F. (Just. Cas.) 84—Ct. of Justy.

Passengers' Luggage.—A shipowner is entitled to limit his liability in respect of the loss of passengers' personal effects. *The Stella*, 81 L. T. 235—Bucknill, J.

Theft from Cabin—Negligence—Conditions on Ticket—No Declaration of Value—"Fault or privity."—A passenger on a steamer placed his watch, with gold cigar cutter and sovereign purse (containing 5*l.*) attached, on retiring for the night in a canvas pocket suspended from a hook over the top bunk which he occupied in a cabin on the main deck. The pocket was placed where it was under the superintendence of the shipowner's marine superintendent. Above the pocket was a fanlight, which the passenger left open, leading into the ventilating shaft which opened on the spar deck. A small man by putting his head and shoulders into the opening of the ventilating shaft could, by stretching his arm downwards, reach the pocket. The contents of the pocket had disappeared by the following morning. Finger-

marks were found round the pocket and in the ventilating shaft. The passenger's ticket contained a condition that "the owners will not be responsible for and shall be exempt from all liability in respect of . . . any loss . . . of . . . any baggage, property, goods, effects, articles, matters, or things belonging to or carried by or with any passenger, whether the same shall arise from or be occasioned by thefts . . . by persons in the employment of the owners, or by others . . . or any other acts, defaults, or negligence of the owner's agents or servants of any kind whatsoever. . . ." The passenger had not declared the value of the articles. On an action for damages for negligence or alternatively for breach of warranty of seaworthiness,—*Held*, that the liability of the carrier as regards articles carried on the person or in the passenger's personal custody was the same as that towards the passenger—namely, to take reasonable care. If the articles by being placed in the pocket changed their character, then the Merchant Shipping Act, 1894, s. 502, applied. There was no "fault or privity" of the shipowners. The condition on the ticket protected the shipowners. The shipowners were not liable for the loss. *Smitton v. Orient Steam Navigation Co.*, 96 L. T. 848; 12 Com. Cas. 270; 23 T. L. R. 359—Channell, J.

8. CARRIAGE OF GOODS—BILL OF LADING.

(a) *The Contract.*

Incorporation of Conditions of Charterparty—"Paying freight . . . all other terms, conditions, and clauses as per charterparty."—Goods, forming part of a cargo loaded under a charterparty of the plaintiff's ship, were shipped under a bill of lading to be delivered to the order of M. or assigns, "he or they paying freight for the goods . . . all other terms, conditions, and clauses as per charterparty." The charterparty contained the following clause: "The ship to discharge in such berth or dock as ordered by charterers or their agents." On the arrival of the ship at the port of discharge the defendant, the indorsee of the bill of lading, he being also the charterers' agent, ordered her to discharge in a certain dock, but she discharged in a different dock from that ordered, whereby the defendant suffered damage:—*Held*, that the clause in the charterparty was incorporated into the bill of lading, and that the plaintiffs were liable to the defendant for the damage suffered by him. *East Yorkshire Steamship Co. v. Hancock*, 5 Com. Cas. 266—Mathew, J.

— "Freight and all other conditions as per charterparty"—**"Deck cargo at merchant's risk."**—Wood was shipped under a bill of lading in good order and well conditioned, to be delivered in like good order and condition at a port named unto orders, "freight and all other conditions as per charterparty." By the charterparty it was agreed that the ship should load a full and complete cargo of battens, including a deck cargo at merchant's risk. A part of the wood so shipped having been delivered to the indorsees of the bill of lading discoloured in consequence of being carried on deck, the indorsees claimed the damage so caused from the shipowner:—*Held* (RIGBY, L.J., *dissentiente*), that the words "freight and all

other conditions as per charterparty" in the bill of lading did not incorporate into the bill of lading the term of the charterparty "deck cargo at merchant's risk," and that the bill of lading holders were entitled to recover. *Diederichsen v. Farquharson*, 67 L. J. Q.B. 103; [1898] 1 Q.B. 150; 77 L. T. 543; 46 W. R. 162; 8 Asp. M.C. 333—C.A.

"All other conditions as per charterparty"—Submission to Arbitration—Incorporation of Arbitration Clause in Bill of Lading.—Where by a charterparty any dispute arising under the charter was to be settled by arbitration, and the charterer's liability was to cease on completion of shipment, the captain having a lien for freight, and goods were shipped under a bill of lading to be delivered to the charterer at the port of discharge, the bill of lading containing a clause, "all other conditions as per charterparty,"—*Held*, that the arbitration clause was not incorporated in the bill of lading. *Runciman v. Smyth*, 20 T. L. R. 625—D.

Legal Proceedings.—The expression "legal proceedings" in section 496, sub-section 3 of the Merchant Shipping Act, 1894, means legal process taken to enforce the rights of the shipowner. *Ib.*

"All other conditions as per charterparty including negligence clause"—Meaning of "negligence clause."—The plaintiffs' goods, while being carried in winter across the Atlantic in the defendants' ship, were damaged owing to a crack in one of the deck plates. The bills of lading for the goods excepted the usual perils, including accidents of the seas, and provided "all other conditions as per charterparty, including negligence clause." The charterparty contained in clause 11 the two following sentences printed together as one set of words: "The steamer is in no way liable for the consequences of the act of God, perils of the seas . . . strandings or other accidents or errors of navigation, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Neither is the steamer answerable for losses occasioned by . . . unseaworthiness . . . whether existing or not before or after the commencement of the voyage. . . ." The County Court Judge found that on the evidence the vessel had not met with exceptional weather during the voyage, and therefore that the crack in the plate was due to unseaworthiness, though without any fault on the part of the defendants; and decided that the term "negligence clause" in the bill of lading incorporated only the first sentence of clause 11 of the charterparty containing the word "negligence," and not the second sentence as regards "unseaworthiness"; and gave judgment for the plaintiffs:—*Held* (allowing the appeal)—first, that on the evidence the vessel had met with exceptionally severe weather during the voyage, and that the crack in the plate was caused thereby and was due to perils of the seas for which the defendants were not responsible; and secondly, that even if the damage had been due to unseaworthiness, the defendants were not liable, because the term "negligence clause" in the bill of lading incorporated the whole set of words in clause 11 of the charterparty, including the sentence regarding "unseaworthiness." *The Northumbria*, 75 L. J. P. 101; [1906] P. 292; 95 L. T. 618—D.

Time Charter—Sub-charter—Owner's Lien—Sub-charterer's Cargo.—Notice to a shipper of a charterparty has not the effect of incorporating into the bill of lading any terms inconsistent therewith which the captain was not bound by the charterparty to embody in the bill of lading. *Turner v. Haji Goolam Mahomed Azam*, 74 L. J. P.C. 17; [1904] A.C. 826; 91 L. T. 216; 9 Asp. M.C. 588; 20 T. L. R. 599—P.C.

Under a time charter, bills of lading were to be signed at any rate of freight the charterers might direct, "without prejudice to this charter"; the charterers were to be at liberty to sub-let the ship, and the owners were to have a lien upon all cargoes for freight or charter money due under the charter:—*Held*, that the owners were not entitled to a lien on the cargo of a sub-charterer, who had notice of the existence but not of the contents of the time charter, for moneys due under the time charter, the words "without prejudice to this charter" referring only to the shipowners' rights against the time charterer; and that the owners must be held to have contracted with the sub-charterer for the carriage of his goods in terms of the bill of lading. *Colvin v. Newberry* (1 Cl. & F. 283) distinguished. *Ib.*

A right to seize one person's goods for another's debt must be clearly and distinctly conferred before a Court can recognise it. *Ib.*

Alteration of Destination—"Bound for London"—Condition—Liberty to Call at any Ports whatsoever, to Tranship by any other Steamer, to Forward to Port of Destination by any Steamer either of Owners or any other Line—Goods Damaged by Excepted Perils.—Under a bill of lading goods were shipped on board a steamship "bound, subject to the liberties hereinafter mentioned, for London . . . with liberty to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route . . . with liberty either before shipment or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or tranship or land and store . . . and thence reship on the said steamship or any other steamship (whether belonging to the company or not) to be carried and delivered (subject to certain exceptions, limitations, and conditions) at the port of London." Among the excepted perils set out in the bill of lading was the following clause numbered 16: "Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by a steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer." During the voyage the destination of the vessel on which the goods were shipped was changed from London to Cardiff, where the goods were transhipped into a small steamer, and by it the goods were carried to London.

In an action by the consignees claiming damages on the ground that by abandoning the voyage to London the shipowners lost the protection of all exceptions in their favour in the bill of lading,—*Held*, that the exceptions were wide enough to cover the total abandonment of the final destination to London, and were reasonable and did not defeat the object of the bill of lading contract to carry the goods to London. *Held*, also, that the words "other line" in clause 16 of the bill of lading meant merely another steamer, and did not therefore compel the shipowners to tranship the goods into a "liner" as distinguished from a small trading steamer. *Hadji Ali Akbar v. Anglo-Arabian Steamship Co.*, 95 L. T. 610; 11 Com. Cas. 219; 22 T. L. R. 600—Bigham, J.

Deviation.—By a charterparty the ship was to proceed to Marianople and there load a cargo of wheat, and being so loaded was to proceed therewith to a safe port in the United Kingdom or on the Continent between Havre and Hamburg, as ordered at Gibraltar. The charterparty also contained the following clause: "Should frost ensue . . . after the steamer has arrived at port of loading and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azof, or Mediterranean port for United Kingdom, Continent, or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers." Frost ensued, and, to avoid being frozen in, the ship left Marianople with a part cargo of wheat, shipped under bills of lading which incorporated all the conditions and exceptions contained in the charterparty, and proceeded to Novorissisk, where she filled up with linseed under bills of lading for delivery at King's Lynn Docks. Upon the ship's arrival at Gibraltar she was ordered by the consignees of the wheat to proceed therewith to Cardiff; but instead of going there direct, she went in the first instance to King's Lynn, and there delivered the linseed before proceeding to Cardiff. On the voyage from King's Lynn to Cardiff the wheat was seriously damaged by one of the perils excepted in the bill of lading and charterparty. In an action by the holders of the bill of lading against the shipowners for breach of contract,—*Held*, that, by proceeding to King's Lynn, the ship had deviated from the voyage, and that her owners were therefore liable. *The Dunbeth*, 66 L. J. P. 66; [1897] P. 133; 76 L. T. 658; 8 Asp. M.C. 284—Goroll Barnes, J.

Custom—Charges to be Paid by the Ship—Charges for Stowing in Transit-shed—Inconsistency—Mersey Docks Act and By-laws.—Bills of lading provided that certain currants were "to be delivered from the ship's deck when the ship's responsibility shall cease . . . Simultaneously with the ship being ready to unload the said goods . . . the consignee is hereby bound to be ready to receive the goods from the ship's side, and in default thereof the master or the agent of the ship is authorised" to enter, land, and warehouse them at the expense of the consignee:—*Held*, that a custom, that in the discharge of dried-fruit cargoes the

charges for trucking from the shed and piling in the transit-shed are to be paid for by the ship, was good, as it did not contradict the bills of lading, but merely annexed an incident to them. *Held*, further, that these charges were not included in the all-round charge made by the master porters under the Mersey Docks Acts and the by-laws of the Mersey Docks and Harbour Board. *Cardiff Steamship Co. v. Jameson*, 88 L. T. 87; 9 Asp. M.C. 367—D.

"At merchant's risk"—Exception of Negligence or Error of Judgment—Goods Damaged by Recklessness in Discharge—Liability of Shipowner.—Goods were shipped under a contract which contained exceptions of liability for damage or loss, whether on shore, or ship, lighter, or hulk, arising from negligence, barratry, or error of judgment of the master, mariners, engineers, or any other persons in the employment of the shipowner. In the margin of the contract the words "Carried entirely at merchant's risk" were written. The goods were damaged through the reckless conduct of the stevedores, who were employed by the shipowner, in discharging the goods into lighters:—*Held*, that the words "at merchant's risk" did not cut down the special exceptions; that damage caused by recklessness, which was an error of judgment or negligence of a bad kind, came within the exceptions; and that therefore the shipowner was not liable. *Briscoe v. Powell*, 22 T. L. R. 128—Channell, J.

Exemption of Insurable Losses—Negligence of Defendants and their Servants—Liability of Carrier.—A cargo of frozen meat belonging to the plaintiffs was carried in one of the defendants' steamers from the River Plate to the United Kingdom, under a contract containing a clause that the defendants would not be liable "for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance." The cargo was damaged owing to the neglect of the defendants to provide refrigerating machinery which would keep the temperature low enough, in consequence of which the ship was unfit to carry the cargo safely to its destination. In an action for damages for breach of contract,—*Held*, that the exception being in general terms did not relieve the defendants from their obligation to provide a ship fit for the cargo at the commencement of the voyage, and that they were therefore liable. *Nelson & Sons, Lim. v. Nelson Line* (No. 2), 75 L. J. K.B. 921; [1906] 2 K.B. 804; 11 Com. Cas. 305; 22 T. L. R. 826—Bray, J.

The bill of lading, the clauses of which were incorporated in the agreement, contained a clause that the owners were "not accountable in any case beyond nett invoice price of the goods damaged":—*Held*, that that clause was not intended to form part of the agreement, and that the intention of the parties was that only the profit on the goods damaged should be excluded from the amount for which the defendants should be liable. *Id.*

Bill of Lading incorporating Harter Act—Fault or Error in the Management of the Ship.—In the course of a voyage, during bad weather, a drainage pipe in the fore-castle of the ship

became choked, and the forecabin was flooded with water. In trying to clear the pipe with a hammer and poker the boatswain drove a hole through the syphon trap of the pipe, and the water running into the hold damaged the cargo. The bill of lading incorporated the provisions of the Harter Act. In an action brought by the shipowner to recover the balance of freight retained by the owner of the cargo to cover damage,—*Held*, that the act of the boatswain was an act done "in the management" of the ship, and that the plaintiffs were entitled to recover. *The Rodney*, 69 L. J. P. 29; [1900] P. 112; 82 L. T. 27; 48 W. R. 527; 9 Asp. M.C. 39—D.

Live-stock—Contract to Carry—Force Majeure—Deterioration of Cargo—Liability of Shipowner.—By a live-stock contract and bill of lading the defendants undertook to carry in their ship the plaintiff's cattle from the dock at Buenos Ayres to Deptford. The contract and bill of lading each contained the following clauses: "The . . . owners of the vessel shall not be responsible for any loss or injury arising from *force majeure* . . . or from any . . . negligence default or error in judgment of the . . . master . . . engineers or other persons in the service of the shipowner . . . whether occurring previously or subsequently to the vessel's sailing or by unseaworthiness or unfitness of the ship or any part of her . . . equipment at or after the commencement of the voyage." "The vessel to have liberty to sail without pilots and to tow and be towed and assist vessels in distress and to deviate for the purpose of saving life or property but not to call at any port or ports before landing her live-stock except in case of *force majeure*":—*Held*, that the latter clause amounted to an absolute undertaking by the shipowners that the vessel should not, before landing her live-stock, call at any port, whether in or out of the ordinary course of the voyage, except in case of *force majeure*. *Yrazu v. Astral Shipping Co.*, 9 Com. Cas. 100; 20 T. L. R. 153—Walton, J.

By a miscalculation of the master and engineer the ship left Buenos Ayres with insufficient coals to take her to St. Vincent—a customary coaling port on the voyage from the River Plate to the United Kingdom at which the master intended to coal, being in some way led to suppose that there was nothing in the contract which would prevent him from so doing. The ship was in consequence compelled to call at Pernambuco for coals, and in consequence the delivery of the cattle at Deptford was delayed and they suffered depreciation:—*Held*, that there was no case of *force majeure*, and that the defendants were liable for the damages suffered by the plaintiffs in consequence of the vessel calling at Pernambuco. *Sembla*, it would have been a case of *force majeure* if the deficiency of coals had arisen from some accident as, for example, jettison. And, under the contract, such a case would be one of *force majeure* even though the accident which rendered the jettison necessary was caused or contributed to by some negligence in the navigation of the ship. *Id.*

Shipping Order—Charterparty—Chartered Freight—Payment of Difference—Right of Shipper to Withdraw Goods after Shipment.—By

a forward freight contract, contained in a shipping order, C. D. & Co. agreed to provide tonnage at 16s. 6d. a ton for the carriage of 3,000 tons of wheat of the plaintiffs from Bombay to Liverpool. C. D. & Co. declared for the shipment of the wheat a steamer of the defendants, which had been chartered by M. & Co. to carry a cargo from Bombay to Liverpool at a freight of 30s. per ton, and half the space of which had been sub-let by M. & Co. to C. D. & Co. The plaintiffs knew that there was a charterparty, but not its terms. After 2,100 tons of the wheat had been loaded, the plaintiffs tendered to the captain for his signature bills of lading in which the freight was 16s. 6d. The captain refused to sign the bills of lading unless the difference between 30s. and 16s. 6d. was paid to him, in accordance with the terms of the charterparty. The plaintiffs declined to pay this, and demanded the return of their wheat. The captain retained the wheat, and sailed without signing any bills of lading for it. In order to get delivery the plaintiffs, under protest, took bills of lading in which the freight was 30s. At the time of the loading the captain had an opportunity of seeing the shipping order, but did not, in fact, do so:—*Held*, that there was no contract by the defendants to carry the wheat at 16s. 6d.; that the defendants were not bound to return the wheat to the plaintiffs; and that the plaintiffs were not entitled to recover from the defendants the excess of freight above 16s. 6d. *Ralli v. Paddington Steamship Co.*, 5 Com. Cas. 124—Mathew, J.

Bulk Cargo—Undivided Portions of Bulk—Each bill of lading to bear its proportion of damage—**Error in Apportioning—Short Delivery.**—Bills of lading for undivided portions of a bulk cargo of grain contained the following clause and note in margin: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any": "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." By an error in apportioning damaged grain one consignee received a full consignment of sound grain. One of the other consignees, refusing to accept more than his proportionate share of damaged grain, received a consignment which was 108 quarters short:—*Held*, in an action for short delivery, that the error was caused by the consignees' agents, and that the clause in the bills of lading cast no duty on the shipowner to apportion the good and unsound grain. *Grange v. Taylor*, 90 L. T. 486; 52 W. R. 429; 9 Com. Cas. 223; 9 Asp. M.C. 559; 20 T. L. R. 386—Bigham, J.

Stipulation as to Discharge—Intended Breach—Interim Injunction.—An interim injunction granted restraining shipowners from discharging part of a cargo in a particular dock contrary to the terms of the bills of lading. *Wood v. Atlantic Transport Co.*, 5 Com. Cas. 121—Mathew, J.

(b) *Through Bill of Lading.*

Inland and Ocean Carrier—Bill of Lading Weight greater than Gross Weight Delivered.

Payment of Freight on Bill of Lading Weight—Recovery of Over-payment in Respect of Inland Freight.—Certain parcels of hay, of which the plaintiff was consignee, were respectively delivered to railway companies at certain places in the United States of America to be carried to New York and thence by the defendants to London under through bills of lading signed by an agent on behalf of carriers "severally but not jointly." By the terms of the through bills of lading with respect to the service until delivery at New York, all liability under the contract terminated on delivery of the property to the steamship at New York, and the inland freight was a first lien, due and payable by the defendants; and with respect to the service after delivery at New York and until delivery at London, payment of freight was to be made on the gross weight landed from ocean steamship unless otherwise agreed or so provided in the bill of lading, or unless the carriers elected to take the freight on the bill of lading weight. The through freight was made up by the railway companies in America after the transport rates of the defendants had been ascertained:—*Held*, first, upon the construction of the bills of lading, that if there was no election to take the bill of lading freight, and if the defendants demanded too much before the goods could be obtained by the plaintiff, they would be liable to be sued for the return of the excess of freight paid, and would not be entitled to say to the plaintiff that he must recover from the land carriers in America so much as represented the overcharge for the inland carriage. Secondly, upon the facts that as the plaintiff, although he objected, had paid the bill of lading through freight, and had accepted a rebate of the ocean freight only, in all cases where the bill of lading freight was greater than the quantity delivered, he was not entitled to recover the over-payment for inland freight as having been made under a mistake of fact. *Kitts v. Atlantic Transport Co.*, 7 Com. Cas. 227—Kennedy, J.

Property Covered by Through Bill of Lading Subject to Conditions in Ocean Bill of Lading—Contract in Through Bill of Lading to Notify Consignee—Condition in Ocean Bill of Lading that no Claims to Attach to Shipowner for Failure to Notify—Lien for Interest on Freight.—A through bill of lading contained the clause "Party to be notified; E. Clemens Horst":—*Held*—first, that the words were words of contract; secondly, that notification by post would have been sufficient, even though the letter did not arrive. *Held*, further, that a "notification clause" in an ocean bill of lading incorporated by the through bill of lading to the effect that "no claim shall, under any circumstances whatever, attach to the steamer, her owners or agents, for failure to notify consignees of arrival of goods" does not contradict the through bill of lading containing the contract to notify, but relieves the shipowner from liability to pay damages if he fails to carry out the obligation to notify. Where there is no express contract for a lien for interest on freight it cannot be implied. *Clemens Horst Co. v. Norfolk and North American Steam Shipping Co.*, 11 Com. Cas. 141; 22 T. L. R. 403—Kennedy, J.

Inland Charges—Payment by Steamship Company—Non-delivery of Part of Goods—"Lien on goods in whole and in part until payment"

of Inland Charges.—Certain sacks of flour were received by an American railway company to be carried under three similar through bills of lading from inland in the United States to London, part of the transit being by railway to the port and the rest by the defendants' steamships to London, to be there delivered upon payment of the through freight. Each through bill of lading was signed on behalf of the railway company and the defendants severally and not jointly. By a clause in the through bill of lading it was provided that, as regards the inland service, the contract was executed and accomplished, and all liability thereunder terminated, on delivery of the property to the steamship, and that the inland freight charges should be a first lien due and payable by the steamship company. By a clause in the through bill of lading as regards the carriage by sea, freight was to be paid on gross weight landed from the steamship unless otherwise agreed to or therein otherwise provided, or unless the carrier elected to take the freight on the bill of lading weight. By a clause in the defendants' regular bill of lading, which was incorporated in the through bill of lading, it was provided that, "When the goods are carried at a through rate of freight, the inland proportion thereof, together with the other charges of every kind (if any), are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof." The defendants paid the railway company the inland charges on all the sacks of flour and shipped them; but afterwards the ship ran aground, and some of the flour was damaged and sold, and the rest had to be transhipped. On arrival of the rest of the sacks in London, the defendants were paid the through freight thereon, but claimed also against the plaintiffs, the indorsees of the through bills of lading, a lien on this flour for the inland charges paid on the sacks sold and not delivered. The plaintiffs paid the claim under protest, and brought an action to recover the amount:—*Held*, that the defendants had a lien on the flour delivered in London under any one bill of lading for the amount of the inland charges which they had paid in respect of the flour under that bill of lading which was sold and not delivered, and that they were entitled to judgment. *The Iibernian*, 76 L. J. P. 122; [1907] P. 277; 97 L. T. 363; 23 T. L. R. 519—C.A.

(c) Conclusiveness.

As against Persons Signing—Description of Goods—"Marked and numbered as in margin"—Goods Incorrectly Marked.—By a bill of lading the goods shipped were described as being "marked and numbered as in margin," and it was provided that the ship should not be responsible for correct delivery or loss, unless each packet was distinctly, correctly and permanently marked by the merchant before shipment with the mark and number or address. Upon the arrival of the ship goods marked differently from the markings in the margin were tendered to the indorsee of the bill of lading as part of the shipment. The difference between the markings on the goods tendered

and the markings in the margin of the bill of lading was in respect of certain figures used for the shippers' own purposes, and which did not affect or denote the substance, quality, or commercial value of the goods. The goods tendered, in fact, formed part of the goods shipped under the bill of lading, but by the shippers' error were incorrectly described in the margin. The indorsee of the bill of lading refused to accept the goods tendered, and brought an action against the signers of the bill of lading for damages for short delivery, contending that by section 3 of the Bills of Lading Act, 1855, the bill of lading was conclusive of the shipment of goods marked as described in the margin, and that the defendants could not be allowed to prove an error in the statement in the margin of the bill of lading as to the markings of the goods:—*Held*, that the defendants were entitled to judgment: *Per* A. L. SMITH, M.R., upon the ground that as the goods in question were not correctly marked by the shippers, the defendants were entitled to rely, as an answer to the plaintiff's claim, upon the clause in the bill of lading that the ship should not be responsible for correct delivery or loss unless each packet was distinctly, correctly, and permanently marked by the merchant before shipment. *Per* COLLINS, L.J., and ROMER, L.J. (A. L. SMITH, M.R., dissenting), upon the ground that the defendants were not precluded by section 3 of the Bills of Lading Act from proving the identity of the goods tendered with those shipped under the bill of lading, and that as in fact the goods tendered were shipped under and comprised in the bill of lading the plaintiff was bound to accept them. *Parsons v. New Zealand Shipping Co.*, 70 L. J. K.B. 404; [1901] 1 K.B. 548; 84 L. T. 218; 49 W. R. 355; 6 Com. Cas. 41; 9 Asp. M.C. 170—C.A.

Evidence of Shipment against Person Signing—Marks on Goods Material to Consignee.]—Section 3 of the Bills of Lading Act, 1855, does not operate to make a bill of lading conclusive as to the statement of marks upon the goods shipped, when those marks do not affect or denote substance, quality, or commercial value. *Parsons v. New Zealand Shipping Co.*, 69 L. J. Q.B. 419; [1900] 1 Q.B. 714; 82 L. T. 327; 9 Asp. M.C. 33; 5 Com. Cas. 179—Kennedy, J.

Misstatement as to Condition of Goods—Harter Act—Authority of Master—Indorsee of Bill of Lading—Estoppel—"Shipped in good order and condition"—"Quality and measure unknown"—Measure of Damages.]—Purchasers of certain timber paid to the vendors, who were foreign shippers, the contract price thereof, relying on a statement in a bill of lading indorsed to them that the goods had been "shipped in good order and condition . . . quality and measure unknown." The bill of lading incorporated the terms of a charterparty by which the master of the ship was to sign bills of lading in a form indorsed upon the charterparty. This form contained the words "Shipped in good order and condition . . . quality and measure unknown"; it also incorporated an Act of Congress of the United States dated February, 1893, and known as the Harter Act, by section 4 of which a duty is imposed upon the shipowner or master to issue bills of lading stating the apparent order and

condition of the merchandise to which they relate. The timber had been damaged before shipment, and was not, in fact, shipped in good order or condition. In an arbitration between the purchasers and the shippers the former obtained an award in their favour for the difference between the contract price paid and the value of the goods when delivered in their damaged condition, upon which, however, they did not proceed further. In an action by the purchasers against the shipowners upon the bill of lading for not delivering in good order and condition,—*Held*, first, that the words "Shipped in good order and condition" did not import a warranty by the shipowners as to the condition of the goods when shipped, but that they did amount to a representation that the goods had been shipped in good order and condition; secondly, that the effect of those words was not altered by the words "quality and measure unknown"; thirdly, that, notwithstanding the terms of the charterparty, the master was bound to state truly the apparent order and condition of the goods when shipped; fourthly, that the statement as to the order and condition of the goods was made by the master within the scope of his employment and bound the shipowners; fifthly, that the shipowners were estopped from denying the statement that the goods when shipped were in good order and condition, assuming that the purchasers had altered their position upon the faith of it; sixthly, that the actual payment of the contract price by the purchasers, and the difficulty which they might experience in recovering it from foreign shippers, were a sufficient alteration of position to entitle them to rely upon the estoppel, even though it did not appear that they might not recover the price paid; and seventhly, that the measure of damages was the difference between the price paid and the value of the goods when delivered in their damaged condition, together with other expenses reasonably incurred by reason of the condition in which they were delivered. *Compania Naviera Vascongada v. Churchill & Sims*, 75 L. J. K.B. 94; [1906] 1 K.B. 237; 94 L. T. 59; 54 W. R. 406; 11 Com. Cas. 49; 10 Asp. M.C. 177; 22 T. L. R. 85—Channell, J.

(d) *Exceptions.*

"Accidents of the seas"—Damage caused by Baking—Engine and Boiler Space—Bulkheads—Ventilators Closed during Exceptionally Bad Weather.]—A cargo of maize and oats shipped on the defendants' steamship was damaged by heat proceeding from the bulkheads enclosing the engine and boiler space, which was unable to escape owing to the necessary closing of the ventilators for a period of seven days during a storm of exceptional severity and duration:—*Held*, that the loss was occasioned by "accidents of the seas." *The Thrunscoc*, 66 L. J. P. 172; [1897] P. 301; 77 L. T. 407; 46 W. R. 175; 8 Asp. M.C. 313—D.

Peril of the Seas or Navigation—Admission of Sea-water by Negligence of Engineer.]—A cargo of sugar was shipped under bills of lading which exempted the shipowners from liability for loss or damage from certain specified perils

whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise however, *inter alia*, "peril of the seas, rivers, or navigation of whatever nature or kind soever." The chief engineer, desiring to fill a ballast tank with sea-water for boiler use while discharging, opened the sea cock, but then, instead of opening the valve of the ballast tank as he intended, he by mistake opened the valve of the deep tank in which the sugar was carried, with the result that the sugar was damaged by sea-water:—*Held*, that the damage was caused by a peril of the sea or navigation within the meaning of the exception in the bills of lading, and that the shipowners were not liable. *Blackburn v. Liverpool, Brazil, and River Plate Steam Navigation Co.*, 71 L. J. K.B. 177; [1902] 1 K.B. 290; 85 L. T. 783; 50 W.R. 272; 7 Com. Cas. 10; 9 Asp. M.C. 263—Walton, J.

Bill of Lading not Incorporating Negligence Clause—Loss of Ship and Cargo by Master's Negligence—Payment of Damages by Shipowners to Holders of Bills of Lading—Indemnity of Shipowners by Charterers.—Merchants chartered a ship by a charterparty, one of the terms of which was that the owners should not be liable for loss caused by the master's negligence. The charterers presented to the master, and the master signed, a bill of lading which did not incorporate this term of the charter. The ship and cargo were lost through the master's negligence, and the owners were compelled to pay to the holders of the bill of lading the damages sustained. The owners, by their action, claimed to be indemnified by the charterers:—*Held*, that they were entitled to be so indemnified. Decision of the COURT OF APPEAL (76 L. J. K.B. 550; [1907] 1 K.B. 809) affirmed. It is the charterers' duty to present for the master's signature such a bill of lading as is not inconsistent with and not to the prejudice of the charterparty. *Kruger v. Moel Tryvan Ship Co.*, 76 L. J. K.B. 985; [1907] A.C. 272; 97 L. T. 143; 13 Com. Cas. 1; 23 T. L. R. 677—H.L. (E.)

Per PHILLIMORE, J., s.c. *Moel Tryvan Ship Co. v. Kruger*, 75 L. J. K.B. 878; [1906] 2 K.B. 792; 95 L. T. 614; 22 T. L. R. 821.—In the particular trade (the Burma rice trade) acceptance of an "address commission" did not constitute the defendants agents to the plaintiffs so as to impose on them the duty to exercise care in the presentation of bills of lading to the plaintiffs' master. *Id.*

Non-liability for "Sweating" or "Heat."—The plaintiffs were indorsees of bills of lading under which bags of maize were shipped on board the defendants' ship to be delivered subject to the exceptions, "That the . . . owners . . . of the vessel . . . shall not be responsible for . . . damage . . . arising from sweating . . . explosion, heat, fire at sea or on shore." The plaintiffs claimed for damage to the maize by general heating and by contact of the bags with the ironwork of the ship:—*Held*, that the defendants were liable, as, "sweating" meant moisture which evaporated and then condensed in the hold and dropped on to the bags of maize, and did not include

the general heating of the maize, though accompanied by moisture, or the wet which had come to the bags from contact with the iron of the ship; and "heat," having regard to its position between "explosion" and "fire at sea or on shore," referred to some extraneous source of heat, and not to heating of the maize from moisture coming against it or its own moisture causing it to develop heat. *The Pearlmoor*, 73 L. J. P. 50; [1904] P. 286; 90 L. T. 319; 9 Asp. M.C. 540; 20 T. L. R. 199—Gorell Barnes, J.

"Restraint of princes"—Importation of Goods—Alleged Prohibition by Law—Partial Performance of Contract of Carriage—Premature Refusal by Shipowner to Complete Voyage.—Rice was shipped at Rangoon on board the defendants' steamship for carriage to Galatz under bills of lading which contained the exception "restraint of princes." On June 18, the ship being then at Beyrout, the defendants were informed by a Government official at Galatz that the importation of rice from Rangoon into Roumania was prohibited by the law of that country, and that if the ship came to Galatz the discharge of the rice would not be permitted. The law of Roumania did not, in fact, prohibit the importation of rice. On June 23, by the orders of the defendants and contrary to the expressed wish of the plaintiffs, the indorsees of the bills of lading, the ship proceeded to London, where the rice was discharged and sold at a loss:—*Held*, that the defendants were not justified in treating the contract as being, on June 23, impossible of performance, and were liable in damages for the non-delivery of the rice at Galatz. *Brunner v. Webster*, 5 Com. Cas. 167—Kennedy, J.

Seaworthiness—Ship Fit to Carry Cargo—Bad Stowage—Defect in Refrigerating Machinery.

—Fruit was shipped under a bill of lading which excepted (*inter alia*) loss or damage from decay resulting from bad stowage, insufficiency of ventilation or temperature of holds, whether occasioned by any act or omission, negligence, or error in judgment of the master, officers, engineers, crew, stevedores, or other persons in the service of the shipowners, and whether before or after the commencement of or during the voyage, or from defects, latent or otherwise, in hull, tackle, machinery, refrigerating or otherwise (whether or not existing at the time of the goods being loaded or at the commencement of the voyage), or from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, refrigerating engineers, crew, or other persons in the service of the owners, nor from any other cause whatsoever. On the voyage the fruit was damaged owing to the cases having been stowed by persons, for whose acts the shipowners were responsible, too close to the top of the hold, which made it impossible for the refrigerating machinery to ventilate the hold and to keep it at the proper temperature:—*Held*, that the damage was caused by bad stowage within the exceptions, and that therefore the shipowners were not liable. *Bond*,

Connolly & Co. v. Federal Steam Navigation Co., 22 T. L. R. 685—G.A.

Defects "latent on beginning voyage or otherwise"—Patent Defect.]—A clause in a bill of lading excepting the shipowner from liability for "defects latent on beginning voyage or otherwise" does not except him from liability for a defect patent at the beginning of the voyage. *Waikato (Cargo ex) v. New Zealand Shipping Co.*, 68 L. J. Q.B. 1; [1899] 1 Q.B. 56; 79 L. T. 326; 8 Asp. M.C. 442—G.A., affirming Bigham, J. See next case.

Exceptions in a bill of lading purported to relieve shipowners from liability for loss or damage to cargo arising from defects in the ship "latent on beginning of voyage or otherwise." The ship's holds had been insulated for the carriage of frozen meat. A cargo of wool was stowed in these holds, and, owing to the want of proper ventilation, became heated and was damaged:—*Held*, that "latent on beginning of voyage or otherwise" did not cover a defect in ventilation patent to the shipowners themselves, nor relieve them from liability for damage to cargo. *Waikato (Cargo ex) v. New Zealand Shipping Co.*, 67 L. J. Q.B. 514; [1898] 1 Q.B. 645; 78 L. T. 197; 8 Asp. M.C. 351.

Ship not Fit to Carry Cargo owing to Shipowner's Negligence—Exemption of Shipowner from Liability for Loss Arising from Breakdown of Machinery, Insulation, or other Appliances, "or from any other cause whatsoever."—A cargo of meat was shipped under several bills of lading, each being headed "Refrigerator Bill of Lading," and each containing two clauses. The first, printed in large type, exempted the shipowners from liability "for any loss or damage (to the goods) whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever whether arising from a defect existing at the commencement of the voyage, or at the time of shipment of the goods or not," and "for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners or charterers," or "from any cause whatsoever." The other clause, which was printed in small type, contained numerous exceptions exempting the shipowners from liability for defects "if reasonable means have been taken to provide against such defects or unseaworthiness." During the voyage the meat was damaged in consequence of the tainted condition of the ship at the commencement of the voyage, arising from the use of carbolic acid, which would not have occurred if proper skill and care had been used by the shipowners before the ship started on her voyage: *Held*, that the shipowners were liable, as the instrument had to be construed as a whole, and that effect must be given to the qualifications in the second clause of the general immunity conferred by the first. *Elderslie Steamship Co. v. Borthwick* (No. 1), 74 L. J. K.B. 334; [1905] A.C. 93; 92 L. T. 274; 53 W. L. 401; 10 Com. Cas. 109; 10 A. P. M.C. 24; 21 T. L. R. 277—H.L. (E.).

Absolute and Qualified Exceptions—Clauses Printed in Different Types.—Meat was shipped under several bills of lading all in the same form, each being headed "Refrigerator Bill of

Lading." The bills of lading respectively contained two clauses, of which the first was printed in Roman type and contained exceptions of the widest possible kind in perfectly clear language, including damage arising from a defect existing at the commencement of the voyage. The second clause was printed in small italics and contained exceptions, many of which were not very applicable to the carriage of a cargo of meat, and the clause expressly provided that the exceptions were only to apply "if reasonable means have been taken to provide against such defects and unseaworthiness." During the voyage damage arose to the meat in consequence of the tainted condition of the ship at the commencement of the voyage, caused by the improper use of carbolic acid by the shipowners:—*Held*, that the shipowners were exempted from liability for the damage to the meat, upon the ground that, although not much importance was to be attached to the fact that the two clauses were in different types, the clause in the larger type was inserted for the purpose of giving a wider scope to the clause in the smaller type, and was therefore the governing clause. *Borthwick v. Elderslie Steamship Co.*, 8 Com. Cas. 150—Walton, J.

Excepted Port—Port of Manchester—Meaning—Immaterial Addition.]—A contract for the sale of a cargo of wheat *per Vauduara* provided that the vessel should discharge at any safe port in the United Kingdom. The vessel was chartered by the sellers to discharge at any safe port in the United Kingdom (Manchester excepted), and the bill of lading was in the same terms. By the Manchester Ship Canal Act, 1885, and by the Customs regulations, the port of Manchester included the whole of the ship canal, but in the ordinary commercial meaning it included only Manchester and the waters adjacent thereto. In the wider meaning Manchester was, but in the more limited meaning was not, a safe port for the *Vauduara*:—*Held*, that Manchester, within the meaning of the charterparty and bill of lading, was not a safe port for the *Vauduara*, and that therefore the addition of the words "Manchester excepted" was not a material alteration of the contract of sale so as to release the buyers. *Goodbody and Balfour, Williamson & Co., In re*, 82 L. T. 484; 9 Asp. M.C. 69; 5 Com. Cas. 59—G.A.

Alteration of Destination—"Bound for London"—Condition—Liberty to Call at any Ports whatsoever, to Tranship to any other Steamer, to Forward to Port of Destination by any Steamer either of Owners or any other Line—Goods Damaged by Excepted Perils.]—Under a bill of lading goods were shipped on board a steamship "bound, subject to the liberties hereinafter mentioned, for London . . . with liberty to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route . . . with liberty either before shipment or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or tranship or land and store . . . and thence re-ship on the said steamship or any other steamship (whether belonging to the company or

not) to be carried and delivered (subject to certain exceptions, limitations, and conditions) at the port of London." Among the excepted perils set out in the bill of lading was the following clause numbered 16: "Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by a steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer." During the voyage the destination of the vessel on which the goods were shipped was changed from London to Cardiff, where the goods were transhipped into a small steamer, and by it the goods were carried to London. In an action by the consignees claiming damages on the ground that by abandoning the voyage to London the shipowners lost the protection of all exceptions in their favour in the bill of lading,—*Held*, that the exceptions were wide enough to cover the total abandonment of the final destination to London, and were reasonable and did not defeat the object of the bill of lading contract to carry the goods to London. *Held*, also, that the words "other line" in clause 16 of the bill of lading meant merely another steamer, and did not therefore compel the shipowners to tranship the goods into a "liner" as distinguished from a small trading steamer. *Hadj Ali Akbar v. Anglo-Arabian Steamship Co.*, 95 L. T. 610; 11 Com. Cas. 219; 10 Asp. M.C. 307; 22 T. L. R. 600—Bigham, J.

"Faults or errors in management of vessel"—**Refrigerating Apparatus—Negligent User—Harter Act Incorporated.**—The defendants were owners of a vessel intended for the carriage of butter and other perishable goods, and fitted with refrigerating apparatus necessary for the safe carriage of such goods, and also used for the ship's provisions. Butter was shipped upon the defendants' vessel for carriage under bills of lading incorporating section 3 of the Harter Act, which exempts a shipowner who exercises due diligence in the equipment of his vessel from responsibility for "damage or loss resulting from faults or errors . . . in the management of the said vessel." The butter was damaged on the voyage through negligent user of the refrigerating apparatus by some of the crew:—*Held*, that the refrigerating apparatus was part of the vessel, and that negligence in its management was a "fault or error in the management of the vessel," and that, therefore, the defendants were relieved from liability by section 3 of the Harter Act. *Rowson v. Atlantic Transport Co.*, 72 L. J. K.B. 811; [1903] 2 K.B. 666; 89 L. T. 204; 52 W. R. 85; 9 Com. Cas. 33; 9 Asp. M.C. 458—C.A.

"Neglect or default of master"—**Part Owner Acting as Master.**—Goods were shipped under a bill of lading which provided that the shipowners were not to be liable for damage caused by the neglect or default of the master. The master was also part owner of the vessel. The goods were lost by the master's negligence. In an action against the shipowners under the bill

of lading,—*Held*, that the fact that one of the owners was also master and that the loss was caused by his personal negligence did not disentitle him to avail himself of the exception in the bill of lading. *Westport Coal Co. v. McPhail*, 67 L. J. Q.B. 674; [1898] 2 Q.B. 130; 78 L. T. 490; 46 W. R. 566; 8 Asp. M.C. 378—C.A.

"Strikes, lock-outs, accidents to railway"—**"Other causes beyond charterer's control."**—By charterparty it was agreed that the ship should load from charterers' agents a cargo of petroleum in cases, lay days for loading to commence twenty-four hours after the receipt by the charterers' agents of written notice of steamer's readiness in berth to receive, strikes, lock-outs, accidents to railway, . . . or other causes beyond charterers' control, excepted. The railway which brought the oil in tanks to the port of loading being partially destroyed by floods, the charterers' agents dismissed the men employed at their factory in packing the oil in cases. On the re-opening of the railway sufficient supplies of oil were received at the factory, but owing to the absence of men the production of filled cases was delayed. The charterers' agents, also, in accordance with the practice of shippers at the port, deferred the loading of the ship until they had loaded other ships which had arrived previously, and been delayed in loading by the same causes. The lay days having been exceeded,—*Held*, that the lay days commenced to run as soon as sufficient oil had arrived to enable the work of filling cases to be resumed; that the failure to load the ship within the lay days was not owing to "strikes, lock-outs, accidents to railway, . . . or other causes beyond the charterers' control" within the meaning of the charterparty; and that the shipowners were entitled to damages for detention. *In re Richardson and Samuel & Co.*, 66 L. J. Q.B. 868; [1898] 1 Q.B. 261—C.A.

Demurrage—Exception of Fire—Exception Enuring for Benefit of Charterer.—A charterparty provided that a certain number of days should be allowed for loading and discharging the cargo, after which demurrage was to be paid at a specified rate per running day. The charterparty also contained an exception clause excepting, amongst other things, fire. While the vessel was discharging, a fire broke out in the cargo, and it became necessary to remove her for a time from her discharging berth. There was a necessary delay of seven days in consequence of the fire:—*Held*, that the exception of fire applied to the obligation of the charterers to discharge, and that they were excused from demurrage in respect of the seven days' delay caused by the fire. *In re Newman and Dale Steamship Co. and British and South American Steamship Co.*, 72 L. J. K.B. 110; [1903] 1 K.B. 262—Bigham, J.

"All other conditions as per charterparty including negligence clause"—**Meaning of "Negligence clause."**—The plaintiffs' goods, while being carried in winter across the Atlantic in the defendants' ship, were damaged owing to a crack in one of the deck plates. The bills of lading for the goods excepted the usual perils, including accidents of the seas, and provided "all other conditions as per charterparty, including negligence clause." The charterparty

contained in clause 11 the two following sentences printed together as one set of words: "The steamer is in no way liable for the consequences of the act of God, perils of the seas . . . strandings or other accidents or errors of navigation, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Neither is the steamer answerable for losses occasioned by . . . unseaworthiness . . . whether existing or not before or after the commencement of the voyage. . . ." The County Court Judge found that on the evidence the vessel had not met with exceptional weather during the voyage, and therefore that the crack in the plate was due to unseaworthiness, though without any fault on the part of the defendants; and decided that the term "negligence clause" in the bill of lading incorporated only the first sentence of clause 11 of the charterparty containing the word "negligence," and not the second sentence as regards "unseaworthiness"; and gave judgment for the plaintiffs:—*Held* (allowing the appeal)—first, that on the evidence the vessel had met with exceptionally severe weather during the voyage, and that the crack in the plate was caused thereby and was due to perils of the seas for which the defendants were not responsible; and secondly, that even if the damage had been due to unseaworthiness, the defendants were not liable, because the term "negligence clause" in the bill of lading incorporated the whole set of words in clause 11 of the charterparty, including the sentence regarding "unseaworthiness." *The Northumbria*, 75 L. J. P. 101; [1906] P. 292; 95 L. T. 618; 10 Asp. M.C. 814—D.

Default of Stevedores in Loading, Stowing, or Discharging—Damage at Port of Discharge by Shipowners' Stevedores—Effect of Deviation.—Shipowners who, by the bill of lading, are exempted from liability for loss arising from the default of their stevedores in the loading, stowing, or discharging of the ship, lose the benefit of that exemption where the ship has deviated, even although the damage in respect of which the action is brought has occurred by the default of the shipowners' stevedores entirely at the port of discharge. *Balian v. Joly, Victoria & Co.* (6 T. L. R. 345) applied. *Thorley v. Orchis Steamship Co.*, 76 L. J. K.B. 595; [1907] 1 K.B. 660; 96 L. T. 488; 12 Com. Cas. 251; 23 T. L. R. 338; 10 Asp. M.C. 431—C.A.

Inaccessibility of Port on Account of Ice.—*Tillmans v. Knutsford Steamship*, 77 L. J. K.B. 136; [1908] 1 K.B. 185—Channell, J.

Carriage of Dog—Damage arising from Negligence—"Providing, despatching, and navigating the vessel or otherwise."—A dog was shipped under a bill of lading which excepted the shipowner from liability for loss or damage arising from any act, neglect, or default of the master, officers, crew, or any servant of the shipowner "in providing, despatching, and navigating the vessel or otherwise." The dog was lost on the voyage owing to the negligence of the shipowner's servants in letting it loose:—*Held*, that the words "or otherwise" protected the shipowner from liability. *Packwood v. Union-Castle Mail Steamship Co.*, 20 T. L. R. 59—Walton, J.

(e) Warranty of Seaworthiness.

What is—Unfitness of Ship to Receive Cargo—Implied Warranty of Shipowner.—A bill of lading contained, amongst other exceptions, "loss or damage resulting from . . . the consequence of any . . . injury to or defect in hull, tackle, boilers, or machinery, or their appurtenances . . . notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel . . . and whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by . . . unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." A cargo of sheepskins shipped under this bill of lading was damaged while on board by fresh water from a pipe used for the supply of water to a tank for domestic purposes, which was broken when the cargo was put on board. It was admitted that the ship was not fit to receive the cargo when it was put on board, and that reasonable means had not been taken to provide against such unfitness:—*Held*, that the warranty on the part of a shipowner implied at common law to provide a ship reasonably fit to carry the cargo which he undertakes to carry was not excluded by the exceptions in the bill of lading, whether that warranty was included in the warranty of seaworthiness or was a separate warranty; and the shipowners were liable for the damage to the cargo. *Held* also, though not absolutely decided, that "unseaworthiness" in the bill of lading included not only the fitness of the ship as a ship to meet the perils of the sea, but also its fitness to carry the cargo which the shipowners know would have to be carried. *Rathbone v. McIver*, 72 L. J. K.B. 703; [1903] 2 K.B. 378; 89 L. T. 378; 52 W. R. 63; 8 Com. Cas. 303; 9 Asp. M.C. 467—C.A.

Per ROMER, L.J.—In the absence of anything to limit it, the warranty of "seaworthiness" in a bill of lading would include fitness of the ship and her equipment to safely carry the cargo contracted to be carried. *Id.*

Fitness of Ship to Receive Cargo—Period of Loading.—At the time of loading there is an absolute warranty by the shipowner, who has agreed to take a particular cargo, that his ship is fit to receive the cargo, but this warranty is not a continuing warranty, and defaults occurring after the period of loading are not breaches of this warranty. *McFadden v. Blue Star Line*, 74 L. J. K.B. 423; [1905] 1 K.B. 697; 93 L. T. 52; 53 W. R. 576; 10 Com. Cas. 123; 10 Asp. M.C. 55; 21 T. L. R. 345—Channell, J.

Breach—Exemptions—Perils of the Sea—Navigation—Management—Harter Act.—After loading a cargo, and before sailing, the servants of a shipowner, in order to drain the ship's bilges, opened a sluice door in a water-tight bulkhead separating the bilges from the stoke hold. Having drained the bilges, they negligently omitted to close the sluice door completely. They then opened the sea-cock to fill a ballast tank. Having filled the tank, they failed (but without negligence) to close the sea-cock completely. Owing to the pressure of water a joint in the tube communicating with

the ballast tank, having been insufficiently packed before the loading was commenced, gave way, and water flowed into the stoke hold, from thence into the bilges, and then into a cargo hold, where it damaged the plaintiff's cargo. The bills of lading under which the cargo had been shipped purported to exempt the shipowners from liability for damage through perils of the sea or accidents of navigation, even when occasioned by the negligence of their servants; they also incorporated an Act of the Fifty-second Congress of the United States, sess. 2, c. 105, known as the Harter Act. "By that Act every clause in a bill of lading relieving shipowners from liability for damage from negligence in the proper custody or care of lawful merchandise committed to their charge shall be null and void; but if a shipowner exercises due diligence to make his vessel seaworthy he is not responsible for damage resulting from faults or errors in the navigation or management of the vessel:—*Held*, first, that the insufficient packing of the joint in the tube communicating with the ballast tank was a breach of the warranty of seaworthiness, as that defect existed before the loading was commenced; secondly, that the failure to close the sluice door in the bulkhead was not a breach of this warranty, as the door had not been opened until after the cargo had been loaded; thirdly, that neither the bills of lading nor the Harter Act affected the shipowners' liability for breach of the warranty. *Ib*.

Semble, that the damage was due to an error in the management of the vessel, and that the owners would have been protected if the vessel had been seaworthy. *Semble*, also, that if a bill of lading incorporating the Harter Act contains any terms inconsistent with that Act, those terms are to be considered null and void. *Ib*.

Cargo of Bullion—Bullion Room.—Under a bill of lading for the carriage of bullion, which is to be stowed in a bullion room upon the carrying ship, the shipowner impliedly warrants that the bullion room is so constructed as to be reasonably fit to resist thieves. *Queensland and National Bank v. Peninsular and Oriental Steam Navigation Co.*, 67 L. J. Q.B. 402; [1898] 1 Q.B. 567; 78 L. T. 67; 46 W. R. 324; 8 Asp. M.C. 338—C.A.

Ship not Fit to properly Carry Cargo owing to Shipowners' Negligence—Exemption of Shipowner from Liability for Loss arising from Breakdown of Machinery, Insulation or other Appliances, "or from any other cause whatsoever."—A cargo of meat was shipped under several bills of lading, each being headed "Refrigerator Bill of Lading," and each containing two clauses. The first, printed in large type, exempted the shipowners from liability "for any loss or damage [to the goods] whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not . . ." and "for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers," or "from any other cause whatsoever." The other clause, which was printed in small

type, contained numerous exceptions exempting the shipowners from liability for defects, "if reasonable means have been taken to provide against such defects and unseaworthiness." During the voyage the meat was damaged in consequence of the tainted condition of the ship at the commencement of the voyage in consequence of the use of carbolic acid, which would not have occurred if proper skill and care had been used by the shipowners before the ship started on her voyage:—*Held*, that the defendants were liable, as the large-type clause must be read as protecting them only from loss or damage arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other similar cause and not as a general exception protecting them from unseaworthiness. *Borthwick v. Elderslie Steamship Co.*, 73 L. J. K.B. 240; [1904] 1 K.B. 319; 90 L. T. 187; 52 W. R. 439; 9 Com. Cas. 126; 9 Asp. M.C. 513; 20 T. L. R. 184—C.A.

Bad Stowage—Defect in Refrigerating Machinery.—Fruit was shipped under a bill of lading which excepted (*inter alia*) loss or damage from decay resulting from bad stowage, insufficiency of ventilation or temperature of holds, whether occasioned by the negligence or error in judgment of the master, officers, engineers, crew, or other persons in the service of the shipowners, and whether before or after the commencement of or during the voyage, or from defects, latent or otherwise, in hull, tackle, machinery, refrigerating or otherwise (whether or not existing at the time of the goods being loaded or at the commencement of the voyage), or from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, refrigerating engineers, crew, or other persons in the service of the owners, nor from any other cause whatsoever. On the voyage the fruit was damaged owing to the cases having been stowed by persons, for whose acts the shipowners were responsible, too close to the top of the hold, which made it impossible for the refrigerating machinery to ventilate the hold and to keep it at the proper temperature:—*Held*, that the damage was caused by bad stowage within the exceptions, owing either to an error of judgment or to an act of negligence, and that therefore the shipowners were not liable. *Bond, Connolly & Co. v. Federal Steam Navigation Co.*, 21 T. L. R. 438—Channell, J.

(f) Delivery and Discharge.

Delivery to be "at any safe port (Manchester excepted)"—"Port of Manchester."—By section 3 of the Manchester Ship Canal Act, 1885, the port of Manchester is defined to include the whole of the Manchester Ship Canal above Eastham Locks, and the former port of Runcorn is abolished. Nevertheless, on its being proved that in commercial matters it was customary for the words "Port of Manchester" to be used as referring only to Manchester and the waters adjacent thereto, and to treat Runcorn Lay-bye,

which is on the Manchester Ship Canal, but about twenty-four miles from Manchester, as a separate port,—*Held*, that in interpreting shipping documents these words were to be read in that sense, and not in their legal significance. B., W. & Co. sold a cargo of grain by the ship *V.* to G. & Co., delivery to be given "at any safe port in the United Kingdom." When the bills of lading arrived it was found that by them—as by the charterparty—delivery was to be given "at any safe port in the United Kingdom (Manchester excepted)." G. & Co. notified B., W. & Co., that they would not accept the documents with this variance. B., W. & Co. then, by arrangement with the owner of the *V.*, had the words "Manchester excepted" erased. At the proper time the documents were presented to G. & Co. so altered, when they refused to accept them, on the ground that they had been altered without their consent or the consent of the master of the *V.* On the dispute being referred to arbitration, the arbitrators found that for a vessel of the *V.*'s tonnage the Manchester Ship Canal above bridges was not a safe port; that Runcorn Lay-bye, the last dock below bridges, was a safe port; that under a charterparty to proceed to a safe port (Manchester excepted) the ship could be compelled to go to Runcorn Lay-bye, and that, though the port of Manchester was defined by section 3 of the Manchester Ship Canal Act, 1885, as including the whole ship canal and the port of Runcorn was abolished as a separate port, yet the weight of evidence was that in commercial matters "Port of Manchester" was used as meaning Manchester itself and the waters adjacent thereto, and Runcorn Lay-bye was treated as a separate port:—*Held*, on these findings, "Manchester excepted" here meant Manchester and the adjacent waters only excepted; that, so read, Manchester was not a safe port for the *V.*, and that accordingly its insertion in the bills of lading was an immaterial variation in the contract of sale, and its erasure was also immaterial; and that therefore G. & Co. were bound to accept the documents. *Goodbody and Balfour, Williamson & Co., In re*, 80 L. T. 188; 8 Asp. M.C. 503—D.

Port of Belfast—Custom of Port—"Whipping" or "Hoisting."—The plaintiffs' steamship *Aboukir*, loaded with Bombay wheat in bags, arrived at Belfast on Thursday, December 28. The defendant was the indorsee of the bill of lading, which contained a provision that if the consignee did not take delivery as soon as the ship was ready to discharge the goods should be landed and warehoused at expense of their owner. The discharge of this cargo commenced on Friday, December 29. For four days, up to Tuesday night, the cargo was discharged by whipping—a process by which one bag at a time is hoisted from the hold by the ship's tackle to a point above a weighing machine, placed at the height of a man's shoulder on an elevated staging on the deck near the hatch. It is then, when weighed, taken by the merchant's stevedore. The plaintiffs having complained to their agent of the slowness of the discharge, and insisting that the cargo should be hurried out at top speed, the plaintiffs' agent informed the defendant's stevedore that he would discharge the rest of the cargo by hoisting—a process by which five bags at a time are raised from the

vessel's hold and placed on deck, from which they are trucked to the weighbridge, which is only a few inches above the deck. The defendant refused to take delivery by hoisting, or to accept delivery from the ship's rail of bags so hoisted, and the remainder of the cargo was discharged by the plaintiffs' men into a warehouse. An action having been brought by the plaintiffs to recover the cost of landing and warehousing this part of the cargo, the defendant relied upon (*inter alia*) a custom of the port of Belfast that cargoes of Bombay wheat in bags should be discharged by whipping:—*Held*, that the alleged custom of whipping, even if there was sufficient evidence to prove it, was unreasonable, and that the plaintiffs were entitled to recover as damages the cost of landing and warehousing the portion of the cargo in question. *Clydesdale Shipowners' Co. v. Gallaher*, [1907] 2 Ir. R. 578—C.A.

Discharge at Customary Place in Port—Ship Carrying Explosives—Place Appointed by Port for Discharge of Ship Carrying Explosives—Expense of Lighterage.—By a charterparty a ship was to load a cargo, including explosives and machinery, and proceed to certain ports, among others Buenos Ayres (including Boca), and there deliver the cargo in regular turn at the customary discharging places named by the charterers' agents into lighters or alongside the wharf according to the custom of the port; the owners authorised the charterers to sign bills of lading for the cargo as usual, and agreed to abide by all the conditions thereof, and the cargo was to be brought to and taken from alongside at the charterers' risk and expense. By the bill of lading the cargo was to be discharged at the consignees' wharf at Boca, provided the same was available, otherwise lighters were to be provided by the consignees. At Boca a ship carrying explosives was only allowed to discharge at a certain wharf, and the ship therefore could not go to the consignees' wharf (which was available), and the consignees' goods had to be lightered there. In an action by the shipowner against the charterers to recover the expense of lightering,—*Held*, that the shipowner was entitled to recover, either upon the ground that the charterers, when they signed the bill of lading, knew that the explosives were on board and that they could not perform the contract without breaking the port regulations, and were therefore imposing a liability on the shipowner which did not come within the above clause in the charterparty authorising the charterers to sign bills of lading; or upon the ground that the charterers had only the right to direct the ship to go to such discharging places as were customary, and that the customary place at Boca for discharging a ship with explosives was the wharf appointed by the port regulations. *Hull Steam Shipping Co. v. Transport and Holt*, 23 T. L. R. 445—Channell, J.

Delay in Delivery—Measure of Damages—Loading Enemies' Goods—Breach of Duty—Negligence.—The plaintiffs shipped on board the defendants' vessel goods intended to arrive at Algoa Bay in December, 1899, and to be sold to the British Government as supplies for British troops at war with the Transvaal. The bills of lading exempted the defendants from loss through restraint of princes. The defen-

dants, without the plaintiffs' knowledge, loaded goods consigned to the Transvaal Government or to residents in the Transvaal, which led to the vessel being arrested in Algoa Bay and detained with her cargo until March, 1900, when the market value of the plaintiffs' goods in South Africa was lower than in the preceding December:—*Held*, that the defendants were liable for breach of duty towards the plaintiffs. *Held*, also, that the measure of damages was the difference between the market value of the plaintiffs' goods at the port of discharge in December, 1899, the date of due delivery, and their market value at that port in March, 1900, the date of actual delivery. *The Parana* (2 P. D. 118) discussed. *Dunn v. Donald Currie & Co.* or *Bucknall*, 71 L. J. K.B. 963; [1902] 2 K.B. 614; 87 L. T. 497; 51 W. R. 100; 8 Com. Cas. 33; 9 Asp. M.C. 336—C.A.

Liberty to Over-carry Goods if Discharge cannot be Effected without Undue Detention—Discharge prevented by Delay at Previous Port—Delay caused by Negligence of Shipowner's Agent—Remoteness of Damage—Liability of Shipowner.—A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns." The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, and he therefore over-carried the goods to London. In an action by the consignee to recover damages for the over-carriage of the goods,—*Held*, that the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignee from succeeding in the action. *Searle v. Lund*, 90 L. T. 529; 9 Asp. M.C. 557; 20 T. L. R. 390—C.A.

(g) *Conversion of Goods.*

Property Passing—Measure of Damages.—H. was a shipowner, and L. loaded a quantity of barley on his ship and received bills of lading. The ship was unable to load the whole of the barley, and L. agreed to indemnify the holder of the bills of lading. One bill of lading came into the hands of B., who handed it to M., and M. advanced 5,057*l.* 16*s.* 4*d.* upon it. M. received less than the quantity of barley covered by his bill of lading, as the holders of the other bills took delivery first from the agents of H., and he called upon B. to make good the deficiency, which he did by making certain payments and delivering some barley. M. sold the barley, and rendered B. an account shewing a balance remaining due on the transaction from B. of 12*l.* 1*s.* 9*d.* Afterwards B. failed, owing M. some 1,651*l.*:—*Held*, that, as between M. and H., M. had the full property in the barley covered by his bill of lading, and that H. had been guilty of a conversion, but that M. could only recover 12*l.* 1*s.* 9*d.* as damages. *Montgomery v. Hutchins*, 94 L. T. 207; 10 Asp. M.C. 223—Bray, J.

(h) *Indorsement.*

Goods in Store—Store Warrants.—A flour merchant having borrowed money from A and B handed to them as security therefor bills of lading for a certain number of sacks of flour of a certain brand which had been shipped to him from America. The bills of lading were blank, indorsed by the consignee named therein. In A's case the bills of lading were handed over to him while the sacks of flour were still on board ship, but they were afterwards landed and stored in ship's name in a neutral store where there was a large quantity of sacks of flour of the same brand belonging to the flour merchant, with which they were mixed so as to be indistinguishable therefrom. In B's case the bill of lading was handed over to him after the sacks of flour had been placed in the store in ship's name, and had become mixed with other sacks of flour belonging to the merchant. One of the lenders also received as additional security store warrants signed by the storekeeper, but addressed to no one, stating that he had received a certain number of sacks which were only deliverable on production of these warrants. The flour merchant became bankrupt and the trustee claimed the whole of the flour in store. At the date of the bankruptcy the bankrupt was still indebted to the lenders in sums exceeding the value of the goods mentioned in the bills of lading and store warrants:—*Held*, that a good security in favour of the lenders was constituted by the transfer of the indorsed bills of lading, and that they were entitled to delivery from the store of the number of sacks of flour covered by the bills. *Held*, further, that the store warrants alone did not confer on the lenders a right preferable to that of the trustee in bankruptcy. *Hayman v. M'Lintock*, [1907] S.C. 936—Ct. of Sess.

(i) *Consignee.*

Duty of Consignee—"Continuously."—A bill of lading provided that the goods were to be received by the consignee "immediately the vessel is ready to discharge and continuously at all such hours as the Custom House authorities may give permission for this ship to work, any custom of the port to the contrary notwithstanding":—*Held*, that immediately the ship was ready to discharge there was an absolute obligation on the consignee to receive the cargo continuously, even though the appliances of the port were not then available. *Maclay v. Spillers*, 6 Com. Cas. 217—C.A.

Goods to be Received by the Consignees "immediately after arrival of steamer"—Delay in Making Report at Custom House—Obligation of Consignees to Receive Goods before Report.—Goods were shipped from Messina to London under bills of lading which provided that they should "be received by the consignees . . . immediately after the arrival of steamer, or the same will be warehoused by the agent of the ship at the expense and risk of the owner of the goods." The ship arrived, and before she was reported at the Custom House in accordance with the Customs Consolidation Act, 1876, the goods, the consignees not being present to receive the same, were landed and warehoused.

The practice in the Port of London is that when a Custom-house officer is present upon the quay the permission of the Customs authorities to discharge the cargo before report is assumed by the master, unless such permission is actually refused or the discharge forbidden. The consignees subsequently paid the warehouse charges under protest, and claimed to recover them from the shipowner:—*Held*, that, inasmuch as the possibility that the goods would be permitted to be landed before the ship was reported must be taken to have been within the contemplation of the parties at the time the contracts were made, there was an obligation upon the consignees under the bill of lading to be ready to receive the goods before the ship was reported, and that, therefore, they were not entitled to recover the amount of the warehouse charges. *Major v. Grant*, 7 Com. Cas. 231—Kennedy, J.

"Goods to be taken by consignees as fast as steamer can deliver or the same will be warehoused"—**Right of Action for Detention.**—A bill of lading given by the charterers of a ship provided: "The goods to be taken from the ship by the consignees . . . immediately after arrival, and as fast as steamer can deliver, or the same will be transhipped into lighters or landed or warehoused at the expense and risk of the proprietors of such goods." In an action by the charterers against the consignees for detention of the ship during the discharge,—*Held*, that the consignees were liable, because the terms of the bill of lading empowering the charterers to tranship, land, or warehouse the goods did not take away their ordinary right to bring an action for detention, if delivery of the goods was not taken by the consignees as fast as was provided by the bill of lading. *The Arne*, 73 L. J. P. 34; [1904] P. 154; 90 L. T. 517; 9 Asp. M.C. 565; 20 T. L. R. 221—D.

(j) Freight.

Payment of—Cost of Weighing—Custom—Wool Cargo—Liability of Consignee.—Wool was shipped in Australia for delivery in this country under bills of lading which provided that freight was "to be paid on delivery in cash, without deduction, on gross weight at Queen's beam." The shipowner alleged that by the custom of the trade the consignee had the option of having the goods weighed at his own expense, or of taking the goods without weighing at the bill of lading weight, plus 2 per cent.:—*Held*, that there was no such custom as alleged, and that, if there had been such a custom, it would have been bad in law as contradicting the express terms of the bill of lading. *Gulf Line v. Laycock*, 7 Com. Cas. 1—Kennedy, J.

Freight Payable "for every load of English cubic feet"—"All other conditions as per charterparty"—**Provision in Charterparty that Freight Payable** "for every intaken load of 50 English cubic feet"—**Bill of Lading made Conclusive as to Quantity of Cargo Shipped—Incorporation of Conditions of Charterparty in Bill of Lading—Excess Cargo Delivered.**—A bill of lading was signed in respect of 284,690 pieces of pitprops measuring 55,782·32 cubic feet to be delivered in right number of pieces, on payment of freight at 9s. 6d. "for every load

of 50 English cubic feet and all other conditions as per charterparty." The bill of lading contained the following clause: "Responsible for number of pieces, but not for quality and measure." By the charterparty it was provided that the cargo was to be delivered at the rate of 9s. 6d. "for every intaken load of 50 English cubic feet," and that bills of lading were to be conclusive evidence against the owners as to the quantity of cargo shipped. At the port of discharge an excess number of pieces beyond that specified in the bill of lading was delivered:—*Held*, in a question between the consignees of the cargo and the shipowners, that the conditions in the charterparty as to freight being payable at 9s. 6d. on every intaken load was incorporated in the bill of lading, and therefore that freight was only payable on the number of pieces specified in the bill of lading. *Oostzee Stoomvaart Maats v. Bell*, 11 Com. Cas. 214; 22 T. L. R. 643—Bray, J.

Short Delivery.]—A merchant in Dundee, having bought a quantity of jute in Liverpool, contracted with shipowners for the conveyance of the goods from the store in Liverpool to Dundee at a certain rate per ton. The shipowners removed the goods from the store and shipped them on board their ships at Liverpool. No bills of lading were granted nor were any receipts given for the quantities received; but the goods were weighed as they were shipped, and a note kept of the gross weights. On arrival at Dundee the merchant, who was duly informed of the arrival, sent carts to receive the goods and convey them to a calender, but the unloading proceeded faster than the removal by the carts, and the goods were unloaded into sheds on the quay, and removed thence by the carts. No complete series of receipts was taken from the carters for the goods unshipped, nor was any tally kept as they were put over the ship's side. The goods as received at the calender were short of the quantities purchased at Liverpool. The shipowners sued the merchant for the balance of freight due, and the merchant claimed to set off the value of the missing goods:—*Held*, that the shipowners having established by evidence that all the goods received by them at Liverpool were put on board their ships, and that all the goods put on board their ships were put over the ships' side at Dundee, had discharged their onus of proving due fulfilment of their contract, and were entitled to payment of the freight claimed. *Langlands v. M'Master*, [1907] S.C. 1090—Ct. of Sess.

Lien for Freight—Right of Shipowner and Charterer Respectively to Collect—Lien on Bill of Lading Freight—Sums Due under Charterparty—Necessary Disbursements—Damages for Breach of Charterparty.]—The question whether shipowners are, when the bill of lading freight is paid to the master, entitled as against the charterer to collect and receive it is one of fact, depending upon the documents and circumstances in each case. The apparent conflict in the authorities arises mainly from the fact that the documents and circumstances are different in different cases. There are certain more or less typical cases. For instance, there is the case, very often referred to, but in practice rather uncommon, where the charterparty amounts to what is called a demise of the vessel. In such a case it is reasonably clear

that the contract with the shippers under the bill of lading is between them and the charterers, and not between them and the owners. Again, there is another class of cases in which the charterers by the charterparty do no more than undertake that a full cargo shall be shipped, and guarantee payment of a certain freight. In such cases it is very often stipulated that upon shipment of a full cargo, and upon the charterers paying or securing payment in the manner agreed upon of the excess (if any) of chartered freight over and above the bill of lading freight, the charterer's liability under the charterparty is to cease. In such cases the contract of carriage under the bill of lading would ordinarily be between the owners and the shippers. But even in cases of this kind it is scarcely safe to lay down a hard-and-fast rule. The circumstances and terms of the documents may differ in different cases belonging to this class. And between the two types or classes there is a great variety of intermediate cases. *Samuel v. West Hartlepool Steam Navigation Co.*, 11 Com. Cas. 115—Walton, J.

9. COLLISION.

Statute.—63 & 64 Vict. c. 32 is the *Merchant Shipping (Liability of Shipowners and others) Act, 1900*.

(a) Regulations for Preventing.

Sound Signals—Engines at Full Speed Astern—Regulations, 1897, art. 28.—A breach of an article of the Regulations for Preventing Collisions at Sea, 1897, will not make the vessel committing the breach to blame for a collision when the guilty vessel was aware of all the circumstances, and the breach could not by any possibility have contributed to the collision. *The Bellanoch*, 76 L. J. P. 160; [1907] A.C. 269; 97 L. T. 315—H.L. (E.)

The steamship *C.* was leaving the port of Monte Video, her course lying southwards between the breakwaters and along a dredged channel half a mile in length, the end of which was marked by two buoys. At the same time the steamship *B.* was bound on an easterly voyage, her course lying almost at right-angles to that of the *C.*, and about a quarter of a mile south of the buoys. From the time the *C.* reached the breakwaters the two vessels were in sight of one another. The *B.* was of such a draught that she was dragging through the mud, and during the time that the *C.* was passing down the dredged channel the engines of the *B.* were on two occasions going full speed astern for the purpose of freeing her and enabling her to continue on her voyage. A collision eventually took place between the vessels, and the *C.* was held to blame:—*Held* (by SIR GORELL BARNES (THE PRESIDENT) and by the COURT OF APPEAL; FLETCHER MOULTON, L.J., dissenting), that the *B.* on the occasions when her engines were going astern was not bound to give the corresponding sound signal under article 28, inasmuch as she was not on these occasions taking a course authorised or prescribed by the Rules, and therefore that she was not to blame for the collision by reason of her not having given these signals. *Id.*

Sound Signals for Vessels in Sight of One Another—“Authorised by these Rules.”—In article 28 of the Regulations for Preventing Collisions at Sea, the words “course authorised . . . by these rules” refer to any course which, by the rules of good seamanship, it is necessary and proper to take in order to manœuvre for another vessel, and are not limited to cases where a course is taken in the performance of a duty imposed by any specific regulation. *The Uskmoor*, 71 L. J. P. 103; [1902] P. 250; 87 L. T. 55; 51 W. R. 93; 9 Asp. M.C. 316—Jeune, P.

The words “any course authorised . . . by these rules” in article 28 of the Regulations for the Prevention of Collisions at Sea, which provides for certain sound signals being given by vessels in sight of one another, refer to any course which, by the rules of good seamanship, it is necessary and proper to take in order to manœuvre for another vessel, and are not limited to cases where a course is taken in the performance of a duty imposed by any specific regulation. Decision of SIR F. H. JEUNE in *The Uskmoor* (71 L. J. P. 103; [1902] P. 250) approved and adopted. *The Anselm*, 76 L. J. P. 54; [1907] P. 151; 97 L. T. 16; 23 T. L. R. 378—C.A. Reversing, 10 Asp. M.C. 257—Bargrave Deane, J.

Application of Sea Rules to River Amazon.—The Regulations for the Prevention of Collisions at Sea apply to collisions taking place between vessels in the River Amazon. *Id.*

Whistle Signals—Steamer Acting under a Starboard Helm—Course “authorised or required.”—A steamship which is directing her course in any particular direction by means of her helm for the purposes of her own voyage, and without reference to other vessels which may be in sight of her, is not taking a course “authorised or required” by the rules, and is not, therefore, bound under article 28 to indicate the course she is taking by means of her whistle. *The Mourne*, 70 L. J. P. 7; [1901] P. 68; 83 L. T. 748; 9 Asp. M.C. 155—Jeune, P.

Departure from Collision Regulations—Onus.—The s.s. *Kyanite*, finding herself in dangerous proximity to the *Buccleruch*, a ship under sail, whose lights were inadequate, and being unable to tell what the course of the sailing ship was, starboarded her helm in order to turn away from the sailing ship, and continued to go full speed ahead. This brought the *Kyanite* across the course of the *Buccleruch*, and two or three minutes after the *Buccleruch* was first sighted by the *Kyanite* a collision took place, the stem of the *Buccleruch* striking the *Kyanite* on the starboard side, nearly amidships. In cross-actions of damages, —*Held*—first, that, although the *Kyanite* did in fact depart from the Regulations for Preventing Collisions at Sea by crossing the course of the *Buccleruch*, she, being wholly unaware of the course of the latter owing to her inadequate lights, was not chargeable with fault in respect of this departure from the Regulations; but secondly, that the *Kyanite* was in fault in respect that she had infringed article 23 of the Regulations by failing to stop and reverse in the short space of time after she sighted the sailing ship, and had failed to dis-

charge the onus which lay on her of shewing that her failure to comply with this article of the Regulations was excusable by proving either that her departure from the Regulations was the only chance of escaping a collision, or that the risk of collision would have been increased by obeying the Regulations. *Windram v. Robertson*, 7 F. 665—Ct. of Sess.

Squadron of Warships—Sailing Vessel Passing through Fleet—King's Regulations and Admiralty Instructions, art. 597 (2) (6) (12)—Regulations for Preventing Collisions at Sea, 1897, arts. 20, 21, 22, 27.]—A squadron of warships were steaming N.N.W. in two columns, each column consisting of four ships. Each ship was two cables distant from the ship next ahead of her measured from foremast to foremast. The wind was southerly. A sailing vessel was seen on the port bow approaching the port column of the squadron, and shewing her green light. The second and third ships in the port column ported in order to pass clear ahead of the sailing vessel, and as the third ship ported the fourth ship in the column—the *Sutlej*—starboarded in order to pass under the stern of the sailing vessel, which she would have done if the sailing vessel had kept her course. Just as the *Sutlej* began to answer her starboard helm, the sailing vessel suddenly came up into the wind and altered her course eight points, exposing her red light to the *Sutlej*. The latter thereupon put her helm hard a-port and reversed her starboard engine, but immediately afterwards she came into collision with the sailing vessel:—*Held*, that the *Sutlej* acted rightly in starboarding her helm, as she would thereby have passed clear of the sailing vessel if the latter had kept her course; that, having regard to the obligation under article 597 of the King's Regulations as to ships in a squadron keeping station as much as possible, she did not act wrongly in not starboarding sooner; and that therefore the *Sutlej* was not to blame for the collision. *H.M.S. Sutlej*, 21 T. L. R. 325—C.A.

Steam Vessel Lying-to—Crossing Rule—Duty of Steam Vessel when Lying-to to Keep Out of the Way.]—The *L.*, a steam trawler, was lying-to heading to the N. with engines stopped, waiting for the tide, when she was ran into and damaged by the steamship *B.*, which was proceeding on a course of W. $\frac{1}{2}$ S. magnetic. Those on the *B.* saw the masthead and green lights of the *L.* on their port bow, and kept their course and speed until just before the collision, when they slowed, stopped, and reversed their engines. Those on the *L.* did nothing:—*Held*, that article 19 of the Collision Regulations applied, and that the *L.* was alone to blame for the collision, as it was her duty to keep out of the way. *The Helvetia* (3 Asp. M.C. 43) explained. *The Broomfield*, 94 L. T. 109; 10 Asp. M.C. 194—D.

Crossing Vessels—Canadian Regulations.]—Vessels converging on a spot on courses and at speeds which present danger of collision are crossing vessels, and in the event of collision the vessel which has the other on the starboard side, and has failed to keep out of the way of the other, is to blame under article 19 of the Canadian Regulations for Preventing Collisions at Sea. *The Albano v. Allan Line Steamship*

Co., 76 L. J. P.C. 33; [1907] A.C. 193; 96 L. T. 335; 10 Asp. M.C. 365; 23 T. L. R. 344—P.C.

Steam Trawler—Sailing Vessel—Regulations for Preventing Collisions at Sea, art. 27.]—A sailing vessel came into collision on a clear night with a steam trawler which had her trawl down, and was making about one and a-half mile an hour, and was exhibiting her proper lights:—*Held*, that there were "special circumstances" within the meaning of article 27 of the Regulations for Preventing Collisions at Sea, and that the sailing vessel ought to have kept out of the way. *Held*, however, on the facts, that both vessels were to blame. *The King's County*, 20 T. L. R. 202—Gorell Barnes, J.

Breach of Article 18—Questions for Nautical Assessors.]—In an action for collision, where both vessels were held to blame for breach of the provisions of article 18 of the Rules for Preventing Collisions at Sea, the Court of Appeal asked the nautical assessors the questions asked in *The Beryl* (53 L. J. P. 75; 9 P. D. 137), and upon their being answered in the negative dismissed the appeal. *The Oporto*, 66 L. J. P. 49; [1897] P. 249—C.A.

Delay.]—Instantaneous compliance with article 18 of the Regulations for Preventing Collisions at Sea, by which "every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is not necessary; a man for the exercise of his judgment must be allowed a short, but a very short, time. *The Emmy Haase* (53 L. J. P. 43; 9 P. D. 81) approved. *The Ngapoota*, 66 L. J. P.C. 88; [1897] A.C. 391—P.C.

Vessel from any Accident not under Command—Duty of Vessel to Keep her Course.]—A vessel shewing the signal that she is not under command ought to act accordingly and keep her course if she can, when another vessel has to keep out of her way. Circumstances considered in which a vessel "from any accident is not under command" within article 4 of the Sea Regulations, 1897. *The Hawthornbank*, 73 L. J. P. 18; [1904] P. 120; 90 L. T. 298; 9 Asp. M.C. 535—Gorell Barnes, J.

(b) Negligence.

Effect of.]—Where a ship is pursuing a wrong course and has notice from another vessel that the latter is continuing on her course, the former must be held solely to blame for a resultant collision, and it is no defence to say that the other vessel by observing lights and heeding blasts might have deviated from the right course which she was pursuing and thereby avoided the collision. *The Chittagony*, 70 L. J. P.C. 121; [1901] A.C. 597; 85 L. T. 430; 9 Asp. M.C. 252—P.C.

Dragging Anchor—Slipping Anchor and Putting to Sea by another Vessel to Avoid Collision—Expenses so Incurred—Liability.]—A vessel which negligently dragged her anchor down upon another so as to cause danger of collision, *held* liable for expenses reasonably incurred by the latter to avoid collision, such

as the value of the anchor and chain lost, and coals and other stores consumed. *The Port Victoria*, 71 L. J. P. 36; [1902] P. 25; 86 L. T. 804; 50 W. R. 383; 9 Asp. M.C. 314—Jeune, P.

Damage by Anchor—"Ring awash."—The fact that a vessel carrying her anchor hanging from the bows has the ring awash in the position indicated by rule 11 of the Thames Rules does not exempt her owners from liability for damage done by her anchor to other vessels with which, in the circumstances and without negligence, she is likely to come in contact, and which are likely to be damaged by her anchor, if so carried. *The Six Sisters*, 69 L. J. P. 139; [1900] P. 302—Gorell Barnes, J.

Barge Moored in Barge Roads—Necessity for Watchman—Test of Negligence.—The barge *G.*, moored in the barge roads in the river Thames near Greenwich Pier, was left unattended. The ketch *W. B.* fouled the barges at the roads and then grounded on the road mooring chains. The *W. B.* got clear of the roads on next flood tide, and at the same time the *G.* and other barges got adrift. The *G.* ultimately caught under a dolphin, and some of her cargo was lost and some damaged. The cargo-owners brought an action to recover their damage against the owners of the *W. B.*, who alleged that the owners of the *G.* had been negligent in leaving her unattended:—*Held*, that the question of whether it was negligent to leave a barge unattended was a question of fact, but that it was not negligent to leave a barge unattended in a river or a dock if there was no reasonable ground to anticipate danger to the barge, and the fact that if a man had been in attendance he might have prevented the damage was no evidence of negligence. *The Western Belle*, 95 L. T. 864; 10 Asp. M.C. 279—Gorell Barnes, P.

Barge Unattended and Swung Across Fairway at Night—Duty to Shew Light—"The special circumstances of the case"—*Thames By-laws.*—In Greenwich reach on a dark night the plaintiffs' dumb barge, fastened only by her headfast to the side of another barge which was alongside a steamship, had swung out on the turn of the tide across the fairway, and was struck and sunk by the defendants' steamer; those on board the steamer, there being other traffic about, did not see the barge until it was under her bows. The man in charge of the barge was on board the steamship, and the barge was left unlighted and unattended:—*Held*, that there was negligence under the preliminary paragraph in the Thames By-laws, 1898, having regard to "the special circumstances of the case," in not having a man on board the plaintiffs' barge with a light ready to shew to the steamer. The barge was held alone to blame for the collision. *The St. Aubin*, 76 L. J. P. 25; [1907] P. 60; 95 L. T. 586; 10 Asp. M.C. 298—Bargrave Deane, J.

Towage Contract—Supply of Tug by Dock Company—Liability of Shipowner for Negligence of Tug in Connection with Towage—Duration of Liability.—A dock company supplied two tugs under a towage contract to assist in transporting a steamship from the entrance of the dock to her berth. By the conditions of the towage contract the masters and crews of

the tugs were to cease to be under the company's control in connection with the towage or transport, and to become subject to the control of the master or person in charge of the steamship, and to be the servants of the owners thereof, who undertook to indemnify the dock company against any claim for injury to any vessel of any other person occasioned by any neglect of such masters or crews, or by any defect or insufficiency of the tugs, or by any other cause of any kind in connection with the towage or transport. The two tugs brought the steamship close to her berth, where she was moored fast stem and stern, and she had only to haul back a few feet by her winches to get into her berth, which she could not yet do owing to a barge lying astern of her. The dock master desired to remove the barge, and he ordered a man from each of the tugs to cast off certain other barges which were fastened to a buoy, in order to make room, and this was done negligently, causing damage to one of those barges. In an action of damage by collision brought by the owners of the damaged barge against the dock company, the defendants admitted liability, but brought in the owners of the steamship as third parties, claiming indemnity from them under the towage contract against the plaintiff's claim:—*Held*, that the third parties were not liable to indemnify the defendants, because, at the time of the negligent act complained of, the operation of towage or transport was finished, and the negligence did not occur in connection with the towage or transport. *The Kate*, 76 L. J. P. 184; [1907] P. 296; 97 L. T. 502—C.A. Affirming, 10 Asp. M.C. 347—Bargrave Deane, J.

Failure of Steam Steering Gear in River—Duty to have Hand Gear Available.—It is the duty of those in charge of a steamship steered by steam gear in a narrow river, where the navigation is difficult and other vessels are likely to be met, to have the hand gear available for use in case of the failure of the steam steering gear, even where there is no reason to apprehend the failure of the steam gear. *The Turret Court*, 69 L. J. P. 117—Jeune, P.

Loss of Mails by Collision—Locus Standi of Postmaster-General as Bailee—Negligence of Stranger.—The Postmaster-General, being under no liability to his bailors for property bailed to him as Postmaster-General, cannot on behalf of the bailors recover for the loss of the property bailed, the loss being caused by the negligence of a stranger. *Claridge v. South Staffordshire Tramway Co.* (61 L. J. Q.B. 503; [1892] 1 Q.B. 422) followed. *The Winkfield*, 49 W. R. 685—Jeune, P.

(c) Compulsory Pilotage.

"Into harbour"—In Itinere—Trinity House Outport District—Harwich Harbour.—The defendants' steamship *Ole Bull*, bound from a foreign port to Harwich, was boarded outside the harbour by a pilot duly licensed to pilot vessels into and out of Harwich harbour at rates fixed for the Harwich district. He took charge, and brought her to anchor in the harbour, to wait for the tide to flow to go to her berth at a quay. When the tide flowed he navigated her towards her berth, and during such navigation she collided with the plaintiff's vessel. Her

place of anchorage was a usual and proper place for vessels to discharge cargo when unable to discharge at a quay. For navigating her into her berth the pilot received an extra fee, which had arisen by usage and was sanctioned by the Trinity House. It was admitted that pilotage was compulsory into the harbour; but the plaintiff contended that on the facts the compulsion ceased when the *Ole Bull* came to anchor, and that therefore the defendants were liable for the damage caused by the collision:—*Held*, that the *Ole Bull* was compulsorily in charge of a pilot at the time of the collision, and the defendants were not liable, because compulsory pilotage into a harbour, generally speaking, must be determined by the place in the harbour to which the vessel was destined to go, and if she was temporarily interrupted in getting there because of tide, wind, fog, or the like, she was still *in itinere* towards that place, and therefore under compulsory pilotage. *The Ole Bull*, 74 L. J. P. 75; [1905] P. 52; 92 L. T. 807; 53 W. R. 590; 10 Asp. M.C. 84; 21 T. L. R. 133—Gorell Barnes, J.

Port of Bristol—Vessel Bound from Newport to Bristol—Vessel in Newport Pilotage District, but within Port of Bristol—Necessity of Bristol Pilot.—By the Bristol Wharfrage Act, 1807, it was provided in section 9 that all vessels navigating or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, should be piloted and navigated by pilots licensed by the Bristol Corporation. By the Bristol Channel Pilotage Act, 1861, it was provided in section 4 that so much of the 9th section of the Bristol Wharfrage Act, 1807, as related to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the ports of Cardiff, Newport, or Gloucester should be repealed, and by the same Act pilotage boards and pilotage districts—which in some cases overlapped the port of Bristol—were created for the ports of Cardiff, Newport, and Gloucester, and power was given to these boards to license pilots for their districts. By the Pilotage Order Confirmation (No. 1) Act, 1891, it was provided that, notwithstanding anything contained in the Bristol Wharfrage Act, 1807, a vessel navigating or passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by pilots licensed by the Bristol Corporation, except when within the limits of that port, which were therein defined:—*Held*, that the Act of 1861 was not intended to deal with and did not deal with or include vessels going to or from the port of Bristol, although such vessels were bound from or to one of the ports of Cardiff, Newport, or Gloucester, and that therefore in the case of a vessel which is not exempt from compulsory pilotage in the port of Bristol there is still the obligation under the Bristol Wharfrage Act, 1807, to have a compulsory pilot licensed by the Corporation of Bristol, when the vessel bound to the port of Bristol gets within the limits of that port, although the vessel may be bound from Cardiff, Newport, or Gloucester, and may still be within one of those three pilotage districts which overlaps the port of Bristol. Consequently, when a vessel* on her voyage puts into Newport, and then proceeds from Newport with a Newport pilot on board to the port of Bristol, as soon as the

vessel gets within the limits of the port of Bristol the Newport pilot is bound to give up the charge of the vessel to a Bristol pilot demanding such charge, although the vessel is still within the Newport pilotage district, and within the district for which the Newport pilot is licensed. *Reed v. Goldsworthy*, 90 L. T. 126; 9 Asp. M.C. 529—D.

Pilotage Certificate Held by Master—Validity of Certificate.—A pilotage certificate granted in 1891 to a master mariner (under section 355 of the Merchant Shipping Act, 1854, now section 599 of the Merchant Shipping Act, 1894) incorrectly described the ship in respect of which it was granted as being owned by a certain firm. The certificate purported to enable the holder of it to pilot "the said ship or any other ship or ships belonging to the same owners of which he shall be acting as master." The certificate was renewed from year to year and, in 1901, another ship belonging to the same line (of which the holder of the certificate was master), but which was neither owned by the firm named in the certificate nor by the persons who in fact owned the vessel in respect of which it was originally granted, came into collision with another vessel within the pilotage district covered by the certificate:—*Held*, that the certificate was bad, and the holder of it not entitled to act as pilot for the ship of which he was then master. *The Bristol City*, 71 L. J. P. 5; [1902] P. 10; 85 L. T. 694; 50 W. R. 383; 9 Asp. M.C. 274—Jeune, P.

Ship Carrying Passengers — Exemptions — Vessel "trading to ports between Boulogne (inclusive) and Baltic" — "Constant trader."—The Order in Council of February 18, 1854, extending the exemptions from compulsory pilotage contained in section 59 of the Pilotage Act, 1825, has not been annulled by the Merchant Shipping Acts, 1854 or 1894. To come within the exemptions from compulsory pilotage given by the Order in Council, it is sufficient if the vessel trades to the ports or countries mentioned; it is not necessary that she should be a "constant" trader to those ports or countries. Nor, to constitute the vessel a trader "to ports between Boulogne (inclusive) and the Baltic," is it necessary that she should trade exclusively to a port or ports within those limits. *The Cayo Bonito* (No. 1), 72 L. J. P. 70; [1903] P. 203; 89 L. T. 260; 52 W. R. 183; 9 Asp. M.C. 445—C.A.

Implied Repeal of Local Act Granting Exemption.—The general exemption from the obligation of carrying a qualified pilot within the limits of the Trinity House, Leith, granted by section 35 of 1 Geo. 4, c. xxxvii. is impliedly repealed by section 604 of the Merchant Shipping Act, 1894; therefore the master of a ship carrying passengers between places in the British Islands must employ a qualified pilot within the district for which the Leith Trinity House is entitled to license pilots. *Randall v. Renton*, 5 F. (Just. Cas.) 16—Ct. of Justy.

Outward Pilotage Limit.—The compulsory pilotage of a vessel sailing out of the port of Liverpool by the Queen's Channel extends as far as the Bar Lightship, which, though further out, is to be considered as substituted for the old Fairway Buoy, prescribed as the outward

pilotage limit by the Mersey Dock Acts Consolidation Act, 1858, s. 127. *The Sussex*, 73 L. J. P. 73; [1904] P. 236; 90 L. T. 549; 9 Asp. M.C. 578; 20 T. L. R. 381—Gorell Barnes, J.

Failure of Master to Stay by—Collision “deemed to have been caused” by Default of Master—“Proof to the contrary.”—Where it has been found that a collision was caused solely by the fault of the pilot compulsorily in charge of a ship, and that the master of that ship failed to stay by the other ship and comply with section 422 of the Merchant Shipping Act, 1894, the collision is not to be “deemed to have been caused” by the wrongful act, neglect, or default of such master because “proof to the contrary” has been given within the meaning of the said section. *The Queen* (38 L. J. Adm. 39; L. R. 2 A. & E. 354) followed. *Ib.*

Moving and Stationary Vessels—Liability for Defective Equipment of Ship.—When a vessel in motion collides with a vessel at rest the presumption is that the former is in fault, and this presumption will not be overcome by proof that the colliding vessel was compulsorily in charge of a pilot, unless it is also proved that the collision was due to the fault of the pilot. *Mann, Macneal & Co. v. Ellerman Lines*, 7 F. 213—Ct. of Sess.

The steamship *City of Edinburgh*, while being towed out of dock by two tugs and while compulsorily in charge of a pilot, collided with the *Glassford*, which was lying moored to the quay. At the time of the collision the *City of Edinburgh's* anchors were not available for use, as the windlass was under repair. In an action for damages by the owners of the *Glassford* against the owners of the *City of Edinburgh*, the defenders maintained that the pilot was in fault in moving the ship when her anchors were not available for use. It was proved that the pilot was aware of the want of anchors, but was not consulted as to whether it was safe to move the ship without them. The evidence was conflicting as to whether the use of anchors would have averted the collision:—*Held*, that the defenders had not overcome the presumption of fault against them as the owners of a moving ship colliding with one that was stationary by proving that their ship was compulsorily in charge of a pilot at the time, as they had not proved that the collision was due to the fault of the pilot. *Ib.*

Semble, if the pilot was in fault in moving the vessel without having available anchors, the defenders were also in fault in not having the vessel duly equipped. *Ib.*

Fault of Pilot—Liability of Shipowners.—The *Assyria*, when coming up the river Clyde, compulsorily in charge of a licensed pilot, collided with the *Monmouth*, which was being fitted out at a wharf on the river. The owners of the *Monmouth* sued the owners of the *Assyria*, alleging that the collision was due to the fault of the defenders, in respect that the *Assyria* was not in trim for navigating in narrow waters, and that she was recklessly and carelessly navigated. The defenders pleaded that the *Assyria* was fifteen inches down by the head owing to her aft-tanks having been pumped out, that the master of the *Assyria*, before the pilot took

charge, informed the pilot of the vessel's trim and offered to refill the tanks, and that the pilot after asking the master if she would be all right, and being told that she would, elected to proceed up the river without altering the trim. The evidence as to the precise cause of the collision was conflicting:—*Held*, first, that if the collision was due to the defective trim of the *Assyria* the defenders were not responsible, the pilot having elected to proceed up the river without altering her trim; and secondly, that if the collision was due to faulty navigation the defenders had sufficiently discharged the onus on them by proving that the pilot was in charge and that all his orders were obeyed. *London and Glasgow Engineering Co. v. Anchor Line*, 5 F. 1089—Ct. of Sess.

Duty of Master to Assist Pilot—Interference with Pilot.—A vessel in charge of a compulsory pilot entering the mouth of the River Thames at night came into collision with a vessel which was lying at anchor and which was properly exhibiting her regulation forward and after anchor lights. The collision was due to the fact that the pilot mistook the lights of the vessel at anchor for the lights of a moving vessel coming out of the river, and navigated his vessel accordingly. The circumstances of the navigation were such that any competent mariner on board ought to have seen that the lights in question were stationary, and not those of a moving vessel:—*Held*, that the pilot was entitled to receive from the master assistance in having his attention called to anything which a competent mariner would see that he ought to know; and that, as the evidence showed that the master failed to give the pilot such assistance by sufficiently calling his attention to the fact that the lights were stationary, the owners, notwithstanding the compulsory pilotage, were liable for the results of the collision. *The Tactician*, 76 L. J. P. 80; [1907] P. 244; 97 L. T. 621; 23 T. L. R. 869—C.A.

Opinions expressed in *The Christiana* (7 Moore P.C. 160), *The Argo* (Swabey, 462), and *The Peerless* (Lush. 30), as to the danger of allowing any interference with the authority of a pilot, considered. *Ib.*

Compulsory Pilotage—Failure to Prove that Collision was Due to Fault or Incapacity of Pilot.—A steamship in charge of a compulsory pilot collided with and damaged a tug moored at a wharf in the Clyde at a place where it was usual and proper for tugs to lie, and where there was sufficient room left for other vessels to navigate the river. In an action by the tug owners against the steamship owners the defenders averred that the collision was caused by the fault of the pilot in failing to navigate the vessel in a proper manner, and pleaded that therefore they were not liable. It was proved that the steamship had a considerable list, and that, whether owing to this list or other causes, she did not in fact answer her helm. No fault on the part of the pilot was proved:—*Held*, first, that the steamship was *prima facie* in fault; secondly that the steamship owners had not discharged the onus which lay on them of proving that the collision was occasioned by the fault or incapacity of the pilot so as to bring them within the exemption of section 633 of the Merchant Shipping

Act, 1894; and thirdly, that, accordingly, the steamship owners were liable to the tug owners for the loss and damage caused by the collision. *Clyde Shipping Co. v. Miller*, [1907] S.C. 1145—Ct. of Sess.

Liability of Pilot—Non-effective Control of Vessel.—When a licensed pilot is employed on board a vessel in a place where pilotage is compulsory, it is his duty to insist on having the effective control of the vessel, or to decline to act as pilot; and if he is ordered by the master to place himself in a position disadvantageous for the effective control of the vessel, and he acquiesces in the arrangement and continues to act as pilot, he will not escape responsibility for damages to another vessel. *Greenock Towing Co. v. Hardie*, 4 F. 215—Ct. of Sess.

Isle of Wight and Southampton Districts—“Pilotage district”—Trinity House of Deptford Strond.]—Neither the Isle of Wight district nor the Southampton district, created in 1875 by the Trinity House of Deptford Strond, is a “pilotage district” within section 605 of the Merchant Shipping Act, 1894, but they are subdivisions of such a district. *The Assaye*, 74 L. J. P. 145; [1905] P. 289; 94 L. T. 102; 54 W. R. 203; 10 Asp. M.C. 183; 21 T. L. R. 677—Bargrave Deane, J.

Pilotage is compulsory, special exemptions excepted, in the Isle of Wight district on vessels bound inwards to or outwards from Southampton. *Ib.*

A collision occurred in the Isle of Wight district, by the fault of the respective pilots alone, between a vessel bound from New York via Cherbourg to Southampton in charge of a pilot licensed to take charge of vessels from Peverell to the Owers Lightship, excepting within the Southampton and one other district, and a vessel bound from Southampton to Queenstown and Bombay in charge of a pilot licensed to take charge of vessels from Southampton to sea:—*Held*, that both vessels were under compulsory pilotage, so that their owners were exempt from liability for the collision. *Ib.*

Practice.—Where in a collision action the defendants, while denying that the collision was caused or contributed to by the negligence of themselves or their servants, pleaded that the negligence, if any (which was denied), was solely that of a compulsory pilot, the Court, having found that the collision was caused by the negligent navigation of the compulsory pilot alone, ordered the action to be dismissed with costs. *The Burma* (No. 1), 80 L. T. 808; 8 Asp. M.C. 547—Bucknill, J.

— Onus of Proof.—Those who rely on a plea of compulsory pilotage must establish the fact that the fault of the pilot was the fault of the pilot alone, otherwise the Court will not act in finding that the fault was that of the pilot. *The Velasquez* (36 L. J. Adm. 19; L. R. 1 P.C. 494) approved. *The Benmohr*, 52 W. R. 686—Gorell Barnes, J. *And see col. 2412.*

(d) Tug and Tow.

Stopping—Steam Vessel—Duty of Tug with Vessel in Tow.—A tug towing another vessel

is not necessarily exempt from the duty which rests on a steam vessel in a fog to stop her engines under article 16 of the Regulations for Preventing Collisions at Sea, 1897, and is to blame for not stopping so as to let the way run off her tow, when there is no difficulty in doing so, and when the circumstances are such as to require the greatest precaution. *The Challenge and The Duc d'Aumale* (No. 1), 74 L. J. P. 55; [1905] P. 198; 93 L. T. 390; 10 Asp. M.C. 105—C.A.

Pilot-Cutter Lashed Alongside Tow—Risk of Collision—Duty of Vessel Alongside.—While a sailing ship in tow of two tugs was proceeding down the Bristol Channel, with a pilot cutter waiting to take off the pilot lashed alongside, a collision occurred with a schooner, whereby the cutter was sunk. If those in charge of the cutter had seen the side-light of the schooner as soon as they ought to have done, there would have been time to have slipped the rope attaching the cutter to the ship, and that would have been a reasonable course:—*Held*, in an action of damage by the owners of the cutter against the owners of the tug, that, while the tugs were in the circumstances to blame for having infringed the collision regulation which directed them to avoid crossing ahead of the schooner, those on board the cutter were not emancipated from the duty of keeping a good look-out and taking all reasonable and proper steps to avoid a collision, and therefore the cutter was also to blame. *The Harvest Home*, 74 L. J. P. 65; [1905] P. 177; 93 L. T. 895; 10 Asp. M.C. 118—C.A.

Joint Tort-feasors—Judgment against One by Default—Judgment against the Other for Half Damages.—Where damages have been assessed on a judgment in an action of tort, as to part against two tort-feasors, and as to the balance against one of them, no amount actually recovered against the latter goes in relief of the liability of his co-defendant, unless and until, and then only to the extent to which, that amount exceeds such balance. *The Morgengry*, 69 L. J. P. 8; [1900] P. 1; 81 L. T. 417; 48 W. R. 121; 8 Asp. M.C. 591—C.A.

The owners of a steamer sued the owners of a barque and the owners of its tug in one action for damages sustained in a collision between all three vessels. Against the owners of the barque judgment was recovered by default for the whole amount of the damage sustained, and the barque was sold and the proceeds paid into Court. Against the owners of the tug judgment was recovered for half the damage, this sum exceeding the proceeds of the barque:—*Held*, that the owners of the steamer were entitled to recover half the damages from the owners of the tug without giving credit for the proceeds of the barque. *Ib.*

Tug and Tow and a Ship of War—Duty of Single Vessels to Avoid Crossing Course of Large Fleet—Exemption of her Majesty's Ships from Regulations for Preventing Collisions at Sea—Order in Council.—The statutory sanction imposed by section 419 of the Merchant Shipping Act, 1894, for a breach of the Collision Regulations has no application to a merchant trader which is crossing the course of one of her Majesty's ships from starboard to port, be-

cause the obligations imposed by articles 21 and 27 are only applicable to ships both of which are bound to obey the regulations. Under ordinary circumstances a tug and tow are not justified in crossing ahead of a fleet of warships which has the tug and tow on the starboard hand, and the tug and tow ought not to keep their course and speed under article 21 of the Collision Regulations. A vessel which neglects, in disregard of articles 27 and 29 of the Collision Regulations, to depart from any of the Collision Regulations is not to be deemed in fault under section 419 of the Merchant Shipping Act, 1894. *The Sanspareil*, 69 L. J. P. 127; [1900] P. 267; 82 L. T. 606; 9 Asp. M.C. 78—C.A.

Right of Tug which Caused Collision to Reward for Towing Vessel Damaged by Collision.—After the collision one of the tugs towed the schooner into port, and claimed salvage, or alternatively towage:—*Held*, that, though the tug was disentitled to salvage, as she was to blame for the collision, yet she was not bound under the Merchant Shipping Act, 1894, s. 422, to tow the schooner to the port where she was towed, and was therefore entitled to towage remuneration. *The Harvest Home*, 74 L. J. P. 3; [1904] P. 409; 92 L. T. 173; 10 Asp. M.C. 18—Jeune, P.

Salvage Arising from Collision—Tug Towing Vessel up to Her Anchor.—Tugs towing a vessel, which has her anchor on the ground, up to her anchor are steam vessels towing another vessel within the meaning of article 3 of the Regulations for Preventing Collisions at Sea, and must carry their side lights and their towing lights:—*Sembla*, a vessel, which is held by her anchor, in the course of being towed up to it by steam tugs, is not a vessel being towed within the meaning of article 5 of the Regulations for Preventing Collisions at Sea, but is a vessel at anchor, and must exhibit only her anchor light. *The Romance*, [1901] P. 15; 83 L. T. 488—Gorell Barnes, J.

(e) *Fog.*

Duty to Keep Course and Speed—Whistle.—The steamship *C.*, while proceeding at the rate of about three knots an hour in a thick fog, heard the whistle of another steamship about four points on the port bow. The *C.* kept her course and speed, and the whistle of the other vessel was heard to be apparently broadening. Shortly afterwards the other steamship was seen close to and bearing five or six points on the port bow of the *C.* The engines of the *C.* were then at once stopped and reversed, but a collision occurred:—*Held*, that the *C.* was in part to blame for the collision for having failed, in accordance with article 16 of the Regulations for Preventing Collisions, when the whistle of the other steamship was first heard, to stop her engines and afterwards to navigate with caution until all danger of collision was over, and was not justified in continuing her speed under article 21. Although article 21 of the Regulations for Preventing Collisions at Sea directing a ship to keep her course and speed is a general rule, it is qualified by article 16, and hence, where two steamships in a fog are crossing, each ought to stop her engines if she hears the whistle of the other

forward of her beam. *The Cathay* (No. 1), 81 L. T. 391; 9 Asp. M.C. 35—Gorell Barnes, J.

Speed—Considerations Affecting.—A passenger steamship, fitted with twin screws, which was proceeding at the rate of nine and a-half knots an hour in a dense fog, was held not to be going at a moderate speed, and to have committed a breach of article 16 of the Regulations for Preventing Collisions at Sea, although it was proved that her engines were so constructed that she could not go slower. That article is imperative, and therefore, although such consequences as loss of handiness and the risk of loss of position may result from proceeding at a lower rate of speed, which may be attained by occasionally stopping her engines, considerations of that nature do not justify a vessel in proceeding at more than a moderate speed. As a general rule, speed such that another vessel cannot be avoided after being seen is excessive. *The Campania*, 83 L. T. 511—Gorell Barnes, J.

“Moderate Speed”—What is.—The power of stopping in a short space is one of the circumstances which ought to be taken into consideration in deciding whether a vessel is proceeding at a moderate speed or not; but article 16 of the Regulations for Preventing Collisions at Sea is imperative, and therefore if the Court is of opinion that in fact a vessel was not going at a moderate speed in a fog under the existing circumstances, the fact that she could stop very quickly, or that a slower rate of speed would lead to unhandiness or loss of position, will not exempt her from liability should a collision occur. *The Oceanic*, 88 L. T. 303; 9 Asp. M.C. 378—H.L. (E.)

—Fog Signal Forward of the Beam—Duty of Vessel Hearing it to Stop—Ascertained Position—Right of Vessel to Proceed.—The steamship *O.*, while on a voyage from Liverpool to Monte Video, was off Lobos Island, River Plate, proceeding at ten knots on a course of W.½N. The weather was fine, with passing banks of fog, and shortly after entering the fog she came into collision with another steamship, the *N.*, which had been heard on the starboard bow after the fog was entered. The *N.* was on a course of E. by S. and had first seen the *O.* about three miles off in a position to pass all clear port to port, had watched her broaden on the port bow, and saw her hidden by the fog which came on. Shortly afterwards, while still on a course of E. by S., those on the *N.* heard a short blast sounded on the whistle of the *O.* The *N.* answered it with a short blast, her helm was ported, and, as the fog was beginning to envelop the *N.*, her engines were put to slow, and, on further signals being heard from the *O.*, were put full speed astern, and shortly afterwards the collision occurred:—*Held*, that the *N.* was not to blame for not stopping her engines on hearing the whistle of the *O.*, as under the circumstances the position of the *O.* was ascertained. *The Oravia*, 97 L. T. 523; 23 T. L. R. 663—H.L. (E.)

—Article 16 of the Regulations for Preventing Collisions at Sea, 1897, is imperative, and a vessel is not justified—except in a case of paramount necessity, arising for instance from narrow channels or cross currents, for the safety

of the vessel to go at a higher rate of speed—in proceeding at more than a moderate speed, although a slow speed obtained by stopping her engines from time to time may involve a loss of handiness and a danger of losing her position; and a vessel which it is alleged cannot go at a less speed than from nine to ten knots an hour, so as to be readily handled to avoid other vessels, is not, when proceeding at that speed in a dense fog, going at a moderate speed in the existing circumstances and conditions within the meaning of article 16. *The Campana*, 70 L. J. P. 101; [1901] P. 239; 84 L. T. 673; 9 Asp. M.C. 177—C.A.

Fog Signal Heard Forward of Beam—Position of Vessel not Ascertained—Duty to Stop Engines.]

—The plaintiffs' and defendants' steamships, proceeding at slow speed on nearly opposite courses, came into collision in a dense fog, and neither had stopped her engines under article 16 of the Sea Regulations, on hearing, forward of her beam, the fog signal of the other vessel. The plaintiffs' excuse was that they were afraid to stop their engines, because they had another steamship sounding her whistle on the port quarter, apparently overtaking them. The defendants' excuses were that the whistle of the other vessel was a long way off, and its position as regards bearing and distance was ascertained by means of two other ships which were approaching on each bow, and that the defendants' ship afterwards stopped for ten or fifteen minutes, so that the non-stopping at first could not have contributed to the collision:—*Held*, that none of these excuses was valid, and that both vessels were to blame for breach of article 16. *The Britannia*, 74 L. J. P. 46; [1905] P. 98; 92 L. T. 634; 10 Asp. M.C. 65; 21 T. L. R. 119—Gorell Barnes, J.

“**Shall stop her engines and then navigate with caution.**”]—The master of the steamship *O.* in a fog heard the whistle of a vessel fine (about a point and a-half) on his bow, and stopped his engines. Afterwards, when his vessel had lost steerage way and was falling off her course, and when he had heard the whistle about three times and judged it to have broadened (to about two and a-half points), he put his engines dead slow, and so proceeded for about twenty minutes before the collision, the whistle appearing to get closer, but broadening. The Court asked the Elder Brethren whether, when the *O.* continued on her course, the indications were such as to shew to her master distinctly and unequivocally that, if both vessels continued to do what they appeared to be doing, they would pass clear without risk of collision. The Elder Brethren answered “No,” and in reply to a further question, said that the *O.* ought to have stopped, if only from time to time, and even at the risk of falling somewhat off her course:—*Held*, that the *O.* had broken that part of article 16 of the Sea Regulations, 1897, which provides that a steam vessel in such a case “shall . . . stop her engines, and then navigate with caution until danger of collision is over.” The *O.* was held alone to blame for the collision. *The Aras*, 76 L. J. P. 37; [1907] P. 28; 96 L. T. 956; 10 Asp. M.C. 358—Gorell Barnes, P.

Failing to Stop Engines.]—In cross-actions

arising out of a collision between two steam vessels, the *Warsaw* and the *Linn o' Dee*, it was proved that in a dense fog, when neither vessel could see the other, the *Warsaw's* whistle was heard on the *Linn o' Dee's* starboard bow, that thereupon the *Linn o' Dee's* engines were stopped. It was maintained for the *Warsaw* that the *Linn o' Dee* was to blame in respect that she ought to have acted on the assumption that the *Warsaw* was a crossing ship, and should have reversed her engines and kept out of the *Warsaw's* way, and that by failing to do so she was in breach of articles 19 and 23 of the Collision Regulations:—*Held*, that the *Linn o' Dee* was not to blame upon that ground, in respect that by stopping her engines and navigating with caution she had conformed to article 16 of the Regulations, and that that article was the only one applicable in a fog so long as the position and course of the other vessel was not accurately ascertained. *Held*, further, that the *Warsaw* was to blame, as she had failed to stop her engines when she heard the *Linn o' Dee's* whistle, and was kept at a considerable speed till the *Linn o' Dee* came in sight. Observations as to the application of the Steering and Sailing Rules in Fog. *Crawford v. Granite City Steamship Co.*, 8 F. 1013—Ct. of Sess.

Hearing Whistle apparently Forward of Beam—Stopping Engines.]

—In order to comply with the provisions of the second part of article 16, a steamer in a fog must stop her engines on first hearing—apparently forward of the beam—the whistle of another steamer, and must keep them stopped until by hearing further signals she is able to ascertain the position of that other vessel. *The Rondane*, 69 L. J. P. 114; 82 L. T. 828; 9 Asp. M.C. 106—Jeune, P.

Steam Trawler—Fog Signals—Duty of Steam Vessel to Stop Engines in Fog.]—Article 10 (*g*) of the Sea Regulations, 1884 (which remains in force until article 9 of the Sea Regulations, 1897, is promulgated), applies to a steam trawler trawling in a fog, and such a vessel should sound a foghorn and bell as therein provided. *The London* (No. 1), 73 L. J. P. 125; [1904] P. 355; 91 L. T. 327; 10 Asp. M.C. 12—Jeune, P.

Article 15 (*a*) of the Sea Regulations, 1897, providing that in fog a steam vessel having way upon her shall sound a prolonged blast, does not apply to such a trawler. *Id.*

Steamer, not Herself in a Fog, Hearing Whistle of another Steamer Proceeding from a Bank of Fog on her Bow—Stopping—Moderate Speed.]—It is the duty of a steamer, not herself in a fog, upon hearing the whistle of another steamer proceeding from a bank of fog on her bow, to stop her engines, under the second part of article 16 of the Regulations for Preventing Collisions at Sea. *The Bernard Hall*, 71 L. J. P. 72; 86 L. T. 658; 9 Asp. M.C. 300—Jeune, P.

Semble, that there is no obligation upon a steamer when in the vicinity of a fog, she not being in the fog nor running into it, to go at a moderate speed. *Id.*

Duty of Tug with Vessel in Tow.]—A tug

towing another vessel is not necessarily exempt from the duty which rests on a steam vessel in a fog to stop her engines under articles 16 of the Sea Regulations, 1897, and is to blame for not stopping so as to let the way run off her tow, when there is no difficulty in doing so, and when the circumstances are such as to require the greatest precaution. *The Challenge and the Duc d'Aumale*, 73 L. J. P. 2; [1904] P. 41; 89 L. T. 481; 9 Asp. M.C. 497—Gorell Barnes, J.

Steamship and Sailing Ship—Duty to Slacken Speed, or Stop or Reverse if Necessary.—A steamship on a N. by W. $\frac{1}{2}$ W. course, in a dense fog, the wind being about south, heard a single blast of a fog-horn on her port bow, whereupon her engines were at once stopped. Shortly afterwards another blast of the fog-horn was heard closer to and nearer on the bow, and her engines were then reversed full speed and her helm put hard aport, but a collision occurred:—*Held*, that the steamship was to blame for not reversing when she stopped her engines, since those on board of her ought to have known that the fog-horn they heard came from a sailing vessel on the starboard tack not far off, and that with the wind where it was the sailing vessel must be on a course crossing that of the steamship from port to starboard, that it was the duty of the steamship under articles 20 and 22 of the Regulations for Preventing Collisions at Sea to avoid passing ahead of the sailing vessel, and, to enable her to perform that duty, it was necessary for her under article 23 to reverse her engines. *The Merthyr*, 79 L. T. 676; 8 Asp. M.C. 475—Gorell Barnes, J.

Vessel Moored to Pontoon—At Anchor—Duty to Ring Bell—River Tyne.—The steam-tug *T.* was lying in the river Tyne, moored at a pontoon connected with the bank by a bridge, when she was run into by the steam trawler *R.* The pontoon and bridge were the property of the Tyne General Ferry Co. The pontoon, the bridge, and the *R.* were all damaged by the collision. The owners of the pontoon and bridge sued the owners of the *T.* for the damage they had sustained, and the owners of the *T.* sued the owners of the *R.* for the damages sustained by the *T.* The owners of the *R.* then agreed with the Tyne Ferry Co. that if the Ferry Co. would bring an action against the *T.* for the damage sustained by the Ferry Co. they would indemnify the Ferry Co. against the costs of the action, and make good the difference between the sum recovered and the total amount of the damage sustained, and if the action proved unsuccessful would pay them the amount of their damage. The two actions were heard together. The owners of the *R.* charged the *T.* with not sounding her bell when anchored in the fog:—*Held*, that the action by the Ferry Co. against the *T.* should be dismissed, for the damage to the pier and pontoon were not caused by the *T.* being at the pontoon. *Held*, further, that the *R.* was liable for the damage for being improperly under way and for excessive speed, and that the *T.* was not to blame for not sounding her bell in accordance with article 18 (a) of the Tyne By-laws, 1884, as she was not at anchor. *The Titan*; *The Rambler*, 96 L. T. 93; 10 Asp. M.C. 350—Gorell Barnes, P.

(f) Lights.

Breach of Article 5 of Regulations for Preventing Collisions at Sea.—Where a steamer collided with a sailing ship which after sunset was shewing no lights the Court held that, although there was some look-out on the steamer, nevertheless the absence of the lights could not in the circumstances have possibly caused or contributed to the collision; and that therefore the sailing ship was not to be deemed to be in fault under section 419, subsection 4 of the Merchant Shipping Act, 1894. *The Argo*, 82 L. T. 602; 9 Asp. M.C. 74—C.A.

Anchor Light—Vessel exceeding 150 feet in Length.—“In the forward part of the vessel.”—A vessel of 813 feet in length, at anchor, had her forward anchor light placed on the forward shroud of the starboard forerigging at a distance of sixty or seventy feet from the stem:—*Held*, that the light was carried “in the forward part of the vessel” within the meaning of article 11 of the Regulations for Preventing Collisions at Sea. *The Philadelphia*, 69 L. J. P. 101; [1900] P. 262; 82 L. T. 601; 48 W. R. 514; 9 Asp. M.C. 72—C.A.

—“At or near the stern”—Regulations for Preventing Collisions at Sea, art. 11.—A steamship, 455 feet long, at anchor in a river at night, was heading across the channel while swinging with the tide, when a vessel proceeding down the river ran into her on her starboard side twenty feet forward of the mainmast. The steamship had two masts only, and her after anchor light was hung inside the port foreshroud of the main rigging 120 feet from the stern. The evidence shewed that the vessel which ran into her had not a proper look-out. Article 11 of the Regulations for the Prevention of Collisions at Sea requires the after anchor light to be carried “at or near the stern”:—*Held*, that the position of the after anchor light of the steamship was not in accordance with article 11, and that, notwithstanding that the vessel coming down the river had not a proper look-out, and that the steamship was struck forward of the after anchor light, it could not be said that the breach of the rule might not possibly have contributed to the collision, and both vessels were therefore to blame. *The Gannet*, 68 L. J. P. 99; [1899] P. 230—C.A. The decision of the Court of Appeal (68 L. J. P. 99; [1899] P. 230) reversed on the facts, and the judgment of BUCKNILL, J., who found the *Alcoa* alone to blame, restored. *The Gannet*, 69 L. J. P. 49; [1900] A.C. 234; 82 L. T. 329; 8 Asp. M.C. 43—H.L. (E.)

Ship at Anchor—Torpedo-boat Destroyer—Masts not Capable of Carrying Proper Riding Lights—King's Regulations, Art. 1,069.—A torpedo-boat destroyer, over 150 feet in length, was lying at anchor in a harbour at night with her forward riding light on the jack-staff six feet above the deck and her after light on the ensign-staff five feet above the deck. There were no masts in the vessel upon which lights could be placed in the positions prescribed by article 1,069 of the King's Regulations (which was the same as article 11 of the Regulations for Preventing Collisions at Sea, 1897). She had an awning up, which was about three feet

higher than the after light. Another vessel coming down the harbour saw only one light, and thinking that the vessel carrying the light was less than 150 feet in length, she came into collision with her. If the destroyer had not exceeded 150 feet in length, the other vessel would have passed clear. In an action by the Admiralty to recover the amount of the damage, the Judge found that the awning of the *Haughty* obscured the after light, and that this was the cause of the collision, and that therefore the other vessel was not to blame for the collision, and he gave judgment for the defendants:—*Held*, upon appeal, that there was evidence upon which the Judge could so find, and that, as the plaintiffs had not proved that the collision was caused by the negligence of the defendants, the judgment must be affirmed. *The Hiron-delle*, 22 T. L. R. 146—C.A.

Sailing Vessel and Steam Trawler Meeting—Lights of Steam Trawler.—A collision occurred at night between a sailing vessel and a steam trawler, which was carrying not the ordinary lights for a steam vessel under way, but the alternative lights permitted to her under article 10 of the Sea Regulations, 1884, and certain Orders in Council, if engaged in trawling and having her trawl in the water. The trawler had been getting her trawl in, and having got it in just before the collision, and not keeping a good look-out, went full speed ahead across the bows of the sailing vessel, which kept her course:—*Held*, that the trawler was to blame—not only for a bad look-out, but also because when she went full speed ahead she was under command, and it was her duty to keep out of the way of the sailing vessel, and because, when she was under command and in a position to go full speed ahead, she ought to have shifted her lights and put up the ordinary lights for a steam vessel under way; and that the sailing vessel was right in keeping her course. *The Tweedsdale* (58 L. J. P. 41; 14 P. D. 164) followed. *The Upton Castle*, 75 L. J. P. 77; [1906] P. 147; 93 L. T. 814; 10 Asp. M.C. 153—Bargrave Deane, J.

Tug made Fast Alongside Ship to Keep her to her Anchor if Necessary—Liability for Absence of Towing Light.—By rule 4 (a) of the Mersey Rules, 1900, a steam vessel when towing another vessel or attached for the purpose of towing or manœuvring such vessel shall carry certain prescribed lights. By section 419, sub-section 4 of the Merchant Shipping Act, 1894, where in a case of collision it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault. A steamship at anchor in the Mersey with engines broken down engaged a tug to stop alongside her to keep her to her anchor if she should go adrift. At 7 P.M. the tug was made fast fore and aft to the side of the ship by a rope which was sufficiently strong to serve as a towing hawser if necessary. Shortly before 11 P.M. the ship was run into by a vessel coming up the river, and sunk. The tug was not at the time of the collision carrying the lights prescribed by rule 4 (a) of the Mersey Rules:—*Held*, first, that the tug was attached to the ship "for the purpose of towing or manœuvring" within the meaning of the rule, and that a breach of the

rule had been committed by the tug not carrying the lights prescribed; and secondly, that, the tug and the tow being so attached and under such control as to be regarded as one vessel, the rule had been infringed by the tow within the meaning of section 419, sub-section 4 of the Merchant Shipping Act, 1894, by the neglect of those in charge of her to see that the tug carried the prescribed lights, and that consequently the tow must under that section be deemed to be in fault. *The Devonian*, 70 L. J. P. 66; [1901] P. 221; 84 L. T. 675; 49 W. R. 565; 9 Asp. M.C. 179—C.A.

Towing Anchored Vessel up to her Anchor.—A steamtug made fast alongside a vessel at anchor and steaming ahead so as to move her up to her anchor, in order that she may get it, is "towing another vessel" within the meaning of article 3 of the Regulations for Preventing Collisions at Sea, although the ship herself, being still under the control of her anchor, may not be a vessel "being towed" within the meaning of article 5. *The Romance*, 70 L. J. P. 1; [1901] P. 115; 83 L. T. 488; 9 Asp. M.C. 149—Gorell Barnes, J.

Injury to Lightship—Damages.—The plaintiffs, the Mersey Docks and Harbour Board, were charged by Act of Parliament with the duty of lighting the river Mersey. For this purpose they kept a lightship in reserve in case of injury to any of the lightships actually in use. The defendants negligently injured one of the lightships in use, which was immediately replaced by that in reserve:—*Held*, that the plaintiffs were entitled to recover substantial damages for the use of the reserve lightship, though but for such use she would have been moored in the river lying idle. *The Clarence* (3 Wm. Rob. 283), *The Rutland* ([1896] P. 195n. (2)), and *The Emerald* (65 L. J. P. 169; [1896] P. 192) are overruled, so far as they are inconsistent with *The Greta Holme* (66 L. J. P. 166; [1897] A.C. 596). *The Mediana*, 69 L. J. P. 35; [1900] A.C. 118; 82 L. T. 95; 48 W. R. 398; 9 Asp. M.C. 41.

Vessel "not under command"—Vessel "aground near a fairway"—Vessel Dragging in Mud.—A steam vessel which has left her anchorage outside a harbour on a voyage, her course lying at right-angles to, and about a quarter of a mile from the entrance to, a dredged channel leading into the harbour, and which, by reason of her draught, is dragging in the mud so that her engines have from time to time to be put full steam astern for the purpose of freeing her, her average speed ahead being only about three-quarters of a mile an hour, is not a vessel which from any accident is "not under command" within the meaning of article 4 (A), and is not, therefore, bound to carry the lights or shapes therein specified. *The Bellanoch*, 76 L. J. P. 88; [1907] P. 170; 97 L. T. 315—C.A. Affirmed *infra*.

A steam vessel in the circumstances last above mentioned is not "aground near a fairway" within the meaning of article 11, and is not, therefore, bound to carry the lights therein specified. *Ib.*

The effect of article 27 considered. *Ib.*

(g) *Rivers.*

Crossing Vessels in Rivers, Art. 22.]—The crossing of vessels referred to in article 22 is "crossing so as to involve risk of collision," and the considerations which arise in regard to vessels in the open sea are not the same as those which apply to the reaches of a winding river. Whether or not vessels are "crossing vessels" in a river depends on their presumable courses, and the question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends upon the nature of the locality where she is at that moment. *The Leverington* (55 L. J. P. 78; 11 P. D. 117) distinguished. *The Pekin*, 66 L. J. P. C. 97; [1897] A.C. 532; 77 L. T. 443; 8 Asp. M.C. 367—P.C.

Thames—Collision—By-law 47—Contributory Negligence.]—A steamship which by breach of by-law 47 of the Thames By-laws put another vessel in such a difficulty that the latter could not, except by the exercise of more than ordinary skill and care, avoid a collision.—Pronounced to blame for the collision which ensued. *The Ovingdean Grange*, 71 L. J. P. 105; [1902] P. 208; 87 L. T. 15; 9 Asp. M.C. 295—C.A.

— Application of Sea Rules to that River—Vessel Aground — "Not under command."]—A vessel hard and fast aground is not a vessel "not under command" within the meaning of article 4 (a) of the Sea Rules and by-law 40 of the Thames Rules. But assuming that the Sea Rules apply generally to the river Thames, and that a vessel aground is a "vessel not under command" within those rules, still a vessel aground in the Thames in the daytime is not bound to exhibit the two black balls prescribed in article 4 (a), as to make that rule apply would have the effect of interfering with by-law 40 of the Thames Rules, contrary to the provisions of article 30 of the Sea Rules. *The Carlotta*, 68 L. J. P. 87; [1899] P. 223; 80 L. T. 664; 47 W. R. 702; 8 Asp. M.C. 544—Gorell Barnes, J.

— Steamer Turning Round—Crossing from one Side of the River towards the other.]—It is a question of fact in each case whether a steamer turning round in the river Thames is or is not a "steam vessel crossing from one side of the river towards the other" within the meaning of the 48th of the Thames By-laws. *The John Holloway*, 69 L. J. P. 15; [1900] P. 37; 81 L. T. 726; 48 W. R. 416; 9 Asp. M.C. 36—Bucknill, J.

A steamer which had been navigating up on the south side of mid-channel, and was turning round on the south side, so far as her length would allow, in order to go into dock on the south side of the river, having her anchor down and holding, and making no movement through the water, but merely swinging slowly to her anchor with her head to the northward,—*Held*, not to be within by-law 48. *Id.*

— Barge Swinging at Tier—Turn of Tide—Duty to have Man on Board—Duty to Shew Light.]—The barge *G.* laden with a cargo of

pitch was fastened by means of her headfast to the port bow of the barge *J.*, which was moored head and stern to the steamship *V.* lying at the tiers at Greenwich. The tide at the time was flood, and when the man in charge of the *G.* had made her headfast secure he went on board the *V.*, leaving the *G.* unattended. When the tide ebbed the barge, which was eighty feet long and had a free-board of fifteen inches, swung out athwart the stream, and the steamship *St. A.*, proceeding down the river during the night, collided with the *G.*, which shortly afterwards sank. Shortly before the collision those on the *St. A.* had slowed and stopped their engines and ported to allow some sailing barges to pass ahead of their vessel, and when the *G.* was seen close to and ahead the *St. A.* was making about two knots, and the engines of the *St. A.* were then reversed. The owners of the *G.* sued the owners of the *St. A.* for the damage sustained by the negligent navigation of the *St. A.*:—*Held*, that the action should be dismissed, as the look-out on the *St. A.* was not defective and her speed was not excessive, and that the *G.* should have had some one on board her at the turn of the tide to give notice of the position of the *G.*, and to shew a light to vessels as they approached, and that the absence of any signal was a breach of the preliminary article of the Thames By-laws, 1898. *The St. Aubyn*, 95 L. T. 586—Bargrave Deane, J.

— Vessel at Anchor in Fairway of—Ringling Bell.]—*Semble*, that the obligation on steamers and sailing vessels under the 38th Thames By-law, when in the fairway and not under way, to ring a bell, does not apply in clear weather. *The Rhein*, 86 L. T. 265; 9 Asp. M.C. 278—Gorell Barnes, J.

Humber—Crossing Ships.]—The part of the river Humber opposite Cleve Ness buoy off Grimsby is a "narrow channel" within article 25 of the Sea Regulations, and the crossing rules in articles 19 and 22 (and therefore the keeping-course rule in article 21) also apply there. *The Ashton*, 74 L. J. P. 28; [1905] P. 21; 92 L. T. 811; 53 W. R. 639; 10 Asp. M.C. 88; 21 T. L. R. 126—Gorell Barnes, J.

A collision took place in the river Humber close to Cleve Ness buoy between a steam trawler coming up the river from the North Sea to Grimsby and a steamship proceeding down river from Grimsby to Hamburg. The trawler had the steamship on her port bow, and the steamship had the trawler on her starboard bow:—*Held*, that the trawler was to blame under article 25 of the Sea Regulations for being on the wrong side of the channel and under article 21 for not keeping her course, and that the steamship was to blame under articles 19 and 22 for starboarding and so attempting to cross ahead of the other, and also for not reversing her engines. *Id.*

Mersey—Crossing Rule—Steamer—Vessel Coming out of Dock Entrance into River.]—A collision occurred in the river Mersey, about off the north end of the Liverpool landing stage, between a steamship which was proceeding down, without steam up, in tow of two tugs at a distance of about one-third of

the river from the landing stage, and another steamer which had been lying just before the collision in the Prince's Half-tide Dock entrance, and which came out into the river during a strong flood tide at full speed under hard a-port helm on the starboard side of the first steamship:—*Held*, that the crossing rule, article 19 of the Sea Regulations, 1897, as introduced by article 1 of the Mersey Regulations, did not apply so as to bind the first steamship to keep out of the way of the other. *The Sunlight*, 73 L. J. P. 25; [1904] P. 100; 90 L. T. 32; 9 Asp. M.C. 509—Bucknill, J.

Scheldt—Liability of Shipowner.—Although pilotage is compulsory in the river Scheldt, in the sense that vessels are compelled either to take a pilot or to pay the pilotage fees, the master is not compelled by the Belgian law to surrender the charge of his ship to the pilot; and therefore, where a master puts the pilot in charge of the navigation of his vessel, and a collision occurs through the negligence of such pilot, the owners are liable for the damages occasioned thereby. *The Dallington and the Socotra*, 72 L. J. P. 17; [1903] P. 77; 88 L. T. 128; 51 W. R. 607; 9 Asp. M.C. 377—Bucknill, J.

Tyne—Steamship Coming out of Dock and Crossing River—Duty to Indicate Intention.—The meaning of articles 21 and 22 of the Tyne By-laws, 1884, is that a vessel crossing the river may cross if there is time and opportunity to do so without hampering another vessel, and the vessel which sees a vessel about to cross must act reasonably and give her a little more room if she requires it, but the burden of the operation at the beginning is upon the vessel crossing. *The Skipssea*, 74 L. J. P. 34; [1905] P. 32; 93 L. T. 181; 53 W. R. 558; 10 Asp. M.C. 91—Gorell Barnes, J.

A steamship, *V.*, coming out of dock, was moving slowly out of the lock entrance on the north side of the Tyne to cross and go down the river, when another steamship, *S.*, came in sight on the port bow about four hundred yards off, coming up the river on the other side with a tug ahead of her. The *V.* continued to go ahead, and gave two short blasts and hard a-starboarded, but shortly afterwards stopped her engines; the *S.* gave one short blast and ported slightly and reversed her engines for a time, and after other manœuvres the vessels collided:—*Held*, that the vessels were at first in such a position that it was the duty of the *V.* to elect to cross ahead of the other vessel or to wait till she had passed, and to indicate in an unmistakable way what her action was to be, and she had not done so, and this had caused the collision; and that if she had meant to wait she ought to have blown three blasts at once and reversed her engines and remained near the lock entrance; and that the *V.* was alone to blame. *Ib.*

(h) Narrow Channels.

Harbour Entrance—"Narrow channel"—Duty to Keep to Starboard Side—Duty of Incoming Vessel to Wait till Outgoing Vessel is Clear—Duty to Stop and Reverse.—A harbour entrance which consists of an opening about half a mile

wide between the ends of two breakwaters is a "narrow channel" within the meaning of article 25 of the Regulations for preventing Collisions at Sea, 1897. Where a harbour entrance is about half a mile wide, a steam vessel which is approaching the entrance with a view to entering the harbour is under no obligation to lie outside the entrance until an outgoing vessel gets clear. *Taylor v. Burger* (78 L. T. 93; 8 Asp. M.C. 364) distinguished. *The Kaiser Wilhelm der Grosse*, 76 L. J. P. 138; [1907] P. 259; 97 L. T. 366; 23 T. L. R. 554—C.A. Affirming, 10 Asp. M.C. 361—Gorell Barnes, P.

The west entrance to the harbour of Cherbourg, which opens towards the north, lies between the ends of two breakwaters and is about half a mile wide. The steamship *O.* was approaching the entrance from the north with a view to enter the harbour, and was keeping to her starboard side of the fairway. The steamship *K.* had left the harbour on a westerly voyage and was pursuing a north-westerly course across the harbour entrance. The *O.* gave one short blast on her whistle (the porting sound signal) and ported slightly to keep well over to the starboard side. The *K.* gave two short blasts (the starboarding signal) and continued on her course, trusting to her speed to pass in front of the *O.* The *O.* gave a second short blast, to which the *K.* replied with a second two short-blast signal. Both vessels then stopped and reversed, but a collision ensued, the stem of the *O.* striking the starboard bow of the *K.*:—*Held*, first, that the *K.* was to blame, inasmuch as the harbour entrance was a "narrow channel" within the meaning of article 25, and she ought, in passing through it, to have kept to her starboard side of the fairway. *Held*, secondly, that, in the circumstances, the *O.* was not to blame, either because she had not waited outside the harbour entrance until the *K.* got clear, or because she had not stopped and reversed sooner than she did, or because she ported after hearing the signals of the *K.* *Ib.*

Uniform System of Buoyage.—In certain water in Sea Reach of the River Thames, which had been hitherto a channel between a row of buoys on the north and a row of buoys on the south side, the Trinity House placed four new lighted buoys at certain points not in a line, but more or less north of the centre line of what had been the channel. The new buoys, according to a notice issued by the Trinity House, marked the northern side of the deepest water through Sea Reach, but by their colour and shape indicated, according to the uniform system of buoyage, that a vessel coming in should pass them on her starboard hand:—*Held*, that a vessel coming in at night had sufficient justification for treating the narrow-channel rule (article 25 of the Sea Regulations) as applying not to the old channel as a whole, but to the water between the new buoys and the buoys on the south side, and passing on her own starboard side of the new buoys, and therefore was not to blame for a collision with another vessel which occurred while she was in that position. *The Gustafsberg*, 74 L. J. P. 42; [1905] P. 10; 92 L. T. 630; 53 W. R. 350; 10 Asp. M.C. 61; 21 T. L. R. 79—Gorell Barnes, J.

Semble, the effect of the placing of the new

buoys was to constitute a new narrow channel within article 25 of the Sea Regulations between the new buoys and the buoys on the south side. *Id.*

Vessel Turning Round—Art. 25.]—Article 25 of the Regulations for Preventing Collisions at Sea is not infringed by a vessel turning round in a narrow channel whereby some portion of her length must necessarily during the process fail to remain on that side of the fairway or mid-channel which lies on her starboard side. *The Whittleburn*, 83 L. T. 748; 9 Asp. M.C. 154—Gorell Barnes, J.

Narrow Channel—Queenstown Harbour—Fairway.]—The navigable water in Queenstown Harbour is a "narrow channel" within article 25 of the Sea Regulations; and although vessels are not bound to navigate in the fairway buoyed by the harbour authorities, they should keep on entering or leaving the harbour, when it is safe and practicable, to their starboard side of the middle of the buoyed fairway. *The Giengariff*, 74 L. J. P. 90; [1905] P. 106; 93 L. T. 281; 53 W. R. 537; 10 Asp. M.C. 103; 21 T. L. R. 299—Bargrave Deane, J.

(i) *Manchester Ship Canal.*

Duty as to Stopping.]—The plaintiffs' steamship was proceeding down the Manchester Ship Canal in foggy weather, with another steamship going down ahead, when those on board heard the whistle of defendants' steamship, which was coming up the canal (and with which they afterwards came into collision), and did not immediately stop their engines:—*Held*, that the plaintiffs' steamship was not to blame for breach of article 16 of the Sea Regulations, because the Sea Regulations could not apply to the Manchester Ship Canal; and because, even if they could apply, the position of the defendants' vessel, as coming up the canal and below the steamship ahead, was ascertained within article 16. *The Hare*, 73 L. J. P. 47; [1904] P. 331; 90 L. T. 323; 9 Asp. M.C. 547; 20 T. L. R. 291—Gorell Barnes, J.

(j) *Suez Canal.*

Regulations for Navigation.]—A collision occurred at night-time in the northern part of the Suez Canal between the plaintiffs' vessel which was going south and the defendants' vessel which was going north. By the Suez Canal Regulations and the practice, it was the duty of the plaintiffs' vessel to tie up, and make certain changes in her lights in doing so, and it was the duty of the defendants' vessel to keep on past her, both acting reasonably. The evidence shewed that both vessels had been going at a greater speed than that allowed by the regulation, that the plaintiffs' vessel duly manœuvred in tying up and changing her lights, and that the collision was attributable to the fact that the defendants' vessel came on at too great a speed and neglected to keep herself under proper command so as to be able to pass the plaintiffs' vessel safely:—*Held*, that, on this evidence, the defendants' vessel was solely to blame. *The Clan Cumming*, 77 L. J. P. 1; [1907] P. 311; 97 L. T. 14—C.A.

(k) *Ports.*

Incoming and Outgoing Ship—Order of Harbour-master.]—The *T.*, a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle-tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between the *T.* and the lock wall, and stopped. The harbour-master, whose orders he was bound to obey, ordered him to go ahead, and at the same time ordered the *T.* to go astern. The *T.* reversed her engines, but only sufficiently to keep her stationary, as the wind and tide were drifting her towards the lock. A collision took place between the port sponson of the tug and the port bow of the *T.*:—*Held*, that the tug was not to blame, because—first, an incoming ship should give way to an outgoing ship; secondly, the master of the tug was bound to obey the order of the harbour-master to go ahead; and thirdly, the *T.* had disobeyed the order to go astern. *Taylor v. Burger*, 78 L. T. 93; 8 Asp. M.C. 364—H.L. (Sc.)

Port Natal—Regulations—Moving Ship in Berth.]—By regulation 17 of the Regulations of Port Natal, in which pilotage was compulsory except for certain exempted ships, "no master or person in charge of an exempted vessel shall cross the bar in such a vessel or shift the berth of such vessel in the harbour without a pilot or otherwise without permission." By regulation 29 "the master of every vessel shall occupy the berth assigned to such vessel and change the berth if so directed; in default whereof the removal may be effected by the port authorities at the risk and expense of vessel and owners." The port authorities directed a vessel, which was not within the exemption from compulsory pilotage, to change her berth, and, as the master failed to comply with the direction, the port authorities sent a pilot with a tug to shift her. While being so shifted she came into collision with another vessel solely through the fault of the pilot:—*Held*, that under the above regulations the pilot was at the time acting as a pilot compulsorily in charge, and the shipowners were not liable for the collision. *The Suffolk*, 21 T. L. R. 267—Bargrave Deane, J.

Vessel taking Cargo at Port in United Kingdom to be Discharged at another Port in United Kingdom.]—A ship sailing under foreign-going articles left Swansea and went to various ports within and without the United Kingdom. She went from Dieppe to Hull in ballast and at Hull she took in a cargo to be discharged at Bristol, and went from Hull with such cargo to Bristol, where she discharged her cargo, still sailing under the same articles. When on the voyage from Hull to Bristol, the ship was proceeding up the Bristol Channel, and was within the limits of the port of Bristol, within which, by section 9 of the Bristol Wharfrage Act, 1807, pilotage by a Bristol pilot is compulsory for all vessels except "coasting vessels and Irish traders." The master refused to take a compulsory pilot on board, on the ground that the ship during the voyage from Hull to Bristol was a "coasting vessel" within the meaning of the exemption by reason of her

having taken in cargo at Hull destined to be discharged at Bristol, both ports being within the United Kingdom:—*Held*, that the ship was not a "coasting vessel" at the time in question, and the fact that she took in cargo at Hull, a port in the United Kingdom, which she was going to discharge at Bristol, another port in the United Kingdom, did not make her a "coasting vessel" on the voyage from Hull to Bristol, and that the master was properly convicted under section 603, sub-section 2 of the Merchant Shipping Act, 1894, for having, within a district where pilotage was compulsory, refused to take a pilot on board. *The Ravensworth*; *Phillips v. Born*, 93 L. T. 634; 10 Asp. M.C. 131—D.

Vessel Bound to Manchester—Coming into the Port of Liverpool—Anchorage in Itinere—Termination.—Pilotage is compulsory subject to special exemptions on all vessels bound to Manchester and coming into the port of Liverpool, and, *semble*, on all vessels bound from Manchester and going out of the port of Liverpool. *The Mercedes de Larrinaga*, 73 L. J. P. 65; [1904] P. 215; 90 L. T. 520; 9 Asp. M.C. 571; 20 T. L. R. 375—Gorell Barnes, J.

When a vessel is under compulsory pilotage, as being bound to Manchester by way of the Manchester Ship Canal and coming into the port of Liverpool, and not specially exempted, the compulsion does not terminate under section 123 of the Mersey Dock Acts Consolidation Act, 1858, if her pilot brings her to anchor, not finally, but only temporarily and *in itinere*. *The Servia and the Carinthia* (67 L. J. P. 36; [1898] P. 36) considered. *Ib.*

(1) Damages.

Both Ships to Blame—Rule of Division of Loss—Seamen Drowned—Payments to their Relatives—Spanish Accidents Act, 1900—Claim against other Ship for Half the Payments.—Some seamen on board a Spanish ship were drowned in a collision with another ship, and the Spanish shipowners were compelled by the Spanish Accidents Act, 1900, without proof of any negligence, to make payments to the relatives of these seamen. The action arising out of the collision was settled on the basis of both ships being to blame. Under the Admiralty rule of division of loss, the Spanish shipowners claimed to recover from the owners of the other ship half the amount of these payments:—*Held*, that the claim must be rejected—first, because it was in respect not of damages at all, but of an accident payment not recognised by English law, but arising out of a foreign statute; and secondly, because it was not such a claim for damages as could be made under Admiralty jurisdiction, or could have been taken into consideration in the Admiralty Court, and therefore the Admiralty rule of division of loss could not apply to it. *The Circe*, 74 L. J. P. 106; [1906] P. 1; 93 L. T. 640; 10 Asp. M.C. 149; 21 T. L. R. 525—Gorell Barnes, P.

Valuation of Ships—Res inter alios Acta.—In the case of a collision in which both ships are to blame the cargo-owner is not bound by the valuation of the ships estimated in an action between the owners of the two vessels to which he was not a party, but is entitled to an

independent valuation in ulterior proceedings. *Van Eijck & Zoon v. Somerville & Gibson*, 75 L. J. P.C. 67; [1906] A.C. 489; 95 L. T. 161; 22 T. L. R. 715; 10 Asp. M.C. 268—H.L. (Sc.)

Consequential Damage to Third Vessel—Admiralty Rule as to Division of Damages—Joint Tortfeasors.—Where, by the negligence of both, two ships come into collision, and the consequence of such collision is that one of the said ships afterwards comes into collision with and damages a third vessel, a moiety of the damages recovered by the owners of the third ship from the owners of the ship which actually did the damage may be recovered by the owners of such last-mentioned ship from the owners of the other wrongdoing ship, as part of the damages arising out of the original collision, notwithstanding the rule of law that there is no contribution between joint tortfeasors. *The Frankland*, 70 L. J. P. 42; [1901] P. 161; 84 L. T. 395; 9 Asp. M.C. 196—Jeune, P.

Personal Injuries.—The plaintiff sustained personal injuries in a collision at sea that occurred between a schooner in his charge as pilot, and the defendants' steamer. In an action *in personam* against the defendants claiming damages for such injuries caused, as alleged, by the defendants' negligence, the jury found that the defendants were negligent in not getting out of the way of the schooner, or stopping; and awarded the plaintiff 500*l.* It was admitted that the schooner, which was being overtaken by the steamer, displayed no stern light as required by article 10 of the statutory regulations:—*Held*, that section 419, sub-section 4 of the Merchant Shipping Act, 1894, is not confined to Admiralty cases, but applies to all Courts; that the schooner was in fault in respect of the said breach of the collision regulations; and (BOYD, J., dissenting) that the Admiralty rule as to division of loss applied; and that the plaintiff was duly entitled to half the damages assessed by the jury. *Boucher v. Clyde Shipping Co.*, [1904] 2 Ir. R. 129—K.B. D.

Total loss—Loss of Profit under Charterparty.—Where a collision results in the total loss of a vessel which is on a voyage under a charterparty, the owners of the wrong-doing vessel are liable for the loss of profit which would have accrued to the owners of the injured ship had the chartered voyage been accomplished. In such a case the value of the ship must be calculated as at the date when the voyage under the charterparty would have been completed. *The Kate*, 68 L. J. P. 41; [1899] P. 165; 80 L. T. 423; 47 W. R. 663; 8 Asp. M.C. 539—Jeune, P.

Successive Charterparties—Assessment of Damages—Loss of Profit under Charterparties.—Where a collision results in the total loss of a vessel which is under successive charterparties, the measure of damages properly includes the profit which the owners would have made if the chartered voyages had been accomplished, less a reasonable sum to cover contingencies. *The Kate* (68 L. J. P. 41; [1899] P. 165) affirmed. Principle of *The Argentino* (59 L. J. P. 17; 14 App. Cas. 519) applied. *The Racine*, 75 L. J. P. 83; [1906] P. 273; 95 L. T. 597; 22 T. L. R. 575; 10 Asp. M.C. 300—C.A.

Loss of Vessel—Amount—How Ascertained.]—Where a ship has been sunk by collision, and there is no market from which she can be replaced, the value of the ship to her owners as a going concern is the proper test of their loss. *The Harmonides*, 72 L. J. P. 9; [1903] P. 1; 87 L. T. 448; 51 W. R. 303; 9 Asp. M.C. 354—Gorell Barnes, J.

Passenger Ship—Proper Method of Assessing Value of Vessel Sunk by Collision.]—In assessing the value of a passenger steamship running in a regular line, the test in a collision action is, not what she would fetch if sold in the market, but what was her value to the owners as a going concern at the time she was sunk. *Ib.*

Injury to Chattel—Owner.]—The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequent thereon. Where, therefore, a vessel is disabled by a collision with another, which is to blame, the owners of the latter are liable in substantial damages in respect of the withdrawal from service of the disabled ship, notwithstanding that the owners of the latter have a vessel in constant readiness to supply the place of any which may happen to be injured. *The City of Pekin* (59 L. J. P.C. 88; 15 App. Cas. 438) distinguished. *The Mediana*, 69 L. J. P. 35; [1900] A.C. 113; 89 L. T. 95; 48 W. R. 398; 9 Asp. M.C. 41—H.L. (E.)

Loss of Use of Vessel During Repairs—Working at a Loss to Establish New Trade—Remoteness—Special and General Damages.]—A steamship, at the time of collision, was being employed by her owners as one of a small fleet of steamers carrying full cargoes at unremunerative rates to establish a new line, though she had previously and might still have been employed in immediately profitable voyages. In the collision action, the owners of the steamship claimed (besides their out-of-pocket expenses for repairs and so forth, to which they were admittedly entitled) damages for loss of the use of the vessel during her detention for repairs, and gave evidence that certain cargo, engaged for her months ahead and which she could not take owing to her detention, would have to be carried later at the unremunerative prices contracted for, and the expected time of remunerative freights would thereby be postponed:—*Held*, that the consideration that the steamship at some future time might make a profit in the new line was too remote to take into account; and that in the circumstances the owners were not entitled to any special or general damages beyond their out-of-pocket expenses. *The Bodlewell*, 76 L. J. P. 61; [1907] P. 286; 96 L. T. 854; 23 T. L. R. 356—Bargrave Deane, J.

Demurrage of Dredger.]—The House declined to interfere with the award of damages by the District Registrar, assisted by Merchants, in a case in which errors had been made on both sides, and in which their Lordships held that, after the correction of such errors, the Registrar might have arrived at substantially the same result as was reached in the award delivered. *The Marpessa*, 76 L. J. P. 128; [1907] A.C. 241; 97 L. T. 1; 23 T. L. R. 572—H.L. (E.)

Repatriation Expenses—Payment by Consul—Norwegian Maritime Law, 1893—Vessel “Lost.”]—A Norwegian vessel belonging to the plaintiffs was holed and almost submerged in a foreign harbour by a collision, for which the defendants admitted liability. The plaintiffs and their underwriters abandoned the vessel to the local authority. The expenses of sending home the master and crew were paid by the Norwegian Consul; but the plaintiffs alleged that by Norwegian law they were liable to repay these expenses, and claimed to recover them from the defendants:—*Held*, that the vessel was “lost” within section 98 of the Norwegian Maritime Law, 1893, and that the repatriation expenses were payable under Norwegian law by the Norwegian State and not by the plaintiffs, and the plaintiffs could not recover them from the defendants. *The Craftsman*, 75 L. J. P. 87; [1906] P. 153; 95 L. T. 157; 10 Asp. M.C. 274—Bargrave Deane, J.

Damages by Two Collisions—Simultaneous Repairs—Damages Caused by Second Collision—Dry Dock Dues—Demurrage.]—The plaintiff's ship met with two collisions on successive days, for each of which it was necessary that she should be dry docked and repaired. The repairs of the damages from the second collision were shorter than, and were carried on in dry dock simultaneously with, the other repairs, without increasing the dry dock dues or the time occupied by the other repairs. The defendants admitted liability for the damages caused by the second collision. The plaintiffs claimed to recover from the defendants a proportion of the dry dock dues and similar expenses, and also a proportion of the demurrage during the repairs:—*Held*, first, as regards the dry dock dues and other similar expenses (reversing the decision of the PRESIDENT), that on the principle laid down in *The Vancouver* (56 L. J. Q.B. 100; 11 App. Cas. 573), the defendants were liable to pay to the plaintiffs a proportion of those expenses; but secondly, as regards the demurrage (affirming the decision of the PRESIDENT), that the defendants were not liable, for the damage caused by the second collision had not in fact caused any detention of the plaintiffs' ship. *The Haversham Grange*, 74 L. J. P. 115; [1905] P. 307; 93 L. T. 733; 53 W. R. 675; 10 Asp. M.C. 156; 21 T. L. R. 628—C.A.

Valued Policy on Ship—Partial Insurance—Total Loss by Collision—Payment by Underwriters—Subrogation—Recovery from Owners of Wrongdoing Vessel of Amount of Damage—Ascertained Value of Ship not Greater than Sum Paid on Policy—Fund in Court Representing Ascertained Value—Distribution of Fund between Owners and Underwriters.]—A schooner, which was insured for 1,000*l.* by a policy in which she was valued at 1,350*l.*, was run into and sunk by a steamship. The owners of the schooner were paid 1,000*l.* by the underwriters, who subsequently took proceedings in the name of the owners of the schooner against the owners of the steamship, who admitted liability. The amount of damage was referred to the Registrar, who found that 1,348*l.* 6*s.* was recoverable from the owners of the steamship, and that of that sum 1,000*l.* represented the value of the schooner. The owners of the steamship having paid the total sum into Court, the underwriters claimed

that they were entitled to the whole of the 1,000*l.* representing the value of the schooner:—*Held*, that the owners of the schooner were entitled to $\frac{3}{4}$ of the 1,000*l.*, and the underwriters to the balance. *The Commonwealth*, 76 L. J. P. 106; [1907] P. 216; 97 L. T. 625; 23 T. L. R. 420—C.A.

Maritime Lien—Damage to Stage—Priorities—Insufficient Proceeds—Damage—Salvage.—A maritime lien attaches to a ship in respect of damage done by her to a landing stage, whether such damage occurs on the high seas or within the body of a county. Damage claimants are entitled to be paid out of proceeds in Court in priority to salvors whose services are rendered before the damage accrued; and *semble* that this would be so even if there were no maritime lien for the damage. *The Veritas*, 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30; 9 Asp. M.C. 237—Gorell Barnes, J.

Ship put into Dry Dock for Repairs—Opportunity taken by Owner to effect Certain Work upon Ship—Dock Charges—By whom Borne.—Where a ship damaged by collision has to be dry docked for the purpose of effecting the necessary repairs, and the owner, taking advantage of the opportunity thus offered, does certain work of his own upon the ship—he being under no obligation to do it—there can, in assessing the damages caused by the collision, be no apportionment of the dry dock charges between the owner and the wrongdoer, but the whole of them must be borne by the latter. *The Acanthus*, 71 L. J. P. 14; [1902] P. 17; 85 L. T. 696; 9 Asp. M.C. 276—Jeune, F.

Claim by Cargo-owner—Agreement between Cargo-owner and Owner of Carrying Vessel—Abandonment of Voyage—Sum Paid by Cargo-owner by way of Compromise—Reasonableness of Compromise.—A collier, under charter to the plaintiffs, and carrying a cargo of coal belonging to them, came into collision with the defendants' steamship, and put back for repairs, which necessitated the discharge of the cargo. The plaintiffs, desiring to sell the cargo at once, and thus avoid its deterioration and their share of the hire of barges for warehousing till it could be re-shipped, agreed with the owners of the collier for the voyage to be abandoned on condition that the plaintiffs would charter the collier for another cargo, on completion of the repairs, at a freight not less than before, and would pay to the owners of the collier a sum in lieu of and less than their share of the barge hire thus rendered unnecessary. In cross-actions of damage by collision between the owners of the collier and the defendants as owners of the steamship, both vessels were held to blame, and the owners of the collier recovered from the defendants a half of the damage which they had sustained in consequence of the collision. The plaintiffs claimed to recover from the defendants half the sum payable by themselves under the said agreement with the owners of the collier. The Registrar reported that no part of the present claim had been dealt with in the ship's reference:—*Held*, that the plaintiffs were entitled to recover the sum claimed. *The Minnetonka*, 74 L. J. P. 97; [1905] P. 206; 93 L. T. 581; 53 W. R. 521; 10 Asp. M.C. 142; 21 T. L. R. 407—C.A.

Damages to be Borne Equally—Liability for Payments to Crew.—A collision having occurred between two vessels, an agreement was made between the owners of the vessels that each was to blame and that "the damages rising therefrom ought to be borne equally by the owners of both." Subsequently the representatives of the seamen, who were drowned owing to the collision on board one of the vessels, made claims against the owners of the other vessel, and these claims were settled by the payment of a sum of money. The owners who paid the claims sought to recover one-half thereof from the owners of the other vessel under the agreement:—*Held*, that the sum so paid was not damage arising out of the collision, that the representatives of the seamen could not have recovered against the owners of the vessel on which the seamen were serving, inasmuch as the collision was caused by the negligence of a fellow-servant, and that therefore one-half of the sum so paid could not be recovered from the owners of that vessel. *The General Havellock*, 21 T. L. R. 438—Bargrave Deane, J.

(m) Limitation of Liability.

"Owner"—Charterer by Demise.—Charterers who have hired a vessel for a period, the master and crew to be their servants, the vessel to be repaired and insured by them and the owners to be indemnified by them against all claims in consequence of collision or accident, are not the "owners" of the vessel within sections 503 and 504 of the Merchant Shipping Act, 1894, and therefore are not entitled to any statutory limitation of liability in respect of loss or damage to person or property. *The Steam Hopper No. 66*, 76 L. J. P. 110; [1907] P. 254; 97 L. T. 360; 23 T. L. R. 414—C.A.

Retrospective Operation of Statute.—Section 69 of the Merchant Shipping Act, 1906, has no retrospective operation. On July 25, 1906, a decree was made in a collision action pronouncing the steamship *L.* alone to blame for a collision with the *F.* In May, 1907, the reference to assess damages was heard, and on June 3, 1907, the Registrar issued his report as to the amounts of the claims against the *L.* arising out of the collision. On June 7, 1907, the owners of the *L.* issued a writ for limitation of their liability, and claimed that the tonnage of the *L.* for this purpose should be calculated according to section 69 of the Merchant Shipping Act, 1906, which came into operation on June 1, 1907. This section provides that for the purpose of limitation of liability the tonnage of a steamship shall be her "registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage," and that these words shall be substituted for certain other words in section 503 of the Merchant Shipping Act, 1894:—*Held*, that section 69 of the Merchant Shipping Act, 1906, was not retrospective, and that the owners of the *L.* must limit their liability according to the original words of section 503 of the Merchant Shipping Act, 1894. *The Langdale*, 76 L. J. P. 154; 23 T. L. R. 683—Bargrave Deane, J.

Loss Due to Shipowner's Negligence.—The plaintiffs shipped goods on board the defen-

dants' ship for carriage from London to Buenos Ayres under a bill of lading containing a clause which provided that the defendants should not be accountable to any extent for certain specified goods, which did not include goods of the kind shipped by the plaintiffs, "nor for any other goods of whatever description beyond the amount of 2½. per cubic foot for any one package." The plaintiffs' goods were lost in the course of the voyage through the negligence of the defendants. In an action to recover the full value of the goods,—*Held*, that, notwithstanding that the loss was due to the defendants' negligence, they were only liable to the limited extent provided by the bill of lading. *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, 77 L. J. K.B. 417; [1908] 1 K.B. 796—Bigham, J.

Gross Tonnage—Certificate of Registry—Certificate respecting Double Bottom.—In an action for limitation of liability, the gross tonnage in the case of a British vessel will be taken as shewn by her certificate of registry, or in the case of a foreign vessel, to which an Order in Council made under section 84, sub-section (1) of the Merchant Shipping Act, 1894, applies, by her certificate of registry or other national papers, without any necessity for adducing a certificate under section 81 respecting the double bottom for water ballast. *The Zanzibar* (61 L. J. P. 81; [1892] P. 233) considered. *The Cordilleras*, 73 L. J. P. 13; [1904] P. 90; 89 L. T. 673; 9 Asp. M.C. 506—Gorell Barnes, J.

Ship not Registered—Not Exceeding Fifteen Tons Burden—Exemption from Registration.—The words "tons burden" in section 3, sub-section 1 of the Merchant Shipping Act, 1894, do not mean "gross" tonnage, but the "net" tonnage which is arrived at after deducting from the gross tonnage the allowances sanctioned by the Act. *The Brunel*, 69 L. J. P. 8; [1900] P. 24; 81 L. T. 500; 48 W. R. 243; 9 Asp. M.C. 10—C.A.

In calculating the tonnage (for the purposes of limitation of liability) of an unregistered vessel which has not been measured under the provisions of the Act, but which is exempt from registration under the above-mentioned sub-section, crew space must be included. *Id.*

Deduction of Crew Space—Danish Ship.—The effect of the words "certified under the regulations scheduled to this Act with regard thereto" in section 503, sub-section 2 (a) of the Merchant Shipping Act, 1894, is, in cases of limitation of liability, to limit the right to deduct crew space from the gross tonnage of the ship, whose owners are seeking to limit their liability, to cases where the certificate mentioned in the third paragraph of the Sixth Schedule to the Act has been given by a surveyor of ships under the Act to the Collector of Customs, at the time when the ship is registered or re-registered as a British ship. *The Cathay* (No. 2), 69 L. J. P. 89; 82 L. T. 823; 9 Asp. M.C. 100—Gorell Barnes, J.

Certificate of Board of Trade—Foreign Vessel.—Danish vessels are, by virtue of Order in Council of November 21, 1895, issued under section 84 of the Merchant Shipping Act, 1894, to be deemed of the tonnage denoted in their certificate of registry in the same manner and

to the same effect and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship. The owners of a Danish vessel with a Danish certificate were *held* not entitled, in ascertaining the tonnage of their vessel for the purposes of section 503 of the Merchant Shipping Act, 1894, to deduct the tonnage set forth in the certificate as taken up by crew space, where such space had not been inspected and certified by one of the surveyors under the Act, as required by Schedule VI. *Olga (Owners) v. Anglia (Owners)*, 7 F. 730—Ct. of Sess.

Title of Suit—Description of Plaintiffs—Life Claims—Bail in Lieu of Payment into Court.—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of sections 503 and 504 of the Merchant Shipping Act, 1894, it is not sufficient to describe the plaintiffs on the writ as "The owners of the ship or vessel," for, the action being one for personal relief, the names of the owners of the vessel at the time of the collision should be set out on the face of the writ. Where the owners of the vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life, and in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the Court may grant a decree on their giving bail for an amount to be fixed by the Court and an undertaking to give bail if required for the balance of their statutory liability, instead of requiring them to pay into Court the total amount of their statutory liability in respect of the life claims. *The Inventor*, 93 L. T. 189—Gorell Barnes, J.

Names of Owners of Ship.—In an action for limitation of liability, though strictly the names of all the plaintiffs who are seeking to limit their liability should be stated in the writ, it is sufficient in the writ to describe the plaintiffs as the owners of the vessel, provided that the affidavit made in support of the claim and the certified copy of the ship's register exhibited thereto shew clearly who are the owners at the date of the collision. *The Blanche*, 21 T. L. R. 145—Gorell Barnes, J.

Claims in Respect of Loss of Life—Interest.—In actions for limitation of liability for a collision, where loss of life has occurred, the wrongdoer is liable, in addition to the 7½. per ton payable in respect of such loss of life, to pay interest thereon from the date of the collision until payment into Court. *The Crathie*, 66 L. J. P. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631; 8 Asp. M.C. 256—Gorell Barnes, J.

Time fixed for Bringing in Claims—Lord Campbell's Act—Certain Claims not made within Time Fixed—Payment out of Court before Expiration of Year from Death.—In a suit for limitation of liability in respect of a collision involving loss of life no claims were made within the time fixed by the limitation decree in respect of certain seamen who were drowned. The Court ordered the balance of the fund in Court, after satisfying those claims which had been brought in, to be paid out to the plaintiffs in the limitation suit, although the twelve calendar months from the death of the deceased person mentioned in section 3 of the Fatal Accidents

Act, 1846, within which actions might be brought, had not expired. *The Alma*, 72 L. J. P. 21; [1903] P. 55; 88 L. T. 64; 51 W. R. 415; 9 Asp. M.C. 375—Jeune, P.

— **Proof of Ownership at Date of Collision.**]

—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of sections 503 and 504 of the Merchant Shipping Act, 1894, and the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, and the certified copy of the register proving the ownership of the vessel should be a certified copy of the register at the date of the collision. *The Rosslyn*, 92 L. T. 177; 10 Asp. M.C. 24—Gorell Barnes, J.

Passengers' Luggage.—A shipowner is entitled to limit his liability in respect of the loss of passengers' personal effects. *The Stella* (No. 1), 81 L. T. 235; 8 Asp. M.C. 605—Bucknill, J.

Cross-actions of Damages between the Two Shipowners—Decree in Favour of one of the Shipowners—Petition for Limitation of Liability at the Instance of the other Shipowner—Competency of Re-opening the Question of Damages at the Instance of Cargo-owners.—A collision between the s.s. *Anglia* and the s.s. *Olga* resulted in the sinking of the *Anglia* and in the *Olga* being slightly damaged. In cross-actions of damages between the owners of the *Anglia* and the owners of the *Olga*, both vessels were found to be in fault, and the owners of the *Anglia* obtained decree against the owners of the *Olga* for 7,149l. 14s. 7d., being one-half of the value of the *Anglia* under deduction of one-half of the damage to the *Olga*. The owners of the *Olga* then presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability to 6,215l. 4s., being 8l. per ton on a tonnage of 776.90, the tonnage of the *Olga*. The owners of the *Anglia* lodged a claim in the petition claiming to be ranked on the sum of 6,215l. 4s. for 7,149l. 14s. 7d., the sum in the decree obtained by them in the cross-actions of damages. The owners of the cargo of the *Anglia* also lodged a claim in which, besides claiming to be ranked in respect of the value of the cargo, they maintained that the decree for 7,149l. 14s. 7d. was not binding on them; that the value of the *Anglia*, on the basis of which that decree was reached, was a gross over-estimate of her true value; that the owners of the *Olga* had no interest to contest, and had not in fact contested, the question of the value of the *Anglia*, in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the *Olga*, whose limit of 8l. per ton was reached by the finding that both vessels were to blame. The cargo-owners of the *Anglia* did not aver that the decree for 7,149l. 14s. 7d. had been obtained collusively or of consent or by way of compromise:—*Held*, that the claim of the owners of the *Anglia*, having been duly constituted against the debtor by a decree *in foro*, must be taken at the amount fixed in the decree. *Olga (Owners) v. Anglia (Owners)*, 7 F. 739—Ct. of Sess.

Costs.—The owners of the *Olga* petitioned under sections 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability for loss caused by a collision (with the *Anglia*) in which both vessels were found to be in fault. Claims were lodged for the owners of the *Anglia*, and for the owners of the cargo on board the *Anglia*:—*Held*, that the claimants were entitled to the costs of their respective claims and relative procedure against the petitioners, the owners of the *Olga*. *Olga (Owners) v. Anglia (Owners)*, [1907] S.C. 1045—Ct. of Sess.

(m) *Foreign Ship.*

Action in Personam—Foreign Plaintiff—Counterclaim—Security for Judgment therein.]

—Where the foreign owners of a foreign vessel bring an action *in personam* against the owners of an English vessel to recover damages for collision, and the defendants counterclaim for the damages sustained by them in respect of the same collision, there is no jurisdiction either under section 34 of the Admiralty Court Act, 1861, or under section 24, sub-sections 5 and 7 of the Judicature Act, 1873, to order the plaintiffs to give security to answer judgment upon the counterclaim. *The James Westoll*, 74 L. J. P. 9; [1905] P. 47; 92 L. T. 150; 10 Asp. M.C. 29—C.A.

High Seas—Breach of Regulations—Presumption of Fault—Application of section 419, sub-section 4 of Merchant Shipping Act, 1894, to Foreign Ships.—In a case of collision outside the territorial waters of the United Kingdom, a point, raised on behalf of the defendants, that the statutory presumption of fault created by section 419, sub-section 4 of the Merchant Shipping Act, 1894, did not apply in the case of a foreign ship, and that such ship could not, therefore, be held to blame for a breach of article 16, unless the Court should be of opinion that the breach of the regulation in fact contributed to the collision, was not decided, the defendants' ship being found to blame upon the facts. *The Koning Willem I.*, 72 L. J. P. 28; [1903] P. 114; 88 L. T. 807; 9 Asp. M.C. 425—Bucknill, J.

(o) *Practice.*

Cross-Actions—High Court and County Court Actions—Transfer of County Court Action to High Court—Conduct of Consolidated Actions.]

—Where cross-actions for collision have been commenced, the one in the High Court and the other in a County Court, and the County Court action is transferred to the High Court and consolidated with the High Court action, the conduct of the consolidated actions will be given to the plaintiffs in the action commenced in the High Court, unless it is clear that in point of time the County Court action was commenced first. *The Mersey*, 70 L. J. P. 100; [1901] P. 369; 85 L. T. 584—Jeune, P.

Title of Suit—Description of Plaintiffs—Life Claims—Bail in Lieu of Payment into Court.]

—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of sections 503 and 504 of the Merchant Shipping Act, 1894, it is not sufficient to

describe the plaintiffs on the writ as "The owners of the ship or vessel," for the action being one for personal relief, the names of the owners of the vessel at the time of the collision should be set out on the face of the writ. Where the owners of the vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life and in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the Court may grant a decree on their giving bail for an amount to be fixed by the Court and an undertaking to give bail if required for the balance of their statutory liability, instead of requiring them to pay into Court the total amount of their statutory liability in respect of the life claims. *The Inventor*, 93 L. T. 189; 10 Asp. M.C. 99—Gorell Barnes, J.

Foreign Court—Proceedings in—Sale of Ship—Receipt of Proceeds—Right to Claim against Fund in Court.]—Where in the limitation proceedings the fund paid into Court in respect of loss of ship, goods, &c., amount to the full 8l. per ton of the ship's tonnage, persons who have taken proceedings in respect of those matters in a foreign Court and received the proceeds of the sale of the wrongdoer's ship in those proceedings, but whose claims have not been thereby satisfied, are not debarred from claiming against the fund in Court, but will be compelled to give credit for any sums they have received in the proceedings abroad. *Ib.*

Action in Rem—Release on Bail—Judgment for Amount Exceeding Bail—Seizure of Ship Released on Bail.]—Where bail has been given by the owners of a ship arrested in an action *in rem* to recover damages for a collision, and the ship is then released, such ship can again be seized under a writ of *fi. fa.* for any amount found by the Court to be due from the owners in excess of the amount for which bail was given. *The Gemma*, 68 L. J. P. 110; [1899] P. 285; 81 L. T. 379; 8 Asp. M.C. 585—C.A.

(p) Costs.

Discretion.]—In a limitation of liability suit the plaintiffs objected to certain items of the defendants' claim for damage to cargo sustained in consequence of the collision, upon the ground that a large proportion of the damage was owing to the defendants' failure to use due diligence after the collision to minimise the damage. The Registrar found that the plaintiffs' objections were well founded and allowed only a portion of the defendants' claim, and ordered each party to pay their own costs of the reference. From this order the defendants appealed by motion:—*Held*, that, though there is a general rule of practice that the plaintiff in a limitation of liability suit must pay the costs, that practice is not invariable; that the Registrar has discretion in a proper case to make such order as to costs as he thinks just; and that his order was right. *The Rijnstroom*, 80 L. T. 422; 8 Asp. M.C. 538—Bucknill, J.

—Amount Recovered not Exceeding 300l.]—In an action of collision in the Admiralty Division the defendants gave bail in the sum of 600l., and after the pleadings had been closed

they admitted liability. The plaintiffs then filed a claim in the Registry for 330l., and the action was eventually settled for 218l. The Court, in its discretion, allowed the plaintiffs costs on the High Court scale, though the amount recovered did not exceed 300l., as it thought that the case was rightly brought in the High Court. *The Emden*, 23 T. L. R. 546—Bucknill, J.

Admission by Successful Appellants that their Vessel in Fault—Both Vessels Found to Blame.]—An appellant in a collision action who, admitting that his own ship was in fault, is successful on the appeal in obtaining judgment that the other vessel was also to blame, is entitled to the costs of the appeal. Order in *The Ceto* (14 App. Cas. 670) followed. *The London* (No. 2), 74 L. J. P. 71; [1905] P. 152; 93 L. T. 393; 53 W. R. 419; 10 Asp. M.C. 109; 21 T. L. R. 339—C.A.

Action of Damage—Co-defendants Each Alleging Negligence on the Part of the Other—Successful Defendant.]—In an action in the City of London Court for damage by collision the plaintiffs sued the owners of a ketch, the vessel which did the damage, and the dock company, in obedience to the orders of whose dockmaster it was alleged by the first-named defendants that the action was taken which caused the collision. The dock company alleged that the collision was solely caused by the negligence of those on board the ketch. The County Court Judge gave judgment against both defendants; but on appeal the Divisional Court held the dock company was alone responsible, and, following the case of *The River Lagan* (57 L. J. P. 28), condemned the dock company in the costs of the owners of the ketch both in the Court below and upon the appeal. *The Mystery*, 71 L. J. P. 39; [1902] P. 115; 86 L. T. 359; 9 Asp. M.C. 284; 50 W. R. 414—D.

10. PILOTAGE.

When Compulsory — Trinity House Outport District—Voyage—Beyrout to Ipswich and Leith—Part Cargo Discharged at Ipswich—Ship Proceeding with Remainder of Cargo to Leith.]—A ship with a cargo from a port in Turkey, which has discharged part of that cargo in Great Britain, and is proceeding to another port in Great Britain to deliver the rest of her cargo, is not a "ship employed in the coasting trade of the United Kingdom" within the meaning of sub-section 1 of section 625 of the Merchant Shipping Act, 1894; nor is she a "ship trading from any port in Great Britain . . . to . . . any port in Europe north and east of Brest" within the meaning of sub-section 3 of the same section. *The Glanystwyth*, 68 L. J. P. 87; [1899] P. 118; 80 L. T. 204; 8 Asp. M.C. 513—Jeune, P.

—River Tyne—Vessel Carrying Passengers between Two Ports in the British Islands.]—Pilotage is compulsory in the river Tyne for vessels carrying passengers between two ports in the British Islands. *The Johann Sverdrup* (56 L. J. P. 63; 12 P. D. 43) distinguished. *The Warsaw*, 67 L. J. P. 50; [1898] P. 127; 78 L. T. 327; 46 W. R. 638; 8 Asp. M.C. 399—Gorell Barnes, J.

— **River Scheldt—Liability of Shipowner.**—Although pilotage is compulsory in the River Scheldt in the sense that by Dutch law vessels are obliged to take a pilot on board and pay pilotage dues, the charge of the ship is not surrendered to him so as to free the owners from liability for a collision caused by his negligence. *The Prins Hendrik*, 68 L. J. P. 86; [1899] P. 177; 80 L. T. 838; 8 Asp. M.C. 548—Gorell Barnes, J.

— **Blyth Harbour—Foreign Ship.**—The port of Blyth being—within the meaning of section 6 of 41 Geo. 3, c. 86 (local)—one of the “creeks or members” of the port of Newcastle, which has not been affected by subsequent legislation, remains—as regards pilotage—under the jurisdiction of the Trinity House of Newcastle-on-Tyne, and pilotage is compulsory on foreign ships within its limits under that section. *The Holar*, 69 L. J. P. 140; [1901] P. 7; 83 L. T. 436; 49 W. R. 224; 9 Asp. M.C. 143—Gorell Barnes, J.

— **Liverpool—Rates—Extra Remuneration.**—In the port of Liverpool, pilots who pilot outward bound vessels from the docks to a landing stage, in order to take on board passengers and their baggage and the mails, are entitled to extra remuneration for so doing; and pilots who pilot inward bound vessels to the cattle stages for the purpose of landing cattle or sheep before entering dock or anchoring in the river, are entitled to extra remuneration for so doing, as in neither case are such services covered by the compulsory pilotage rates fixed under the Mersey Docks Acts Consolidation Act, 1858. *The Servia. The Corinthia*, 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M.C. 353—Gorell Barnes, J.

Pilotage Dues—Collier Carrying Coal for the Navy—King's Ship.—A vessel owned by his Majesty's Government, and appearing in the Navy List, was exclusively engaged in going to and from various ports carrying coal for the Navy. The appellant, the master of the vessel, held a Board of Trade certificate, and was employed by the Devonport dockyard authorities under the Admiralty. He was not an officer of the Royal Navy. The crew were engaged at the dockyard under articles of agreement. The respondent, a licensed pilot, at the request of the appellant, piloted the vessel into the port of Cardiff. Upon proceedings by the respondent against the appellant for the recovery of the pilotage dues authorised by by-laws made pursuant to the Merchant Shipping Act, 1894, and the Bristol Channel Pilotage Act, 1861, the magistrate gave judgment for the respondent for the amount claimed:—*Held*, that the vessel was a King's ship, and that the appellant was not liable for the payment of the pilotage dues. *Symons v. Baker*, 74 L. J. K.B. 965; [1905] 2 K.B. 723; 93 L. T. 548; 54 W. R. 159; 10 Asp. M.C. 129; 21 T. L. R. 734—D.

Exemption—“Ship trading from any port in the London district to any port of Europe north and east of Brest.”—A ship carrying a cargo from a foreign port to London, and thence, without taking any fresh cargo on board, proceeding to Rotterdam, is a “ship trading from” a “port in Great Britain within the London

district to” a “port in Europe north and east of Brest,” within the meaning of section 625 of the Merchant Shipping Act, 1894, and therefore exempt from compulsory pilotage. *The Rutland*, 66 L. J. P. 105; [1897] A.C. 333; 76 L. T. 662; 8 Asp. M.C. 270—H.L. (E.)

— **Ship Navigating within Limits of Port—Passengers—Distressed Seamen.**—Distressed seamen taken on board a ship to be brought home under the provisions of the Merchant Shipping Act, 1894, are not “passengers” within the meaning of section 625 of that Act; and therefore a vessel, which is in other respects within the provisions of that section, is not by reason of having such persons on board excluded from the exemptions from compulsory pilotage contained therein. *The Clymene*, 66 L. J. P. 152; [1897] P. 295; 76 L. T. 811; 46 W. R. 109; 8 Asp. M.C. 237—Gorell Barnes, J.

Vessel Bound from Norway or Sweden—Port North and East of Brest.—The provisions of section 1 of the Merchant Shipping (Exemption from Pilotage) Act, 1897, abolishing exemptions from compulsory pilotage contained in 6 Geo. 4, c. 125, s. 59, and an Order in Council dated February 18, 1854, do not abolish the exemptions from compulsory pilotage contained in section 625 of the Merchant Shipping Act, 1894. A vessel bound from Norway or Sweden to this country is a vessel trading from a port in Europe north and east of Brest within the meaning of section 625 of the Merchant Shipping Act, 1894, and is consequently, when not carrying passengers, exempt from compulsory pilotage. *The Columbus*, 80 L. T. 203; 8 Asp. M.C. 488—Jeune, P.

Decision of Pilotage Authority—Appeal—Power of Magistrate to Extend Time.—By rule 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates), 1890, notice of appeal to a magistrate from the decision of a pilotage authority is to be given in writing to the magistrate and to the pilotage authority by the person aggrieved within seven days after he shall have received a notification of such decision “or within such further time as may be allowed by the magistrate”:—*Held*, that a magistrate has power under the rule to extend the time for appealing, although the prescribed time has expired before the date of the application for the extension. *Re v. Lewis*, 75 L. J. K.B. 508; [1906] 2 K.B. 307; 95 L. T. 476; 10 Asp. M.C. 270—D.

Collision, in Cases of.—*See COLLISION*, col. 2380.

Salvage—Right of Pilot to.—*See SALVAGE*, col. 2420.

11. TOWAGE.

Contract to Dock Ship.—The Court implied, in a contract by tugs to take a ship from her anchorage in Grimsby Roads and dock her at Grimsby, a term that if difficulties arose which prevented the ship from being docked the tugs would take her back to her anchorage again. *The Aboukir*, 21 T. L. R. 200—Gorell Barnes, J.

Failure to Render Material Benefit—Engaged Services—Failure to Accomplish the Service—

Engagement to Tow—Right to Reward.]—The steamship *N.* fell in with the steamship *D.* in the North Atlantic Ocean. The *D.*, which was flying the signal "N C," engaged the *N.* to tow her. The weather was very bad. The *N.* succeeded in making fast to the *D.*, and towed her a short distance. Shortly afterwards the tow-rope parted, and the *N.*, after standing by for some time, continued her course, and did not attempt to render further assistance. The *D.* was subsequently saved by another steamship, the *P.* Upon the owners, master, and crew of the *N.* claiming salvage reward, *Held*, that the action must be dismissed, upon the grounds that the *N.* had not rendered any material benefit to the *D.*, and that she had not accomplished the service she was engaged to perform—namely, to tow; an engagement to tow is only fulfilled by the vessel engaged towing the other into a port of safety. *The Melpomene* (L. R. 4 A. & E. 129) distinguished. *The Dart*, 80 L. T. 23; 8 Asp. M.C. 481—Phillimore, J.

Contract to Tow from One Place to Another for a Fixed Sum—Part Performance—Complete Performance becoming Impossible—Indivisibility of Contract.]—A contract to tow a vessel for a fixed sum from one place to another, the complete performance of which becomes impossible through no fault of either party, is an indivisible contract, and the owners of a tug rendering towage services under such a contract are not entitled to be paid *pro rata*, or any sum, for the towage actually performed. *The Madras*, 67 L. J. P. 53; [1898] P. 90; 78 L. T. 325; 8 Asp. M.C. 397—Jeune, P.

Collision, in Cases of.]—See COLLISION, cols. 2385–2387.

12. LIGHTS.

Lights.]—61 & 62 Vict. c. 44 is the *Merchant Shipping (Mercantile Marine Fund) Act*, 1898.

In cases of collision, see COLLISION, col. 2392.

13. SALVAGE.

Subject-matter of Salvage Services.]—Salvage (apart from life salvage) is by the maritime law of England confined to ship, apparel, and cargo, or what has formed part of these, and to freight earned by carriage of cargo, and is not applicable to a gas float used as a floating beacon, which, though capable of being moved on the face of the water, is not "a ship or vessel" in the sense in which the Merchant Shipping Act uses these terms, or in any fair sense of the words. *Gas Float Whiffon* (No. 2), 66 L. J. P. 99; [1897] A.C. 337; 76 L. T. 663; 8 Asp. M.C. 272—H.L. (E.). Affirming, 44 W. R. 263—C.A.

Services Rendered by Request—No Actual Benefit Resulting Therefrom—Principle upon which Awards will be Made.]—Where a vessel stands by or renders services to another upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration. *The Cambrian*, 76 L. T. 504; 8 Asp. M.C. 263—Gorell Barnes, J.

Signals of Distress Exhibited—Steamtug

Going out to Assistance of Vessel—Services no Longer Required.]—A vessel which goes to the assistance of another in distress, in answer to signals of distress made by the latter, is not entitled to salvage remuneration if the vessel which made the signals no longer requires her services when they are offered. *The Elswick Park*, 72 L. J. P. 79; [1904] P. 76; 89 L. T. 217; 9 Asp. M.C. 481—Bucknill, J.

Vessel in Distress—Telegram Sent—Receivers already Aware of Fact and Sending Assistance.]—The mere sending of a telegram to the effect that a vessel is in distress to persons who are already aware of the fact and are preparing to send to her assistance does not entitle the sender to salvage remuneration. *The Marguerite Molinos*, 72 L. J. P. 56; [1903] P. 160; 89 L. T. 192; 9 Asp. M.C. 421—Bucknill, J.

Agreement to Render Services, not knowing Services already Partly Rendered by Servants—Performance of Agreement.]—Where one party to an agreement agrees to render certain services by his servants at a time when, without his knowing it, his servants have already partly rendered these services, he is none the less bound to treat the acts so done by his servants as in performance of, and done upon the terms of, the agreement. *The Friesland*, 78 L. J. P. 121; [1904] P. 345; 91 L. T. 324; 20 T. L. R. 699; 10 Asp. M.C. 9—Jeune, P.

The owners of a vessel may bind the master and crew without their assent by an agreement with other parties as to future but not as to past salvage services. *Ib.*

Agreement of Owners of a Tug and a Disabled Vessel for Services on Towage Terms—Salvage Services Rendered before Agreement—Rights of Owners, Master, and Crew to Salvage.]—Where tug-owners agreed with the owners of a disabled vessel that their tug should render services to her on towage terms, not knowing that, before the agreement was made, a substantial part of the services (in themselves salvage services) had been performed, the tug-master having previously sighted the vessel, and gone to her assistance, *Held*, that the tug-owners were bound by the agreement that the services should be rendered on towage terms and could not recover salvage reward, but that the master and crew were not so bound and were entitled to salvage reward. *The Inchmaree* (68 L. J. P. 30; [1899] P. 111), col. 2417, followed. *Ib.*

Agreement to Attempt to Tow.]—A vessel which contracts to do her best to tow another to a named port, and, after honestly attempting so to do, fails through no fault of her own, is entitled to remuneration. *The Benlariq* (58 L. J. P. 24; 14 P. D. 3) followed. *The August Korff*, 72 L. J. P. 53; [1903] P. 166; 89 L. T. 194; 9 Asp. M.C. 428—Bucknill, J.

Interrupted Services Contributing to Ultimate Safety.]—Services unavoidably interrupted before completion, which nevertheless materially contribute to the ultimate safety of the saved property, entitle those performing them to salvage remuneration. *The Atlas* (Lush. 513) followed. *Ib.*

Agreement on "no cure no pay" Principle—Reasonableness—Existence of Alternative Agree-

ment—Agreement with Ship's Agents.]—A steamship of the defendants having run on a reef, the master sent a message to the plaintiffs, who had acted as the ship's agents at a neighbouring port, asking them to engage a tug to get the ship off on the "no cure no pay" principle. The plaintiffs hired a tug at the rate of 60*l.* a day, making themselves personally responsible, and informed the defendants by telegraph of what they were doing. The tug proceeded to the ship having on board a representative of the plaintiffs, who took with him a letter from the plaintiffs to the master stating that it was impracticable to get assistance on the "no cure no pay" principle. The master refused to accept the services of the tug on the footing on which she was engaged, and eventually entered into an agreement on behalf of his owners with the plaintiffs' representative to pay the plaintiffs, on the "no cure no pay" principle, the sum of 4,000*l.* if they succeeded in getting the ship off. The tug got the ship off in two days. The plaintiffs claimed 4,000*l.*:—*Held*, that the agreement for 4,000*l.* was one which ought not to be enforced, because it was unreasonable for the master to enter into any such agreement when he was in a position to get, under the existing agreement for 60*l.* a day, practically all that he got under the new agreement. *The Crusader*, 76 L. J. P. 102; [1907] P. 196; 97 L. T. 20; 23 T. L. R. 382—C.A. Affirming, 10 Asp. M.C. 353—Gorell Barnes, P.

Agreement—Services already Performed—Authority of Master of Salving Vessel.]—The master of a salving vessel has no authority to make an agreement binding his owners and crew as to the remuneration to be paid for a salvage service already performed, except where such service is merely some slight step in one continuous salvage operation, and would, by itself, give no right to salvage remuneration. *The Inchmaree*, 68 L. J. P. 30; [1899] P. 111; 80 L. T. 201; 8 Asp. M.C. 486—Phillimore, J.

Extortionate Agreement for Salvage.]—A sailing vessel dragged her anchors in Holyhead Harbour during a gale of wind towards another sailing vessel, which was also at anchor. In answer to signals made by the vessel which had dragged, a steamtug came out, but her master refused to put a rope on board unless he was paid 1,000*l.* for his services. This sum the master of the sailing ship eventually agreed to give him, and the tug, having held the ship till she had weighed her anchors, towed her away. In an action brought by the owners, master, and crew of the tug against both sailing ships, claiming 1,000*l.* under the agreement against the ship whose anchors had dragged, and salvage against the other,—*THE COURT* in the one case set aside the agreement as inequitable, and awarded a sum of 200*l.* to the plaintiffs, with costs on the County Court scale, and in the other dismissed the action, the Elder Brethren having advised the Court that the circumstances were not such as to have led a prudent master himself to engage a tug to tow the other ship away. *The Port Caledonia and the Anna*, 72 L. J. P. 60; [1903] P. 184; 89 L. T. 216; 52 W. R. 223; 9 Asp. M.C. 479—Bucknill, J.

Services Rendered by Vessels Specially

Equipped for Salvage Purposes.]—The Court, in order to encourage the maintenance of vessels specially built and equipped for, and solely employed in, rendering salvage services, will take that factor into consideration and will be liberal in awarding salvage remuneration for services rendered by such vessels to a vessel which but for such services would have become a total loss. *The Glengyle*, 67 L. J. P. 48; [1898] P. 97; 78 L. T. 139; 46 W. R. 308; 8 Asp. M.C. 341—C.A. Affirmed, next case.

Services Rendered by Steamtug Kept by National Lifeboat Institution expressly to Tow Lifeboat—No Actual Services Rendered by Crew of Lifeboat—Identification of Lifeboat Crew with Tug.]—A steamtug belonging to the National Lifeboat Institution, and kept expressly to tow the lifeboat, proceeded with the lifeboat in tow to a vessel in distress. The tug took the vessel in tow, the lifeboat during the towage being made fast astern of the vessel. The lifeboat crew did not render any actual service. It was proved that the tug and lifeboat were obliged to remain together:—*Held*, that the crew of the lifeboat were entitled to be rewarded as salvors of property. *The Auguste Legembre*, 71 L. J. P. 53; [1902] P. 123; 86 L. T. 358; 50 W. R. 622; 9 Asp. M.C. 279—Gorell Barnes, J.

Services of Steamtug declined by Vessel in Distress, but accepted as a Precaution by another Tug engaged in rendering Services—Award.]—The master of a vessel already in tow of two steamtugs which were rendering salvage services, declined to accept the assistance of a third tug which offered her services. One of the tugs already towing, however, directed the third tug to make fast ahead of her, in case further assistance should be required. The services of the third tug were not in fact required, but she assisted in towing the vessel to a place of safety:—*Held*, that the third tug was entitled to a salvage award. *Id.*

Service by Steam-tugs—Vessel in Tow—Towing Clear of another Vessel—Claim against other Vessel.]—A steamship, whilst leaving the Alexandra Dock at Hull in charge of two steam-tugs, fouled her propeller and drove foul of a French barque which, with tugs in attendance upon her, was waiting to enter the dock. The vessels drove together until the barque went ashore. The tugs in attendance on the steamer subsequently towed her away clear of the barque. In an action in which the tugs in attendance on the steamer claimed salvage against the barque,—*THE COURT* dismissed the claim on the ground that it was not satisfied that, in the circumstances of the case, a reasonably prudent man in the position of the master of the barque would have engaged the tugs on his own behalf to tow the steamer clear. *The Annapolis* (Lush. 355) and *The Vandyc* (7 P. D. 42) followed. *The Emilie Galline*, 72 L. J. P. 39; [1903] P. 106; 88 L. T. 743; 9 Asp. M.C. 401—Bucknill, J.

Tug and Tow—Collision of Tow with another Vessel—Negligence of both Tow and Master of Tug—Subsequent Services to Tow by Tug—Claims for Salvage by Owners and Crew of Tug.]—Where a collision or other occurrence has originated in the negligence of both a tug and her tow, and that occurrence requires services

of a salvage nature to be rendered by the tug to the tow, the tug cannot claim salvage remuneration. *The Duc d'Aumale* (No. 2), 73 L. J. P. 8; [1904] P. 60; 89 L. T. 486; 52 W. R. 319; 9 Asp. M.C. 502; 20 T. L. R. 14—Gorell Barnes, J.

A collision occurred between two vessels, one in tow of a tug, caused by the negligence of both the tow and the tug, and the negligence of the tug was that of her master alone. Owing to the collision the tug subsequently rendered services of a salvage nature to the tow, but the crew of the tug incurred no risk, and did nothing more than their ordinary duties on the tug. The towage contract provided "that to all intents and purposes whatsoever the master and crew of the tug . . . shall be deemed . . . to be the servants of the owners of the vessel . . . towed," and was to the effect that the owners of the tug should not be answerable, and the owners of the tow should indemnify them against all liability for any loss or damage to the tow arising from the negligence of the master of the tug, and that the hiring of the tug was not to prejudice any claim of the tug-owners to salvage.—*Held*, that neither the owners of the tug nor her crew could recover salvage remuneration. *Ib.*

Towage Contract—Counterclaim—Contributory Negligence—Pilot.—Where a ship in tow of a steam-tug suffers damage by reason of the negligence of those on board the tug, her owners are entitled to recover in respect of that damage from the owners of the tug, notwithstanding the fact that the negligence of a pilot in charge of the ship by compulsion of law contributed to the mischief. *The Adam W. Spies*, 70 L. J. P. 25—Jeune, P.

Damage Sustained by Salvaging Ship in Rendering Service—Liability of Vessel Salvaged—Burden of Proof.—Where a vessel is injured or lost in rendering salvage services the presumption is that the injury or loss was caused by the necessities of the service and not by the default of the salvors, to whom compensation may be awarded in respect thereof. *The Baku Standard*, 70 L. J. P.C. 98; [1901] A.C. 549; 84 L. T. 738; 9 Asp. M.C. 197—P.C.

Cargo of Government Stores—Action in Personam—Salved Vessel on Time Charter—Charterers Responsible for Safe Delivery.—Charterers of a ship on a time charter who receive goods on board the ship for purposes of delivery in consideration of freight, and who are responsible for their safe delivery, have such an interest in the goods as will support a claim for salvage services rendered in respect of them. The salvors may recover in an action *in personam*. *The Steel Barges* (59 L. J. P. 77; 15 P. D. 142) followed. *Port Victor* (Cargo *ex*), 70 L. J. P. 52; [1901] P. 243; 84 L. T. 677; 49 W. R. 578; 9 Asp. M.C. 182—C.A.

Claim by Master and Crew—Vessels Insured in Mutual Insurance Clubs—Agreement by Owners to Determine all Questions of Salvage by Arbitration—Proof.—In an action for salvage brought by the master and crew of one fishing vessel against the owner of another such vessel the defendant sought to prove that the plaintiffs had, by acquiescence, agreed to be bound by an

arrangement alleged to have been arrived at by the respective owners, by which all questions of salvage were to be referred to the arbitration of the committee of the mutual insurance clubs, in which the vessels were respectively insured. THE COURT found that the plaintiffs had not so agreed to be bound. *The Margery*, 71 L. J. P. 83; [1902] P. 157; 86 L. T. 863; 50 W. R. 654; 9 Asp. M.C. 304—D.

Claim by Pilot on Board Salvaging Ship.—A pilot employed to pilot a vessel which is towing another vessel in distress is entitled as against the salved property to be remunerated as a salvor in respect of his services to that property, if in the performance of them he runs risk outside what can reasonably be considered to have been within the ordinary scope of his employment as pilot. *The Santiago*, 70 L. J. P. 12; 83 L. T. 439; 9 Asp. M.C. 147—Gorell Barnes, J.

Perishable Cargo—Danger to Cargo and Freight—Separate Award against Cargo.—Where salvage services have been rendered in circumstances in which the danger to a perishable cargo and the freight is much more serious than that to the ship, a separate salvage award may be made against the cargo and freight. *The Velox*, 75 L. J. P. 81; [1906] P. 263; 95 L. T. 271; 10 Asp. M.C. 277—Gorell Barnes, P.

A Norwegian steamship with a cargo of herrings, having practically exhausted her coal, was towed by a steam trawler from the edge of the Dogger Bank to off Grimsby, and brought safely into port. The cargo of herrings if kept out even two days longer would have become useless. The value of the steamship was 1,875*l.*, of the cargo 1,060*l.*, and of the freight 136*l.* The Court made an award of 180*l.* against the steamship, and of 420*l.* against the cargo and freight. *Ib.*

Amount of Award—Powers of Court of Appeal.—In the absence of exceptional or extraordinary circumstances the House will not interfere with the amount of an award for salvage services made by the Court of first instance and confirmed by the Court of Appeal, even though the award be larger than their Lordships would have granted if the question had come before them for assessment in the first instance. *The Glengyle*, 67 L. J. P. 87; [1898] A.C. 519; 78 L. T. 801; 8 Asp. M.C. 436—H.L. (E.)

Derelict—Award of Whole Proceeds to Salvors.—A dismasted barque, on fire and abandoned by her crew, was about twenty miles from port, when the tug *D.* went out to her, and, taking her in tow with some difficulty, brought her into harbour, and with the help of another tug put out the fire by pumping water on her, and then stood by for two days. The vessel and her cargo were sold, but the total net proceeds, after deducted expenses and payments to the other tug and fishermen for assistance, amounted only to about 37*l.* In the salvage action by the owners, master, and crew of the tug *D.*, the Court gave judgment by default, and awarded the total net proceeds to the salvors without a reference. *The Louisa*, 75 L. J. P. 76; [1906] P. 145; 94 L. T. 553; 10 Asp. M.C. 256—Bargrave Deane, J.

— **Appeal as to.**—A Danish schooner of ninety tons was found derelict about ninety miles from Iceland by a steam trawler, which towed it to Aberdeen, 500 miles distant. The salvage was effected without material risk at a cost of about 150*l.* The vessel was valued at 800*l.*, and the cargo at 300*l.* In the Sheriff Court the salvage was fixed at 400*l.* On appeal, the Court, while indicating the opinion that the award was, in the circumstances, very liberal, refused to interfere with it, on the ground that it was not so extravagant as to warrant interference by a Court of Appeal. *Jørgensen v. Neptune Steam Fishing Co.*, 4 F. 992—Ct. of Sess.

— **Alteration on Appeal.**—It is not the practice of the Judicial Committee to vary the decision of a Court below on a question of amount merely on the ground that if the case had come before them in the first instance they might have awarded a different sum. *The Baku Standard*, 70 L. J. P. C. 98; [1901] A.C. 549; 84 L. T. 788; 9 Asp. M.C. 197—P.C.

Value of Salvaged Vessel—Reduced Value Due to Salvaged Vessel Refusing Sufficient Assistance.—The plaintiffs' steam trawler rendered salvage services to the defendants' steamship and towed her in bad weather close to port, where the steamship improperly refused to employ a tug which would have taken her in safely, and in consequence went ashore and was badly damaged, and incurred heavy expenses for other salvage assistance to get into port. In an action for salvage, *Held*, that the plaintiffs were entitled to an award based on the value of the steamship as she lay close to port before the stranding, without deduction for the damage by stranding or the subsequent salvage expenses. *The Germania*, 73 L. J. P. 59; [1904] P. 181; 90 L. T. 296; 9 Asp. M.C. 538—Gorell Barnes, J.

— **Practice—Appraisement—Conclusiveness—Market Value—Value to Owners.**—In an action of salvage, when the salvaged property has been appraised under a commission of appraisement, the appraised value in ordinary cases is conclusive. For the purpose of appraisement, when there is a divergence between the market value of the salvaged vessel and her value to her owners, the proper value to be taken is the value to the owners. *The Hohenzollern*, 76 L. J. P. 17; [1906] P. 339; 95 L. T. 585; 10 Asp. M.C. 296—Bargrave Deane, J.

Apportionment of Award—Members of Crew of Salvaging Ship—Distinction in Apportioning Award.—In apportioning a salvage award the Court has regard both to the actual services rendered and risks run by individual members of the crew of the salvaging ship; and also discriminates between those members of the crew who are actually engaged in working the ship and those whose duty it is to attend on passengers or to look after livestock or other matters not connected with the navigation of the vessel. *The Minneapolis*, 71 L. J. P. 28; [1902] P. 30; 86 L. T. 263; 9 Asp. M.C. 270—Gorell Barnes, J.

— **Navigation and Engineer Officers' Ratings—Separate Representation of Some Members of Crew—Costs.**—The tank steamship *L.* fell in with the disabled twin-screw steamship *B.* in

the North Atlantic and towed her into Halifax, a distance of about 280 miles. The *B.*'s boat was employed in passing the hawsers and making the vessels fast. No member of the crew of the *L.* performed any special service. On December 1, 1905, the solicitors acting for the owners of the *L.*, without any direct authority from the crew, who numbered thirty-six, issued a writ on behalf of the owners, master, and crew of the *L.*, claiming salvage for services rendered to the *B.*, her cargo and freight, and on December 12, 1905, delivered a statement of claim on behalf of the owners, master, and crew of the *L.*, to which on December 27 the owners of the *B.* delivered a defence. On December 18 twelve of the crew of the *L.*, four able seamen and eight firemen—gave notice to the defendants' solicitors of a change of solicitors, and on January 5, 1906, a further statement of claim was delivered on behalf of the twelve, and on January 10 the owners of the *B.* delivered a defence to that claim. On the hearing of the salvage suits the owners, master, and twenty-four of the crew were represented by two counsel, and the remaining twelve of the crew were also separately represented by two counsel. Counsel for the owners, master, and twenty-four of the crew, when asking for an apportionment, stated that if the usual practice was followed of apportioning the salvage among the crew according to their rating, the effect would be that the engineer officers would receive more than the navigating officers, who probably had had harder work in consequence of the salvage than the engineer officers had had:—*Held*, that, as the navigating officers had not taken any extraordinary part in the salvage service, they were not entitled to an increased share in the award, which would be apportioned amongst the crew according to their rating. *The Bremen*, 94 L. T. 380; 10 Asp. M.C. 229—Bargrave Deane, J.

Counsel for the twelve seamen asked for costs. The twelve seamen had recovered salvage, and were entitled to be represented; they had given no retainer to the owners' solicitors to appear for them. The owners of the *B.* opposed the application on the ground that, as the interests of the twelve seamen were exactly similar to that of the rest of the crew, who were represented by counsel for the owners, there was no necessity for separate representation. The owners of the *B.* asked that the twelve seamen should be ordered to pay the extra costs to which they had been put by reason of the separate representation:—*Held*, that the twelve seamen were not entitled to costs, but that they were not to be condemned in costs. *Id.*

— **Navigating and Engineer Officers.**—On the hearing of a salvage suit brought by the owners, master, and crew of the steamship *E.* to recover salvage for services rendered to the *I.*, an apportionment between the owners, master, and crew of the salvaging vessel was asked for. The navigating officers on the *I.* were rated at a lower rating than the engineer officers; and if the salvage was distributed among the crew according to their ratings, the navigating officers would have received less than the engineer officers:—*Held*, that the salvage should be distributed among the officers as though the navigating officers were rated at the same rate

as the engineer officers of the same grade. *The Bremen* (94 L. T. 381) not followed. *The Italia*, 95 L. T. 398; 10 Asp. M.C. 284—Gorell Barnes, P.

— **Rating of Navigating Officers.**—In the apportionment of a salvage award it is now an established rule, as regards the portion awarded to the crew of the salving ship according to their ratings—that is to say, salaries—that the rating of each of the navigating officers shall be treated as equal to that of the corresponding grade of engineer officer—the chief officer's rating being treated as equal to that of the chief engineer, the second officer's to that of the second engineer, and so on. *The Birnam*, 76 L. J. P. 28; 96 L. T. 792—Bargrave Deane, J.

Life Salvage—Foreign Ship—Outside Limit of British Jurisdiction—Services Rendered “wholly or in part” within British Waters.—Salvors rendered services in saving the lives of the crew of a foreign ship which was in distress outside British waters by taking them off the ship and bringing them to an English port, where they were landed. The ship was subsequently salvaged by other salvors. In an action brought by the first-named salvors for life salvage, *Held*, that the services rendered in saving life were so rendered “in part” in British waters, and that the plaintiffs were therefore entitled to an award. *The Pacific*, 67 L. J. P. 65; [1898] P. 170; 79 L. T. 125; 46 W. R. 686; 8 Asp. M.C. 422—Jeune, P.

— **Vessel—Salvage on High Seas.**—A British steam trawler rescued seamen from a disabled foreign vessel on the high seas at a point 200 miles distant from the nearest land. The salvors landed the seamen at Hull, the port for which the trawler was bound:—*Held*, that no salvage award was payable, as the salvage was complete when the seamen were taken on board a seaworthy vessel, and was therefore “not rendered wholly or in part in British waters” within section 544, sub-section 1 of the Merchant Shipping Act, 1894. *Jørgensen v. Neptune Steam Fishing Co.*, 4 F. 992—Ct. of Sess.

Misconduct of Salvors—Agreement to Pay Master of Salvaged Vessel a Share of Salvage Award—Forfeiture of Right to Salvage.—In a case arising out of an alleged agreement for the apportionment of a salvage award, evidence, to some extent conflicting, was given that before the salvage services were rendered an arrangement was made between the master of the vessel to be salvaged and the salvors that the master should be paid 5 per cent. of the salvage award:—*Seemle*, if an agreement to this effect were proved, it would amount to misconduct on the part of the salvors, for which in all probability they would forfeit all rights to salvage whatever. *The Kolpino*, 73 L. J. P. 29—Gorell Barnes, J.

Power of Receiver of Wreck to Detain Salvaged Property—“Salvage due under this Act.”—The receiver of wreck has power to detain property until payment made or process issued, wherever a claim for salvage recoverable under the Merchant Shipping Act, 1894, is made in respect thereof. *The Fulham*, 68 L. J. P. 75;

[1899] P. 251; 81 L. T. 19; 47 W. R. 598; 8 Asp. M.C. 559—C.A.

The words “due under this Act” in section 552 mean recoverable under the Act, and are not confined to salvage due under sections 544 to 546. *Ib.*

Where a claim was made for salvage services rendered to a vessel at a distance of twenty miles from shore, *Held*, that the receiver of wreck had power to detain the vessel till payment made or process issued. *Ib.*

Right of Action for Salvage—Lifeboat—Launchers.—Launchers who launch a lifeboat contemplating that it will render either life salvage only, in which case they will look to be paid by the Lifeboat Institution, or property salvage, in which case they will look to be paid out of the sum recovered for the salvage service, are entitled, if property is in fact salvaged, to bring an action for salvage. *The Cayo Bonito* (No. 2), 73 L. J. P. 93; [1904] P. 310; 91 L. T. 102; 9 Asp. M.C. 603; 20 T. L. R. 576—Gorell Barnes, J.

Consolidation of Actions—Costs—Country Solicitor.—In a consolidated salvage suit the two sets of plaintiffs were at issue at the trial as to the merits of the services performed by them respectively, and the Judge at the trial directed that the costs of two counsel should be allowed to both sets of plaintiffs. The district registrar, upon taxation, disallowed the costs of the attendance at the trial in London of the country solicitor to that set of plaintiffs who had not had the conduct of the consolidated suit. Those plaintiffs appealed:—*Held*, that, inasmuch as the Judge at the trial had considered it reasonably necessary for the elucidation of the true state of the facts that both sets of plaintiffs should be represented by two counsel, it was also reasonably necessary that the country solicitor should be in attendance at the trial, and he ought to be allowed the costs of attendance. *The Metropolis*, 81 L. T. 236; 8 Asp. M.C. 583—Bucknill, J.

Co-salvors—Consolidated Suits—Separate Representation by Counsel—Costs.—The *P.*, a four-masted steel barque of 2,138 tons register, while on a voyage from Belfast to Antwerp in tow of the tug *H.*, which was under contract to tow her to Flushing, met with heavy weather, and, while running for shelter, broke adrift from the *H.*, but managed to bring up near Pladda Island with a full scope of chain out on both her anchors. When the *H.* came up to the *P.* it was found that the anchor chains of the latter were foul, that the anchors could not be raised, and that they would have to be slipped. The master of the *P.* then sent the *H.* for further assistance, and the *H.* brought back the tug *F. S.* The *H.* and *F. S.* then took the *P.* to Greenock, where she was safely moored. The owners, masters, and crews of both tugs instituted proceedings for salvage, the owners of the *H.* claiming that the towage contract had been superseded by the events which had happened. The salvage suits were consolidated, the conduct of the action being given to the owners of the *F. S.* At the trial of the action the *H.* was represented by a leading and junior counsel. The *F. S.* was also

represented by two counsel. The Court awarded each salvor 300*l*. Counsel for the *H.* asked for a certificate for the separate representation of the *H.* by two counsel:—*Held*, that as the defendants had alleged that the *H.* was not entitled to salvage, but was only fulfilling her agreement, the owners of the *H.* were entitled to be separately represented by two counsel. *The Pollalloch*, 94 L. T. 556; 10 Asp. M. C. 255—Bargrave Deane, J.

Costs.—There is no hard-and-fast rule as to the costs of a successful appeal in a salvage action. Where the defendants succeeded on appeal in getting the amount of the award considerably reduced,—*Held*, that they were entitled to the costs of the appeal, the costs in the Court below remaining as they were. *The Prince Llewellyn*, 89 L. T. 489—D.

Costs of Salvage Action—Salvage Rendered Necessary by Negligence of Tug—Recovery of Costs from Wrongdoer as Damages.—A ship while being towed by the tug *Teign* suffered damage. Salvage services were rendered by the *Teign* and also by the tug *Regia*. In an action by the owners, masters, and crew of these tugs it was found that the salvage services were necessary owing to the negligent towage by the *Teign* in the first instance. The claim on behalf of the owners, &c., of the *Teign* was accordingly dismissed with costs, and those owners were ordered to pay to the owners of the salvaged vessel the damage she sustained and the amount awarded as salvage to the *Regia*:—*Held*, that the costs of the action by the *Regia* should be added to and be recoverable as damages by the owners of the salvaged vessel against the owners of the *Teign*. *The Kauss*, 20 T. L. R. 326—Gorell Barnes, J.

Appeal in Salvage Action—Award Reduced on Appeal—Costs.—On appeals to salvage actions there is no hard-and-fast rule of practice that appellants who succeed in reducing the award will not get costs. Costs allowed to successful appellants under the circumstances. *The Prince Llewellyn*, 73 L. J. P. 22; [1904] P. 83; 89 L. T. 489; 9 Asp. M.C. 505—D.

Amount of Award Reduced—Costs.—There is no hard-and-fast rule of practice that on appeals in salvage actions an appellant who succeeds in getting the amount of an award reduced will not be allowed the costs of the appeal. *The Prince Llewellyn* (73 L. J. P. 22; [1904] P. 83) followed. *The Toscana*, 74 L. J. P. 54; [1905] P. 148; 93 L. T. 392; 53 W. R. 405; 10 Asp. M.C. 108; 21 T. L. R. 329—C.A. *And see PRACTICE*, col. 2444.

Crown—Liability of.—*See CROWN.*

Division of Amount—Construction of Charter-party.—*See Booker v. Pocklington Steamship Co.*, 69 L. J. Q.B. 10; [1899] 2 Q.B. 690.

Staying Proceedings.—*See ARBITRATION*, vol. 33.

14. HARBOURS, DOCKS, AND PIERS.

“Limits of port”—Fiscal or Local—Inland Docks above High-water Mark—Admissibility of Evidence—“Contemporanea expositio”—Entries

in Course of Duty—Reputation.—The trustees under the Carnarvon Harbour Acts, 1793 and 1809, are entitled to levy tolls on vessels loading or unloading within the limits of the port of Carnarvon. The plaintiff constructed docks and quays above the old high-water mark and artificially connected with the sea on his own land at Dinorwic, four miles north of Carnarvon, but within the area of the customs or fiscal port of Carnarvon, and at these docks and quays he loaded ships owned or chartered by him with slates from the Dinorwic quarries. These ships generally sailed through the north end of the Menai Straits, and on their return also unloaded goods for the plaintiff's use at Dinorwic. In the view of the Court the plaintiff participated in the benefit of the works done by the trustees under the Acts for the better navigation of the Straits:—*Held*, that the trustees were entitled to levy tolls under the Acts on the plaintiff's ships loading or unloading at Dinorwic; *STIRLING, L.J.*, and *COZENS-HARDY, L.J.*, being of opinion that on the true construction of the Acts, and having regard to the usage which had always prevailed, the “limits of the port” denoted the fiscal port of Carnarvon; *VAUGHAN WILLIAMS, L.J.*, being of opinion that (whether or not such words extended to the whole fiscal port) they did extend at least to a port having an area which covered Dinorwic. *Assheton-Smith v. Owen*, 75 L. J. Ch. 181; [1906] 1 Ch. 179; 94 L. T. 42; 10 Asp. M.C. 164; 22 T. L. R. 182—C.A.

Held also, that the limits of the port extended to the plaintiff's docks, though more inland than the old high-water mark, the limits following the line of high water for the time being. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—The meaning of the words “port” or “limits of the port” in Acts passed in 1793 and 1809 for improving and regulating the harbour of Carnarvon ought not to be determined by the definition of the port of Carnarvon in a certificate made in 1723 by Commissioners under 13 & 14 Car. 2, c. 11, an Act passed for preventing frauds and regulating abuses in the Customs. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—The words “limits of a port” have not acquired a recognised technical meaning as denoting a fiscal port, and *Kingston-upon-Hull Dock Co. v. Browne* (2 B. & Ald. 43) is no authority for such a proposition. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—In the absence of any definition, evidence is admissible to shew what was reputed amongst the officers administering the Carnarvon Harbour Acts in past times to be the port of Carnarvon; and evidence of the collection of rates from people well able to resist an unjust imposition may be evidence of a *contemporanea expositio* shewing that these Acts had always been applied to a port outside the limits of the local port. *Per COZENS-HARDY, L.J.*—The doctrine of *contemporanea expositio* cannot be applied in construing these comparatively modern Acts. *Ib.*

On appeal to the House of Lords, the House held that Port Dinorwic, the property of the appellants, formed part of the port of Carnarvon within the meaning of the Carnarvon Harbour Acts of 1793 and 1809, and that the dues

imposed by those Acts were payable in respect of the use of Port Dinorwic. *Assheton-Smith v. Owen*, 76 L. J. Ch. 308; [1907] A.C. 124; 96 L. T. 478; 23 T. L. R. 385—H.L. (E.)

Harbour Authority—Duty to Provide Efficient Tugs—Liability.—The appellants, a port and harbour authority, undertook the towage of the respondents' vessel up their river by a particular tide. The respondents' vessel was preceded by two smaller vessels each in charge of a tug, and the leading tug, from some cause not explained by the appellants, was so long in accomplishing the journey that the respondents' vessel was stranded and damaged by reason of the fall in the tide. The tugs were hired for the purpose by the appellants. The time and order of departure of the several vessels were arranged by the harbour-master, the servant of the appellants:—*Held*, that the appellants were liable for the damage caused to the respondents' vessel. *The Ratata*, 67 L. J. P. 73; [1898] A.C. 513; 78 L. T. 797; 47 W. R. 156; 8 Asp. M.C. 427—H.L. (E.)

Tolls—Duty to Provide Buoys, Beacons, and Lights—Power to Borrow Money for this Purpose—Money not wholly Expended in Providing Buoys, &c.—The plaintiffs, as the harbour authority of Q., were empowered by statute to levy tolls on every vessel stopping in the harbour more than one tide. By the same Act they were authorised to borrow a certain sum for the purpose of providing such buoys, beacons, and lights as might be necessary for the guidance of vessels using the harbour, and a like sum for maintaining the sea and river walls, quays, &c. The limits of their borrowing powers in each case were reached. The larger portion of the amount borrowed had been expended in maintaining the sea walls, &c., and not in providing buoys, &c. A substantial sum had, however, been paid out of revenue for this latter purpose:—*Held*, in an action for tolls, that the fact that the whole of the amount borrowed for the purpose of providing buoys, &c., had not been expended for that purpose was no defence to the claim. *Queenborough Corporation v. Sneed, Dean & Co.*, 68 J. P. 244; 20 T. L. R. 279—Walton, J.

Wharf in Harbour—Defective Berth—Damage to Vessel—Statutory Duty of Harbour Authority to Render Berth Safe and Commodious—Liability of Harbour Authority for Neglect of Statutory Duty—Duty of Wharfowner to take Reasonable Care to Ascertain Condition of Berth Alongside Wharf—Duty to Warn Vessel—Liability for Damage to Vessel from Breach of Duty.—A harbour authority, upon whom the duty is imposed by statute to do all such works as should be necessary for preserving the navigation and use of the harbour by persons trading thereto and rendering it safe and commodious, cannot relieve themselves from the performance of that duty by relying upon its being performed by some one else, and will therefore be liable for damage sustained by a vessel in consequence of the bed of a berth in the harbour being in a dangerous condition owing to a failure on their part to take soundings to ascertain its condition, having relied on soundings being taken by the Trinity House pilots, who were not their servants, but the servants of, and only responsible for the per-

formance of their duties as pilots to, the Trinity House; and wharfingers, who are the owners of a wharf in the harbour which they invite the owners of vessels to use for the purpose of loading and discharging cargoes on payment of dues to them, being bound—within the rule laid down in *The Moorcock* (58 L. J. P. 73; 14 P. D. 64)—to take reasonable care to ascertain whether a berth lying alongside their wharf is in a safe and proper condition, and, if not, to warn the owners of a ship about to use the berth that they have not done so, are not entitled to rely solely upon the harbour authority performing their statutory duties in connection with the berth, and consequently will be liable, as well as the harbour authority, for damage sustained by a vessel owing to the defective condition of the berth. *The Bearn*, 75 L. J. P. 9; [1906] P. 28; 94 L. T. 265; 10 Asp. M.C. 208; 22 T. L. R. 165—C.A.

Steam Tug—Tug for Moving Steam Trawlers in Dock—Right of Owners of Steam Trawlers to have their Own Tug.—The owners of steam trawlers are not entitled under section 33 of the Harbours, Docks, and Piers Clauses Act, 1847, and section 247 of the Manchester, Sheffield, and Lincolnshire Railway Co. Act, 1849, to have one of their own tugs in the Grimsby Docks for the purpose of moving the trawlers to different parts of the dock as required. *Great Central Railway v. North-Eastern Steam Fishing Co.*, 22 T. L. R. 520—Walton, J.

Defective Welding of Ring on Buoy—Omission of Adequate Test—Liability of Harbour Commissioners.—Owing to its defective welding the ring of a buoy broke off, and a ship which was attached thereto by a cable parted from her moorings and sustained damage. The buoy had been in use a short time only; it had been purchased by the harbour commissioners from a first-class manufacturer, and the defect in the welding could not have been discovered by inspection or by the ordinary test of hammering. It is not usual for manufacturers to submit such rings to any test unless required to do so by the specification; but if so required (which is frequently but not universally done), they are tested by a public department in a well-known and recognised manner analogous to the testing of cable chains. This precaution had not been taken by the harbour commissioners:—*Held*, that the omission was actionable negligence rendering the commissioners responsible for the result of the accident. *Burrell v. Tuohy*, [1898] 2 Ir. R. 271—Q.B. D.

Rates—Goods Imported “from parts beyond the seas”—Goods Imported “coastwise”—Goods Transhipped at English Port in Course of Transit.—Goods shipped from a foreign port under a through bill of lading to Liverpool, landed in London, and sent thence to Liverpool in another ship, are imported into Liverpool “from parts beyond the seas,” within the meaning of section 234 of the Mersey Dock Acts Consolidation Act, 1858. *Mersey Docks and Harbour Board v. Twigge*, 67 L. J. Q.B. 604—Mathew, J.

Maximum Sum—Lease from Harbour Company—Power of Lessee to Raise Rates.—Under sections 78 and 79 of the Paignton Harbour Act, 1838, the harbour company are entitled to levy

quay dues on goods landed in the harbour, which are not specified in Schedule D to the Act, at the rate of one shilling per ton, or at the option of the company to fix quay dues at a sum not exceeding one tenth part of the freight, so that such rate does not exceed one shilling per ton. Under section 83 of the Act the company only, and not the lessee of the rates, can raise and reduce the rates. *Millman v. Renwick, Willon & Co.*, 22 T. L. R. 168—Swinfen Eady, J.

— **Vessels Loading in the Port—Port of Carnarvon.**—"Within the limits of the said port."—The village of Port Dinorwic, situated on the Menai Straits, about four miles north of Carnarvon, is within the limits of the port of Carnarvon, so as to make vessels loading at Dinorwic liable to pay dues to the trustees of the Carnarvon Harbour Trust under section 16 of the Carnarvon Harbour Act, 1793. *Held* also that certain docks and quays constructed at Dinorwic on land which was above high-water mark at the date of the Act of 1793, but to which now by artificial means the sea has access, are within the limits of the port of Carnarvon within the meaning of the Act. *Assheton Smith v. Owen*, 20 T. L. R. 755—Kekewich, J.

— **Exemption—Barge Entering Dock with Cargo for Vessel in Dock—Barge Leaving Dock without having Discharged Cargo.**—"Bona fide engaged in discharging."—The West India Dock Act, 1831, by section 76, empowers the dock company to take in respect of every lighter or barge entering into any of their docks or lying therein reasonable tonnage rates; and by section 83 provides that all lighters and craft entering into the docks to discharge or receive ballast or goods to or from any ship or vessel lying therein shall be exempt from rates "so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods." Two barges entered the East India Dock laden with goods intended to be discharged into a vessel then lying in the dock. The barges lay alongside until it was found that the vessel was full and unable to take any more goods, and the barges then left the dock without having discharged any part of their cargoes. The dock company claimed the dock rates upon the barges, contending that, as the barges had not discharged their cargoes or any part thereof into a vessel lying in the dock, the barges were not within the exemption in section 83:—*Held*, that, as the barges had entered the dock with the bona fide intention of discharging into a vessel then lying therein, they were "bona fide engaged in discharging" within the meaning of section 83, and were exempt from rates, although no actual discharge had taken place, and, as they had left the dock as soon as it became known that they could not discharge the goods into the vessel, they were exempt from the time they entered until they left the dock. *London and India Docks v. Thames Lighterage Co.*, 97 L. T. 357; 23 T. L. R. 590—C.A.

— **Mersey Docks—"Town dues."**—By section 17 of the Upper Mersey Dues Act, 1860, the right to collect "town dues" was transferred from the Mersey Docks and Harbour Board to a separate body of trustees in respect of all goods "carried or conveyed upon, over, or along

any part of the Upper Mersey," as therein defined:—*Held*, that the section applied to goods carried over any part of the Upper Mersey in the ordinary course of a voyage, not only to goods landed at some port in the Upper Mersey. *Mersey Docks v. Hunter*, 80 L. T. 96; 8 Asp. M.C. 489—H.L. (E.)

— **Cessation from Work—Sunday Lighter.**—Rules of a dock company providing that vessels are not allowed to pass from one basin to another on Sundays, and that no cargo shall be loaded or unloaded, nor shall any unnecessary work be done or permitted to be done on Sunday, do not exempt a barge which, after completing her discharge, might have left the dock by the Sunday tide, but has remained till the following tide, from payment of a dock rate in respect of her delay. The powers conferred upon the London and India Docks Co. by the London and St. Katharine's Docks Act, 1864, ss. 132, 133, and 136, and the East and West India Dock Co.'s Extension Act, 1882, ss. 25 and 26, and Schedule, Part I., and the London and St. Katharine and East and West India Docks Act, 1888, s. 57, do not entitle the company to impose upon any lighter with ballast or goods for or from a ship, and entering the dock before the arrival of such ship, a rate of 6d. per ton register for entering the dock and lying therein for a period not exceeding one week from the date of entrance; or upon any lighter which, having discharged or received ballast or goods to or from on board of a ship, remains in the dock, a rate of 6d. per ton register, for any period not exceeding one week from the tide next following the completion of the discharge or receipt of the ballast or goods. Section 136 of the London and St. Katharine Docks Act, 1864, provides that "All lighters and craft entering into the docks . . . to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods":—*Held*, that under that section a lighter is not disentitled to claim exemption because at the time when she enters the dock the vessel into which she ultimately discharges has not yet arrived there. *McDougall v. London and India Docks Co.*, 96 L. T. 13; 12 Com. Cas. 56; 10 Asp. M.C. 394—Walton, J. Affirmed, 23 T. L. R. 765—C.A.

— **Ship Entering Harbour "only for convenience"—Ship Entering Harbour to be Placed at Disposal of Charterer.**—By the Leith Harbour and Docks Act, 1892, the harbour commissioners are empowered to levy rates from the owners of every ship coming into or going out of the harbour and docks of Leith; and the statutory regulations provide that all vessels entering the harbour "only for safety, convenience, or repairs, shall be charged half rates, but if they shall land or take on board goods or remain in the harbour or docks above one month they shall be charged full rates." By a charterparty it was provided that the owners should let the vessel to the charterers for a period of six calendar months commencing from May 5 to 10, 1905, "at which date she is to be placed, with clear holds, at the disposal of the charterers at Leith," in such dock, wharf,

or place as the charterers might direct, to be employed in such lawful trades between such specified ports in the United Kingdom and on the Continent as the charterers should direct, the charterers to pay all port charges. The vessel arrived at Leith on May 8 in ballast, and was there handed over to the charterers, who loaded her at Leith for one of the specified ports. She paid the full harbour rates for entry at Leith, and the charterers deducted the full rates on paying the stipulated hire to the owners. The owners admitted liability for half the rates, but sued the charterers for the other half:—*Held*, that, as the vessel had entered Leith docks under a contract between the owners and the charterers that she should be delivered there to the charterers, she had not entered "for convenience only," within the meaning of section 58 of the Leith Docks and Harbours Act, and that the owners were liable for the full rates due for her entry. *Aktieselskabet Lina v. Turnbull*, [1907] S.C. 507—Ct. of Sess.

Access to Harbour—Representation by Harbour Authority as to Depth of Water at Gate of Dock—Less Depth at Bar of Harbour—Detention of Ship—Liability of Authority—Implied Warranty.—Where a harbour authority, having by statute a right to charge dues in respect of vessels using the harbour and a duty to render the harbour safe and commodious, advertise that there is a certain depth of water on the sill of a dock within the harbour, they incur at common law an obligation to take all reasonable care to secure that there shall be free and unobstructed access to the dock from the open sea and egress from the dock to the open sea for a vessel whose draught is the greatest that the dock sill will admit of; and where by reason of their failure to perform this obligation a vessel is detained in the harbour, they are liable to her owners for damages for her detention. *Bede Steam Shipping Co. v. Wear River Commissioners*, 76 L. J. K.B. 434; [1907] 1 K.B. 310; 96 L. T. 370; 10 Asp. M.C. 370—C.A.

Semble, that where a harbour authority advertise that there is a certain depth of water on the sill of a dock in the harbour they become bound on an implied warranty to the owner of a vessel who in reliance on the advertisement has sent his vessel to the dock that there is at least an equal depth of water throughout the entire channel of communication between the dock and the open sea, including the bar, if any, at the entrance to the harbour. *Williams v. Swansea Harbour Board* (14 C.B. (N.S.) 845) discussed. *Ib.*

Obligations of Harbour Commissioners—Injury to Vessel from Defects of Berth.—A vessel sustained injuries while lying grounded in a tidal river at a quay under the control of harbour commissioners. The commissioners had laid the berth at the quay with skids in the form of a grid, on which vessels would rest at low tide. The injuries were due to the berth having been allowed to become defective by the skids not being in a uniform gradient and by several of them, at the part where the forward portion of the vessel would rest as she was berthed, being wanting. These defects could have been ascertained by the harbour

commissioners by the exercise of reasonable care:—*Held*, that the harbour commissioners were bound to use reasonable diligence to keep the berth safe, that they had failed to use such reasonable diligence, and that consequently they were liable to the shipowners for the injuries sustained by their vessel. *Steamship Fulwood v. Dumfries Harbour Commissioners*, [1907] S.C. 456—Ct. of Sess.

The *Flying Venus*, a fishing-boat, was laid up for the winter in S. harbour, moored to a quay at a place where the bottom slopes rapidly downwards from the quay wall. Another fishing-boat, the *Victoria*, which was lying in the harbour in a waterlogged condition, was ordered by the harbour-master to be removed to a certain place. Instead of removing her to that place, those in charge of the *Victoria* took her alongside and moored her to the *Flying Venus*. Next day at low tide, when both sides were resting on the bottom, one of the crew of the *Victoria* removed the plug from her and allowed the water to escape, and then replaced the plug. The result of this lightening of the *Victoria* was that at next low tide she failed to take the bottom at the same time as the *Flying Venus*, and by straining at her moorings capsized the latter and damaged her. The owner of the *Flying Venus* sued the harbour authority, alleging negligence on their part in allowing the *Victoria* either to take up or remain in the position alongside the *Flying Venus*:—*Held*, that the facts did not import fault on the part of the harbour authority or of those for whom they were responsible and that they were not liable. *Mackenzie v. Stornoway Pier and Harbour Commission*, [1907] S.C. 435—Ct. of Sess.

Piers on River Thames—Acquisition by London County Council—Power to Levy Tolls—Transference—"Rights and privileges"—"Rights and powers."—By two private Acts of William 4 the G. Pier Co. was authorised to make and maintain a pier, and also to take certain rates, duties, and tolls prescribed by such Acts. W. pier was constructed as a private undertaking, and the lease became vested in the T. S. Co., who made certain charges for the use of such pier. Under the Thames River Steamboat Service Act, 1904, the L. County Council bought from the G. Pier Co. "their undertaking (including therein all the property, estates, rights, and privileges . . . of the Greenwich Co.), and they also purchased the W. Pier "and any rights and powers connected therewith." By section 15 of the Act of 1904 the L. County Council could "charge and levy in respect of vessels calling at the piers and landing places a toll not exceeding the amount stated in the schedule to this Act":—*Held*, that the L. County Council had no statutory right to charge any tolls in respect of G. pier or W. Pier beyond those chargeable by virtue of section 15 of the Act of 1904; and that they were not entitled to charge the tolls prescribed by the private Acts of William 4 in respect of G. Pier, or any reasonable sum in addition to the tolls prescribed by the Act of 1904 in respect of W. Pier. Any facilities, however, provided by the L. County Council which they were not bound to provide under the Act of 1904 would have to be paid for by the person

at whose request, express or implied, they were provided. *London County Council v. General Steam Navigation Co.*, 96 L. T. 57; 10 Asp. M.C. 340—Bray, J.

15. LIGHT DUES.

"Deck cargo" — Freight-earning Cargo — "Timber, stores, or other goods" — Bunker Coal Carried on Deck.]—By section 85, sub-section 1 of the Merchant Shipping Act, 1894, "If any ship . . . carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all duties payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable":—*Held*, that, upon the natural construction of the language of the section, the expression "deck cargo" was wide enough to include goods which were not freight-earning. *Cairn Line v. Trinity House Corporation*, 76 L. J. K.B. 377; [1907] 1 K.B. 604; 96 L. T. 846; 12 Com. Cas. 244; 23 T. L. R. 341—Bray, J. Affirmed in C.A.

A vessel belonging to the plaintiffs took on board a quantity of coal which the plaintiffs had bought for use in the ship's fires during a voyage. Some of the coal was stored on the awning deck, but was afterwards transferred into the thwartship bunkers and consumed in the boiler fires. The coal was not shipped under bills of lading:—*Held*, that the coal so stored on the deck, although it was not freight-earning, came within the words "stores, or other goods" carried as "deck cargo," and that therefore light dues were properly payable by the plaintiffs in respect of the space which it occupied under the provisions of section 85, sub-section 1. *Richmond Hill Steamship Co. v. Trinity House Corporation* (65 L. J. Q.B. 561; [1896] 2 Q.B. 134) discussed. *Ib.*

16. WRECKS.

Removal by Navigation Authority—Abandonment by Owners—Tidal Water—Liability of Shipowners for Expenses.]—Section 47 of the Aire and Calder Navigation Act, 1889, provides that if any vessel shall be sunk in the river Ouse within the limits of the jurisdiction of the undertakers, and the owners shall not forthwith remove the same, it shall be lawful for the undertakers to remove such vessel, and to detain the same until payment be made of all the expenses relating thereto, or to sell such vessel and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus:—*Held*, that, upon the true construction of the section, the time when the expenses were incurred, and not the time when the vessel sank, is the period at which the ownership is to be ascertained, and that the owners of a vessel which sank in tidal water in the river Ouse within the statutory limits, who abandoned her *sine animo recuperandi*, were not liable to pay to the undertakers of the navigation the expenses, incurred by the undertakers after the abandonment, of

unsuccessfully attempting to raise the vessel and of destroying her by explosives. *Barraclough v. Brown*, 66 L. J. Q.B. 672; [1897] A.C. 615; 76 L. T. 797; 62 J. P. 275; 8 Asp. M.C. 290—H.L. (E.)

Raising — Public Body not Making Profit — Remoteness of Damage.]—A public body, with statutory public duties to discharge and power to levy rates for the purpose of discharging those duties, is entitled, though it is not a profit-earning body, to substantial damages in respect of the loss of the use of property injured by the negligence of another, and for the recovery of such damages it is not necessary to prove direct pecuniary loss. *The Greta Holme*, 66 L. J. P. 166; [1897] A.C. 596; 77 L. T. 231; 8 Asp. M.C. 317—H.L. (E.)

A dredger, the property of the Mersey Docks and Harbour Board, the Conservancy authority of the port of Liverpool, was sunk by the negligence of those in charge of the *Greta Holme*. The wreck was raised, and in addition to other items the Board claimed 1,500*l.* damages for the loss of the use of the dredger during the fifteen weeks she was under repair. There was evidence that the dredger might have been let at the rate of 100*l.* a week, and that during its disablement the work of deepening the river had been retarded:—*Held* (Lord Morris dissenting), that the Board were entitled to substantial damages, which the House of Lords assessed at 500*l.* *Ib.*

— Priority — Thames Conservators — Expenses of—Maritime Lien for Collision Damage.]—The statutory lien for expenses in connection with raising a sunken vessel, given by the Thames Conservancy Act, 1894, to the Conservators, takes priority of the claim of the plaintiffs in an action in which the vessel has been arrested to enforce a maritime lien for collision damage. *The Sea Spray*, 76 L. J. P. 48; [1907] P. 183; 96 L. T. 792—Bargrave Deane, J.

Wreck in Navigable River—Duty of Owner to Warn other Vessels.]—The owner of a vessel, sunk in the fairway of a navigable river, so as to be a danger to other vessels, who retains the possession, management, and control of the wreck, is under an obligation to take reasonable care to warn other vessels of its position, and is liable for damage to another vessel occasioned by the neglect to give proper warning, though such neglect was that of an independent contractor employed by him. *The Snark*, 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M.C. 50—C.A.

Independent Contractor — Abandonment of Possession, Management, and Control.]—An owner does not abandon or properly transfer the possession, management, and control of a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck. *Ib.*

Vessel Sunk in Thames—Abandonment by the Owners—Thames Conservators—Recovery from the Owners.]—Under section 77 of the Thames Conservancy Act, 1894, the Conservators of the River Thames, when they have incurred ex-

penses in raising a sunken vessel, can recover the expenses from the owners of the vessel, although the owners have abandoned her before such expenses were incurred. The plaintiffs' vessel sank in the River Thames, owing to a collision with the defendants' vessel, and in the collision action the defendants admitted liability. The Thames Conservators incurred expenses in raising the plaintiffs' vessel, sold her, and, after deducting the proceeds from their expenses, brought an action for the balance against the plaintiffs under section 77 of the Thames Conservancy Act, 1894, and recovered judgment. At the reference in the collision action, the plaintiffs claimed to recover against the defendants the amount due to the Conservators. The managing owner of the plaintiffs' vessel admitted at the reference that (before the expenses of raising were incurred) the intention was to abandon her, and the Registrar reported in effect that the plaintiffs had abandoned her:—*Held*, first, that the Registrar's report was not an order of the Court, and was not binding on the Court; secondly, that the Court was not satisfied that the plaintiffs had abandoned the vessel; and thirdly, that, even if the plaintiffs had abandoned the vessel, this was no defence to the claim by the Conservators against them as the owners of the vessel under section 77 of the Thames Conservancy Act, 1894, for the expenses of raising her; and that the defendants must pay the amount claimed. *The Wallsend*, 76 L. J. P. 181; [1907] P. 302; 96 L. T. 851; 23 T. L. R. 356—Bargrave Deane, J.

Duty to Deliver to Wreck Receiver of District.]—Salvors found a derelict ship, with a cargo, off the coast of Pembrokeshire, and beached her, and communicated with the coast-guard there, the chief officer of whom was the receiver of wrecks for the district. The salvors then, with the knowledge of the coastguard, emptied her of water and took her into port:—*Held*, that the salvors were entitled to salvage, as they had "reasonable cause" for their failure, if there was any failure, to comply with section 518 of the Merchant Shipping Act, 1894, in not delivering the wreck to the receiver of the district. *The Glynoeron*, 21 T. L. R. 648—Bargrave Deane, J.

17. AVERAGE.

Ship and Cargo in Peril—Tipping Ship Head Down to Repair Propeller—Damage to Cargo—General Average Act—General Average Contribution.]—A ship, laden with a perishable cargo which could not by any means be discharged, having on her voyage become unnavigable and incapable of moving through damage to her propeller, is, with her cargo, in peril, although the ship be tight and strong and the cargo sound. If tipping the ship head down to repair her propeller be resorted to, and in the course of the operation a portion of the cargo be damaged by salt water, the cargo-owners have a right to a general average contribution. The operation of so tipping the ship is under the circumstances a general average act, and the loss a general average and not a particular average loss. *McCall v. Houlder*, 66 L. J. Q.B. 408; 76 L. T. 469; 8 Asp. M.C. 252—Mathew, J.

Sacrifice of Mast Dangerous to Whole Adven-

ture—Unfounded Belief that Mast Hopelessly Lost.]—Where in the course of a voyage the master of a vessel, with a view to prevent it from being lost, cuts away a mast in the belief that it is already a hopeless wreck, there is a general average sacrifice if such belief proves to have been unfounded. *Montgomery v. Indemnity Mutual Marine Assurance Co.*, 70 L. J. K.B. 45; [1901] 1 K.B. 147; 84 L. T. 57; 49 W. R. 221; 9 Asp. M.C. 141; 6 Com. Cas. 19—Mathew, J.

Heating of Cargo—Sacrifice of Freight—Deviation to Port of Refuge—Abandonment of Voyage.]—A ship was chartered to carry a cargo of coals from Cardiff to Esquimalt. During the voyage the coals began to heat, and the captain decided for the safety of the ship, freight, and cargo to bear up for Buenos Ayres. Upon examination it was found that the condition of the coals was such that the cargo could not be carried with safety to Esquimalt, and it was condemned and ultimately sold. While at Buenos Ayres the ship and cargo were in safety:—*Held*, that under the circumstances the sale of the cargo constituted the abandonment of the voyage, and that as at that time the common danger had ceased there was no such general average sacrifice of the freight as would form the subject of general average contribution. *Iredale v. China Traders' Insurance Co.*, 69 L. J. Q.B. 783; [1900] 2 Q.B. 515; 83 L. T. 299; 49 W. R. 107; 5 Com. Cas. 397; 9 Asp. M.C. 119—C.A.

Ship Putting into Port of Refuge—Consequential Loss to Cargo-owner—Wages of Cattle-men—Cost of Fodder and Water—Contribution.]—The plaintiffs shipped on board one of the defendants' steamers at Buenos Ayres a cargo of sheep and cattle for carriage to Deptford. The contract provided that the steamer should not call at Brazilian ports before landing her livestock, and that average, if any, should be adjusted according to the York-Antwerp Rules, 1890. In the course of the voyage the vessel sprang a leak, and, for the safety of all concerned, the captain put into Bahia, a Brazilian port, for repairs. The landing of the plaintiffs' cattle at Deptford was by this act rendered impossible, by reason of the Foreign Animals Order, 1896, which prohibits the landing of foreign animals in the United Kingdom if the steamer conveying them has touched at a Brazilian port. The cattle were therefore sent on to Antwerp, where they were sold at a less price than they would have realised at Deptford. The plaintiffs also incurred expense in respect of extra wages for their cattlemen and the cost of fodder and water for the cattle while at Bahia:—*Held*, that the putting into Bahia was a general average act, and that the loss upon the sale of the cattle, being the direct consequence of that act, was admissible in general average. *But held*, that the wages of the cattlemen and the cost of the fodder and water were not subjects for general average contribution either under the York-Antwerp Rules, 1890, or at common law. *Anglo-Argentine Livestock and Produce Agency v. Temperley Steam Shipping Co.*, 63 L. J. Q.B. 900; [1899] 2 Q.B. 403; 81 L. T. 296; 49 W. R. 64; 8 Asp. M.C. 595—Bigham, J.

Contribution—Adjustment—General Average

Sacrifice on Outward Voyage—Liability of Homeward Freight to Contribute.]—Homeward freight payable under a charterparty is liable to contribute to a general average sacrifice made on the outward voyage. *Carisbrook Steamship Co. v. London and Provincial Marine and General Insurance Co.*, 70 L. J. K.B. 930; [1901] 2 K.B. 861; 50 W. R. 42; 6 Com. Cas. 291—Mathew, J.

A ship was insured upon hull, materials, engines, and machinery, and chartered to proceed from Fleetwood to Savannah, and there load for her charterers a cargo of cotton, which she was to deliver at a specified port of discharge on being paid freight. She proceeded to Savannah in ballast, but before her arrival grounded and sustained injuries to her propeller. These were repaired, and she subsequently loaded her cargo at Savannah, delivered it at the port of discharge, and earned the freight under the charterparty:—*Held*, that the freight so earned on the homeward voyage must contribute to the general average sacrifice on the outward voyage. *Williams v. London Assurance Co.* (1 M. & S. 318) approved. *Ib.*

Exception of Negligence—Expense Owing to Negligence—Bill of Lading Signed by Charterers' Direction—No Exception of Negligence—Indemnity.]—Expenses incurred by the ship for the benefit of the adventure, though rendered necessary through the master's negligence, may be the subject of a general average contribution from the holders of bills of lading containing a clause excepting the master's negligence. *Milburn v. Jamaica Fruit-importing and Trading Co.*, 69 L. J. Q.B. 860; [1900] 2 Q.B. 540; 83 L. T. 321; 5 Com. Cas. 346; 9 Asp. M.C. 122—C.A.

A charterparty, containing a clause excepting the master's negligence, provided that the master should sign bills of lading without prejudice to the stipulations of the charterparty, and that the charterers should indemnify the shipowners from the consequences of signing bills of lading under their instructions. The master, by the charterers' direction, signed bills of lading containing no exception of negligence. Expenses on behalf of the adventure having been incurred by the ship owing to the master's negligence, the cargo-owners refused to contribute in general average:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that if the bills of lading had contained a negligence clause the cargo-owners would have been bound to contribute; and consequently, that the charterers were bound to indemnify the shipowners for general average contribution not recovered from the cargo-owners. *The Carron Park* (59 L. J. P. 74; 15 P. D. 203) followed. *Ib.*

Bond—Average Statement—Duty to Obtain.]—Where by an average bond executed at the port of discharge consignees of cargo undertook to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contribution to which they were liable might be ascertained and adjusted "in the usual manner,"—*Held*, that these words did not imply as a condition of the obligation that the shipowners should employ an average stater

at the port of discharge. *Simonds v. White* (2 B. & C. 305) explained. A shipowner may make out his own average statement, and is not bound to employ an average stater either at the port of discharge or elsewhere. *Waver-tree Sailing Ship Co. v. Love*, 66 L. J. P.C. 77; [1897] A.C. 373; 76 L. T. 576; 8 Asp. M.C. 276—P.C. And see INSURANCE (MARINE).

18. SHIPPING CASUALTIES.

Board of Trade Enquiry—Suspension of Certificate—Duty of Board of Trade to Express Opinion—Appeal to High Court—Costs.]—On a Board of Trade enquiry, when a formal investigation is being held under section 466 of the Merchant Shipping Act, 1894, and when the evidence has been given and the questions are put to the Court, and there is a liability for the master or other officer of the ship to have his certificate suspended, the Board of Trade should state whether in their opinion such certificate should be suspended or not. *The Carlisle*, 75 L. J. P. 97; [1906] P. 301; 95 L. T. 552; 10 Asp. M. C. 287; 22 T. L. R. 709—D.

19. NECESSARIES—BOTTOMRY BOND.

Master's Bill of Exchange—Personal Liability.]—The master of a vessel is personally liable on a bill of exchange drawn by him upon the owners in payment of necessities ordered by him, for which he purports by the terms of the bill to hold his vessel, owners, and freight responsible. *The Ripon City* (66 L. J. P. 110; [1897] P. 226) followed. *Ceylon Coaling Co. v. Goodrich*, 73 L. J. P. 104; [1904] P. 319; 91 L. T. 151—Gorell Barnes, J.

Bond on Ship, Freight, and Cargo—Claim by Material Men to have Assets Marshalled.]—The Court, acting upon equitable principles, will not direct assets to be marshalled except in cases where the two funds to which one of the creditors can resort belong to the same person. *The Edward Oliver* (36 L. J. Adm. 13; L. R. 1 A. & E. 379) distinguished. *The Chioggia*, 66 L. J. P. 174; [1898] P. 1; 77 L. T. 472; 46 W. R. 253; 8 Asp. M.C. 352—Gorell Barnes, J.

—Validity of—Maritime Risk—Stipulation for Immediate Payment—Going into Port of Refuge to Repair.]—A stipulation in a bottomry bond, providing that, in the event of the ship in the course of the voyage putting into any port of refuge to repair, all moneys for the payment of which the ship, &c., has been pledged shall forthwith become due and payable, does not invalidate the bond provided that a maritime risk is in the contemplation of the parties. *The Huabet*, 68 L. J. P. 121; [1899] P. 295; 81 L. T. 463; 48 W. R. 223; 8 Asp. M. C. 605—Bucknill, J.

Recovery of Insurance Premiums—Payment by Brokers—Right of Broker and Underwriter to Recover by Action in Rem.]—Sums paid by a broker as insurance premiums for the purpose of effecting insurances on the hull and safe arrival of a vessel or sums due to underwriters as premiums cannot be recovered by the broker

or by the underwriters as necessities within the meaning of section 6 of the Admiralty Court Act, 1840; and, as such sums are not necessities, the broker and underwriters have no right to proceed against the ship *in rem*. *The André Théodore*, 93 L. T. 184; 10 Asp. M.C. 94; 21 T. L. R. 158—Gorell Barnes, J.

Priorities — Conflicting Liens — Wages — Possessory Lien of Shipwright.—A shipwright, into whose dry dock a vessel is placed for the purpose of being repaired, has a possessory lien for all work done by him upon the ship, which attaches from the time the vessel enters his dock, notwithstanding that the master and the crew remain on board the ship and that all the work ordered to be done is not completed. *The Tergeste*, 72 L. J. P. 18; [1903] P. 26; 87 L. T. 567; 9 Asp. M.C. 356—Phillimore, J.

20. MORTGAGE.

Register of Mortgages — Entry Improperly Made — Jurisdiction of Court to Expunge.—The Court has jurisdiction to make an order that the entry of an invalid mortgage of a ship be expunged from the register. *Brond v. Broomhall*, 75 L. J. K.B. 548; [1906] 1 K.B. 571—Phillimore, J.

Unregistered Mortgage of Shares of Ship — Subsequent Sale of Same Shares to Another Owner — Registered Bill of Sale — Application of the Purchase-money by the Purchaser in Discharging Vendor's Debt to Ship — Mortgagee's Claim on Purchase-money.—An owner of shares of a ship mortgaged his shares to mortgagees, who did not register the mortgage. Subsequently, having misappropriated part of the ship's money, he entered into an agreement for the sale of the same shares to two other owners of shares of the ship. By this agreement the purchase price was to be applied by the purchaser in paying the vendor's debt to the ship, and the purchasers, as owners of shares thereof, were peculiarly interested in this being done. The agreement provided that any balance of purchase-money remaining was to be paid to the vendor. The vendor executed a bill of sale transferring his shares to the purchasers, and the bill of sale was duly registered. Up to then the purchasers had no knowledge of the unregistered mortgage. The mortgagees, on learning what had happened, gave notice to the purchasers that they claimed to have a prior right to the purchase-money in respect of their mortgage:—*Held*, that, notwithstanding this notice, the purchasers were entitled to apply the purchase-money in paying the vendor's debts to the ship, and that the mortgagees could only claim any balance of the purchase-money remaining. *Barclay v. Poole*, 76 L. J. Ch. 488; [1907] 2 Ch. 284; 97 L. T. 632—Swinfen Eady, J.

Mortgagor in Possession — Charterparty Impairing Security — Not Binding on Mortgagees.—Mortgagors in possession of a ship agreed by charterparty that the ship should carry a cargo of coal to a port of a belligerent country. The voyage entailed great risk of capture, and the ship was not insured against it:—*Held*, in an action by the mortgagees against the mortgagors and the holders of the bills of lading,

that the mortgagees were entitled to a declaration that the charterparty was not binding upon them, since it impaired their security. The rule in *Collins v. Lamport* (34 L. J. Ch. 196; 4 De G. J. & S. 500) followed. *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade*, 74 L. J. K.B. 577; [1905] 1 K.B. 815; 92 L. T. 435; 10 Com. Cas. 159; 10 Asp. M.C. 41; 21 T. L. R. 383—C.A.

— Circumstances Impairing Security of Mortgagee — Right of Mortgagee to take Possession.—A mortgagee of a ship is entitled to take possession of her, although there has been no actual default under the mortgage, if the mortgagor is working the ship in such a way as to materially impair the security of the mortgagee. *The Manor*, 77 L. J. P. 10; [1907] P. 339; 96 L. T. 871; 10 Asp. M.C. 446—C.A.

Agent Receiving Profits — Notice by Mortgagee — Periodical Distributions of Profits by Agent.—E. was the mortgagee of certain shares in two ships. The profits were received by Messrs. B., A. & Co., who made periodical distributions, once a year in March, amongst the persons entitled. E. gave notice in November of the mortgage:—*Held*, that E. was only entitled to the freight earned and received by Messrs. B., A. & Co. after the notice, and that before that date the mortgagor was entitled, as the fact that the agents only accounted to the persons entitled at stated periods made no difference. *Essarts v. Whinney*, 88 L. T. 191; 9 Asp. M.C. 363—C.A.

Action Brought by Mortgagees in Possession — Claim for Declarations for Use in an Action in France — Stay of Proceedings.—Mortgagees of a ship, having taken possession under their mortgage, chartered the ship on a voyage to a French port. On her arrival at her destination she was arrested in an action brought in the French Courts by material men who had supplied necessities at the order of the mortgagors—a limited company which had since gone into liquidation—and the freight in the hands of the consignees was also attached. The mortgagees, having given the necessary security in France to obtain the release of the ship, commenced actions in the High Court against the material men and the mortgagors, claiming declarations as to the validity of the mortgage and their rights as mortgagees in possession, in order to make use of such declarations in the litigation in France. On motions by the material men and the mortgagors to stay proceedings or dismiss these actions,—*The Court* dismissed the motion on behalf of the material men, but stayed proceedings in the action against the mortgagors, on the ground that as against them—they having taken no step antagonistic to the mortgagees—the action was oppressive and vexatious. *The Manar* (No. 1), 72 L. J. P. 41; [1903] P. 95; 89 L. T. 26; 51 W. R. 687—Bucknill, J.

*** Mortgagee taking Possession — Right to Freight — Freight Earned but not Paid before Possession taken.**—The mortgagee of a ship, upon taking possession of the vessel, is entitled to all unpaid freight which the ship is then in the course of earning, but is not entitled to freight previously earned, and due and payable, but unpaid at the time of his taking possession.

Shillito v. Biggart, 72 L. J. K.B. 294; [1908] 1 K.B. 688; 88 L. T. 426; 51 W. R. 479; 8 Com. Cas. 137; 9 Asp. M.C. 396—Walton, J.

Act of Bankruptcy before Date of Mortgage—Validity.]—See *The Ruby* (No. 1), col. 2444.

Charterparty—Whether it Impairs Mortgagee's Security.]—See *The Heather Bell*, col. 2309.

Payment off of Maritime Lien—Liability of Mortgagee.]—See *The Ripon City* (No. 2), col. 2293.

21. TRANSFER OF SHARES.

Transfer—Bill of Sale—Fees.]—Where several owners of shares in a ship by separate bills of sale transfer their shares to the same person, on registration of the transfers a separate fee is payable upon the scale set forth in the First Schedule to the Merchant Shipping (Mercantile Marine Fund) Act, 1898, and adopted by the Board of Trade with the consent of the Treasury, pursuant to section 3 of the Act, according to the gross tonnage represented by the shares transferred by each separate bill of sale. *Harrowing Steamship Co. v. Toohey*, 69 L. J. Q.B. 447; [1900] 2 Q.B. 28; 82 L. T. 677; 9 Asp. M.C. 91—Kennedy, J.

22. SHIPBROKER.

Ships to Load Cargo in Rotation—Interposing Ship—Duty of Broker—Delay to Ship in Rotation List.]—The defendants, who were shipbrokers, had for several years combined with firms in Australia to work together in providing ships for loading wool during the season, which lasts from June to February. For this purpose a programme was arranged by which ships were to load at regular intervals of about a week. The plaintiffs had had steamers on such programmes for some years. In the programme for 1901-1902, the plaintiffs' vessel, the *Anglo-Chilian*, was arranged to arrive at Sydney to load on December 17. That vessel was, in the course of another voyage, detained in South Africa, and the defendants, fearing that they would be left without tonnage, arranged, on November 12, that a ship called the *Winchester*, which was expected to arrive at Sydney about December 1, should come into the wool berth. The *Winchester* being late, the *Eskdale* was put in before her, and the *Eskdale* was loaded and despatched before, and without interfering with, the *Anglo-Chilian*. The *Winchester* arrived at Sydney on December 13, but had to be docked, and so did not commence loading till December 17, and she left Sydney on December 24. The last wool sale before Christmas was on December 18. The *Anglo-Chilian* arrived on December 20, but, owing to the presence of the *Winchester*, she got no cargo out of the sales before Christmas, and it was not till January 28 that she could get a cargo and sail. By that time the freight market was bad. The defendants did not inform the plaintiffs that they had arranged for the *Winchester* and *Eskdale* to go to Sydney to ship wool, nor did they arrange that they might refuse to load these interpolated ships if they should not be up to time and should clash with the programme

ships. In an action by the plaintiffs to recover damages for breach by the defendants of their duty as shipbrokers,—*Held*, that the shipbrokers had not committed a breach of contract to use their best endeavours to load the ship in rotation on or about a specified day, the ship not having arrived at the port of loading until too late to load on or about that date, and that therefore the shipbrokers were not liable to the shipowners for the delay. *Nitrate Producers' Steamship Co. v. Wills*, 21 T. L. R. 699—H.L. (E.)

Disbursement by, on Account of Ship—Liability of Shipowner to Shipbroker Employed by Charterer.]—The charterers of a foreign ship instructed a shipbroker to do the ship's business at the port of loading. The shipbroker, having made disbursements and rendered services, brought an action against the foreign shipowners for the amount of his outlays and his commission. The owners, who did not dispute the charges, but had a counterclaim against the charterers, pleaded that they were not liable to the pursuer in respect that he had been employed by the charterers:—*Held*, that the defendants' master having accepted the pursuer's services as shipbroker, and the defendants having got the benefit of the pursuer's services, they were liable to him for his disbursements and services on account of the ship. *Barnetson v. Peterson*, 5 F. 86—Ct. of Sess.

23. FOREIGN SHIP.

Order for—Service of, on Consul "forthwith."]—An order for the provisional detention of a foreign ship is regular, although it bears to proceed under section 459 of the Merchant Shipping Act, 1894, only, and makes no reference to section 462. A copy of such an order served on the foreign consul by registered letter, delivered on the day after that on which the detention order was served on the master, is served "forthwith" on the consul within the meaning of section 462. *Larsen v. Hart*, 2 F. (Just. Cas.) 54—Ct. of Justy. See *CORLISON*, col. 2410, and *INTERNATIONAL LAW*.

24. THAMES.

River Regulations—Barge Moored within Certain Distance of Dock Entrance—Dockmaster's Requisition to Remove—Sufficiency—Actual Obstruction.]—A notice to unmoor and remove a barge from within two hundred yards of an entrance to a dock in the Thames, served by the dockmaster's assistant, in pursuance of general instructions, upon the master or person in charge, is a proper and sufficient requisition by the dockmaster within section 101 of 1 & 2 Will. 4, c. lii., notwithstanding that it had been signed by him beforehand, and that the name of the barge was inserted, in a space purposely left blank, by the assistant immediately before service. *Duckham v. Gibbs*, 69 L. J. Q.B. 127; [1900] 1 Q.B. 394; 48 W. R. 239—D.

Evidence of actual obstruction, by a barge so moored, to a vessel entering or leaving the dock is not essential to proof of an offence under the latter part of the section. *Id.*

Conservancy—Duty to Keep the River Thames Free from Obstructions to Navigation—Negligence—Evidence.—The plaintiffs' steamer, while navigating the river Thames near Kew Bridge, was damaged by a baulk of timber which had been at one time apparently used as a pile, and which was afterwards found to have its blunt end stuck in the bed of the river and its pointed end slanting upwards and only a few inches below the surface of the water:—*Held*, upon the facts, assuming that a duty lay upon the Thames Conservators to keep the river Thames free from obstructions to navigation, that there was no evidence that the Conservators had been guilty of any neglect of such duty causing the damage to the plaintiffs' steamer. *Queens of the River Steamship Co. v. Thames Conservators*, 96 L. T. 901; 12 Com. Jas. 278; 23 T. L. R. 478—C.A. *And see* WRECK, *supra*.

Waterman—Lighter Navigating River—Men on Board—Licensed Waterman—"Competent"—"Navigating."—By by-law 27 of the Thames Conservancy By-laws, 1898, "Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft exceeding 50 tons out of not more than 150 tons burden shall when under way have one man in addition . . . on board to assist in the navigation and management of the same . . .":—*Held*, that in the case of a lighter exceeding fifty tons, but of not more than one hundred and fifty tons burden, it was necessary that both the men on board should be "competent" in the sense of being licensed by the Watermen's Company. *Fardner, Locket & Hinton v. Doe*, 75 L. J. K.B. 114; [1906] 2 K.B. 171; 95 L. T. 492—D.

Three lighters, the property of the appellants, or the purpose of being taken out of a dock were lashed together with ropes. A line was attached to one of them, and they were hauled through the lock of the dock out into the river by one of the appellants' watchmen, who stood with the line in his hand on a pierhead of the dock entrance. When the lighters were clear of the pierhead the watchman placed the end of the line round a post on the pierhead, and by slackening the line allowed the lighters to be carried up by the tide as far as the line would allow. Another watchman on board one of the lighters then released the line, and pushed the lighters by means of a staff along the shore until they reached a barge which was moored about ninety-five yards from the post on the pierhead. The lighters were then made fast to the barge and left to await the arrival of a tug:—*Held*, that the lighters were not being "navigated" within the meaning of section 66 of the Watermen's and Lightermen's Amendment Act, 1859. *Ib*.

The owners of a lighter exceeding fifty tons burden, lying in dock, put it in charge of a licensed lighterman with instructions that it was to leave the dock and anchor outside in the river to await a tug. The lighter, which had no additional man on board, was then hauled by machinery from the dock and through the entrance into the river. The tug not having arrived, the lighterman cast anchor, but it failed to hold, and the lighter was carried up

the river a distance of five hundred yards, when it was secured at some barge roads:—*Held*, that the lighter was not "navigating" the river within the meaning of by-law 27. *Ib*.

— Licensed — Steamboat Navigated on Thames—Towage of Barges—By-law—Validity.—A by-law, purporting to be made under the Watermen's and Lightermen's Amendment Act, 1859, providing that every steamboat navigated in the River Thames within the limits of the Act, in the towage of barges, "shall have one licensed waterman on board . . . for the purpose of assisting in the management and navigation thereof" is *ultra vires* and void, inasmuch as it subverts no provision or purpose of the Act. *Kennaird v. Cory*, 67 L. J. Q.B. 809; [1898] 2 Q.B. 578; 78 L. T. 816; 47 W. R. 30; 62 J. P. 580; 19 Cox C.C. 145—D.

Authorised Toll—Illegal Charges—Right to Recover Excess.—There is nothing in the Thames Conservancy Act, 1894, giving the Conservators the right to levy more than the sixpence toll authorised by section 165 on a vessel merely because she is more than a few minutes alongside a pier embarking or disembarking her passengers or goods. An extra charge having been demanded in respect of this and paid,—*Held*, that, being unauthorised, it was paid without consideration, and could be recovered back. *Queen of the River Steamship Co. v. Thames Conservators*, 47 W. R. 685—Phillimore, J. *And see* THAMES.

25. JURISDICTION AND PRACTICE.

Action in Rem—"For wages as ship's husband."—Section 10 of the Admiralty Court Act, 1861, does not extend to give the Court jurisdiction to entertain a suit *in rem* "for wages as ship's husband." *The Ruby* (No. 2), 67 L. J. P. 28; [1898] P. 59; 78 L. T. 235; 46 W. R. 687; 8 Asp. M.C. 421—Jeune, P.

— Sale of Ship—Writ of Execution—Mortgagee.—County Courts with Admiralty jurisdiction have jurisdiction, in actions *in rem*, to condemn the *res* by their judgments, and to give effect to such condemnation by the sale of the *res* by way of execution. In a damage action *in rem*, the sale of the wrongdoing ship by the high bailiff under a warrant of execution issued from the County Court is a good sale as against a registered mortgagee of the ship, and passes to the purchaser the property in the ship free from incumbrances. *The Ruby* (No. 1), 67 L. J. P. 25; [1898] P. 52; 78 L. T. 267; 46 W. R. 464; 8 Asp. M.C. 389—Jeune, P.

— Negligent Grounding of Ship upon Oyster Bed—Damage done to Oysters and Oyster Beds.—The fact that the Sea Fisheries Act, 1868, ss. 51 to 53, gives a property in oysters to the owners of oyster fisheries under the Act, and provides a remedy for damage done thereto against the person doing the damage, does not prevent the owners of the fishery from proceeding *in rem* against the owner of a ship which has negligently been allowed to take the ground upon their oyster beds, thereby doing damage both to the oysters and the oyster beds. *The Swift*, 70 L. J. P. 47; [1901] P. 168; 85 L. T. 346; 9 Asp. M.C. 244—Jeune, P.

— **Single Individual Suing in Name of Firm—Right to Sue “as owner of” Cargo—Indorsement on Writ—Irregularity.**—In an action *in rem* for damage to cargo the plaintiff (one L. L. D.) sued as L. D. & Co. (the name of the firm under which he carried on business). From the indorsement on the writ, it appeared that L. D. & Co. were suing “as owners of” the cargo in question. On a motion to set aside the writ,—*Held*, that Order XLVIII. a rule 1 did not operate to abrogate the old practice of the Admiralty Court which enabled plaintiffs to sue as “owners of” a ship or cargo; and that, having regard to that practice and to the fact that the indorsement shewed that the action was brought by the “owners of” the cargo in question, the mistake on the face of the writ was a mere irregularity which might be amended. *The Assunta*, 71 L. J. P. 75; [1902] P. 150; 86 L. T. 660; 50 W. R. 544; 9 Asp. M.C. 302—Jeune, P.

— **Res Sold by Private Person—Action against Proceeds of Sale.**—Where property, which might have been the subject of an action *in rem* under Admiralty jurisdiction, has been sold by a private person, there is no right of action *in rem* against the proceeds of sale in the hands of such person. *The Optima*, 74 L. J. P. 94; 93 L. T. 638; 10 Asp. M.C. 147—Gorell Barnes, P.

Stores were landed from a vessel by alleged salvors and were delivered by them to an agent for the owners of the vessel, under an agreement, as they alleged, that they should look to the agent for a settlement of their claims for salvage, and the agent sold the stores, they assisting in the sale. The alleged salvors afterwards brought in the County Court what purported to be an action *in rem* against the proceeds of sale of the stores in the hands of the agent. On motion for writ of prohibition,—*Held*, that the County Court had no jurisdiction to entertain the action. *Id.*

Action in Personam—Judgment upon Default of Appearance.—The plaintiff in an Admiralty action *in personam* is entitled to enter final judgment upon default of appearance under Rules of Supreme Court, Order XIII. rule 3, notwithstanding any practice to the contrary. *The Madelaine and the André Théodore*, 73 L. J. P. 24; 89 L. T. 675; 9 Asp. M.C. 508; 20 T. L. R. 83—Gorell Barnes, J.

Action for Salvage Services—Counterclaim for Breach of Charterparty—Embarrassing Fair Trial.—The Admiralty Division has jurisdiction to entertain a claim for damages in respect of a breach of a charterparty, and may in its discretion allow in a proper case such a claim to be set up by way of counterclaim in an action *in rem*—for example, in a salvage action. *The Cheapside*, 73 L. J. P. 117; [1904] P. 339; 91 L. T. 83; 53 W. R. 120; 9 Asp. M.C. 595; 20 T. L. R. 655—C.A.

Action Brought by Mortgagees in Possession—Claim for Declaration for Use in an Action in France—Stay of Proceedings.—Mortgagees of a ship, having taken possession under their mortgage, chartered the ship on a voyage to a French port. On her arrival at her destination she was arrested in an action brought in the

French Courts by material men who had supplied necessities at the order of the mortgagors—a limited company which had since gone into liquidation—and the freight in the hands of the consignees was also attached. The mortgagees, having given the necessary security in France to obtain the release of the ship, commenced actions in the High Court against the material men and the mortgagors, claiming declarations as to the validity of the mortgage and their rights as mortgagees in possession, in order to make use of such declarations in the litigation in France. On motions by the material men and the mortgagors to stay proceedings or dismiss these actions,—*THE COURT* dismissed the motion on behalf of the material men, but stayed proceedings in the action against the mortgagors, on the ground that as against them—they having taken no step antagonistic to the mortgagees—the action was oppressive and vexatious. *The Manar* (No. 1), 72 L. J. P. 41; [1903] P. 95; 89 L. T. 26; 51 W. R. 687; 9 Asp. M.C. 420—Bucknill, J.

Cross-Actions for Collision—High Court and County Court Actions—Transfer of County Court Action to High Court—Conduct of Consolidated Actions.—Where cross-actions for collision have been commenced, the one in the High Court and the other in a County Court, and the County Court action is transferred to the High Court and consolidated with the High Court action, the conduct of the consolidated actions will be given to the plaintiffs in the action commenced in the High Court, unless it is clear that in point of time the County Court action was commenced first. *The Mersey*, 70 L. J. P. 100; [1901] P. 369; 85 L. T. 584; 9 Asp. M.C. 273—Jeune, P.

Bail—Release of Ship—Amount—Minority Owners.—In an action of restraint the amount of bail to be put in by the defendants is the same proportion of the whole value of the vessel as the number of shares held by the plaintiff bears to the whole number of shares in the vessel. *The Cawdor* (No. 1), 79 L. T. 357; 8 Asp. M.C. 475—Gorell Barnes, J.

Caveat Warrant—Præcipe for, Signed by Defendant's Solicitor—Subsequent Arrest of the Ship by Plaintiffs—Discharge of Warrant—Condemnation of Plaintiffs in Damages and Costs.—A solicitor who, without any qualification, signs a *præcipe* for caveat warrant is personally liable to see that the undertaking to give bail therein given is complied with. *The Crimdon*, 69 L. J. P. 103; [1900] P. 171; 82 L. T. 660; 48 W. R. 623; 9 Asp. M.C. 104—Gorell Barnes, J.

It is not a “good and sufficient reason” for arresting a ship, notwithstanding the entry of a caveat against the issue of a warrant, that the plaintiffs preferred the security of the ship to the undertaking of the defendant's solicitor to give bail. *Id.*

Action of Restraint—Bail Bond—Jurisdiction of Court to Enforce Bond—Ship not Lost.—Where in an action of restraint a bond is given in the usual form for the safe return of the ship to the port to which she belongs, the Court has jurisdiction to order the amount secured by the bond to be paid into Court, although the ship be not lost. *The Cawdor*, 69 L. J. P. 23;

[1900] P. 47; 81 L. T. 705; 48 W. R. 293; 9 Asp. M.C. 19—C.A.

Payment into Court with Denial of Liability—Tender—Acceptance—Plaintiff's Right to Costs.]—Order XXXIX.B, rule 50 of the County Court Rules of 1892 applies to cases where money is paid into Court with a denial of liability under rule 48 of the same Order, as well as to cases of tender. *The Vulcan*, 67 L. J. P. 101; [1898] P. 222; 47 W. R. 123—D.

Appeal—Final or Interlocutory Order—Costs.]—Where money paid into Court by the defendant with a denial of liability has been accepted by the plaintiff in satisfaction, a refusal to make an order for the taxation and payment of the plaintiff's costs is a final decree or order within the meaning of section 26 of the County Courts Admiralty Jurisdiction Act, 1868. *Ib.*

Trial by Jury.]—Section 101 of the County Courts Act, 1888, does not confer a right upon the plaintiff or the defendant in an action brought on the Admiralty side of a County Court under section 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, to have the case tried by a jury. *The Theodora*, 66 L. J. P. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157; 8 Asp. M.C. 259—D.

County Court—Jurisdiction—"Damage by collision"—Damage by Ship to Pier.]—The County Courts Admiralty Jurisdiction Act, 1868, s. 3, provides that any County Court having Admiralty jurisdiction shall have jurisdiction to try and determine any claim for "damage by collision":—*Held*, that this Admiralty jurisdiction does not extend to damage done by a ship or vessel to some other object not a ship or vessel (such as a pier) by striking against it. *The Normandy*, 73 L. J. P. 55; [1904] P. 187; 90 L. T. 351; 9 Asp. M.C. 568; 52 W. R. 634; 20 T. L. R. 239—D.

—Payment into Court in Satisfaction—Acceptance of Amount—Amount Recovered Less than 2l.—Taxation of Costs.]—In an Admiralty action in the County Court, where money is paid into Court unconditionally by the defendant and accepted by the plaintiff in satisfaction, the plaintiff is entitled to his costs under Order XXXIX.B, rule 50A of the County Court Rules and Orders, and to have them taxed under Column B of the County Court Scales of Costs under rule 80 of the same Order, unless the County Court Judge otherwise orders, even where the amount so recovered by him is less than 2l. *The Skudenaes*, 70 L. J. P. 64—D.

—Defendant's Ship Lost—Defendant Resident in Scotland—Agent in England—Service.]—In section 21, sub-section 2 of the County Courts Admiralty Jurisdiction Act, 1868, the words "owner of the vessel or property to which the cause relates" refer, in collision cases, to the defendant; and the words "agent in England" mean agent in respect of the business of the particular vessel to which the cause relates, at the time of the issue and service of the summons. *The City of Agra*, 67 L. J. P. 81; [1898] P. 198; 79 L. T. 307; 8 Asp. M.C. 457—Gorell Barnes, J.

—Coal Trimmers' Union.]—Where a committee of a coal trimmers' union held that a certain vessel was, according to their by-laws, a "self-trimmer," the effect of which was to bind her to a certain tariff rate of the board,—*Held*, that the question was one of law, and was within the jurisdiction of the County Court, and not of the Trimmers' Union. *The Swindon*, 49 W. R. 634—D.

Transfer of Action from County Court to High Court.]—A wages suit having been instituted in the County Court of Lancashire holden at Liverpool sitting in Admiralty, the defendants, in accordance with section 6 of the County Court (Admiralty Jurisdiction) Act, 1868, moved the High Court of Admiralty that the action should be transferred to the High Court. The application to the High Court was made by motion in Court:—*Held*, that the transfer would be made, but that the proper method of asking for a transfer from the County Court to the High Court under section 6 of the County Court (Admiralty Jurisdiction) Act, 1868, was by way of summons in chambers. *The Indra*, 94 L. T. 110; 10 Asp. M.C. 196; 22 T. L. R. 12—Gorell Barnes, P.

Appeal—Damages under 50l.]—A plaintiff in a collision action, instituted on the Admiralty side of the County Court, whose damages are less than 50l., has no right of appeal from a judgment dismissing the suit on a question of fact, although he institutes his action in a sum exceeding 50l. *The Burma* (No. 2), 80 L. T. 839; 8 Asp. M.C. 549—D.

Decisions of Privy Council.]—Observations as to the authority of decisions in Admiralty Appeals of the Privy Council prior to the Judicature Act, 1873. *The Cayo Bonito* (No. 1), 72 L. J. P. 70; [1903] P. 203; 89 L. T. 260; 52 W. R. 133; 9 Asp. M.C. 445—C.A.

In Collision Cases.]—See COLLISION, *supra*, cols. 2410–2411.

Jurisdiction over Foreign Public Ship.]—See *The Jassy*, *ante*, INTERNATIONAL LAW, col. 1084.

SLANDER.

See DEFAMATION.

SLAUGHTER-HOUSE.

See LOCAL GOVERNMENT.

SMALL HOLDINGS.

• Statute.]—7 Edw. 7 c. 54 is the *Small Holdings and Allotments Act*, 1907.

SMOKE.

See LOCAL GOVERNMENT, col. 1367, METROPOLIS, col. 1633, and RAILWAY, col. 2050.

SOLICITOR.

1. *Statutes*, 2449.
2. *Certificate*, 2449.
3. *Retainer*, 2449.
4. *Privilege*, 2450.
5. *Client and Solicitor*, 2450.
6. *Undertaking*, 2454.
7. *Country Solicitor*, 2455.
8. *Covenant as to Practice*, 2456.
9. *Uncertificated Solicitor*, 2457.
10. *Bill of Costs and Taxation*, 2458.
11. *Scale of Allowances*, 2465.
12. *Action for Costs*, 2471.
13. *Lien and Charging Order*, 2472.
14. *Misconduct*, 2478.
15. *Other Matters*, 2481.

1. STATUTES.

Colonial Solicitors.—63 & 64 Vict. c. 14 is the *Colonial Solicitors Act*, 1900.

Solicitors.—6 Edw. 7 c. 24 is the *Solicitors Act*, 1906.

2. CERTIFICATE.

Refusal of Registrar to Grant—Undischarged Bankrupt—Discretion.—Under section 23 of the Solicitors Act, 1843, the registrar of solicitors has no discretion to refuse to grant a certificate for practice except in the one case mentioned in the section—namely, where he is not satisfied that the person applying for the certificate is on the roll of solicitors; therefore, the fact that an applicant who is on the roll is an undischarged bankrupt does not entitle the registrar to refuse to issue to him his annual certificate. *Solicitor, In re*, 71 L. J. K.B. 36; [1902] 1 K.B. 128; 85 L. T. 619; 50 W. R. 196—C.A.

Section 24 of the Solicitors Act, 1843, does not confer a general jurisdiction on the Judge; his power is limited to reviewing the decision of the registrar where the latter has refused to grant a certificate on the ground mentioned in the exception in section 23. *Solicitors Act*, 1843, *In re* (80 L. T. 720), overruled. *Ib.*

3. RETAINER.

Pauper Litigant in House of Lords—Right to Costs.—There is nothing in the Rules of the Supreme Court to prevent a litigant, who is suing in the House of Lords *in forma pauperis*, from retaining a solicitor in the ordinary way; and when this has been done, the solicitor will be entitled to have his costs of the proceedings paid, after taxation, as between solicitor and client. *Raphael, In re; Salomon, ex parte*, 68 L. J. Ch. 309; [1899] 1 Ch. 853; 80 L. T. 226; 47 W. R. 330—Kekewich, J. Reversed on the facts, 68 L. J. Ch. 765; 81 L. T. 479—C.A.

Order for Taxation Obtained by Solicitor—Dis-

puting Retainer.—*Quere*, whether, on an order for taxation obtained by the solicitor under the Solicitors Act, 1843, s. 37, containing a specific statement of a retainer in a particular transaction, it is open to the client who chooses to go in under the order to dispute such retainer. *Jones, In re* (56 L. J. Ch. 720; 36 Ch. D. 105), considered on this point. *Wingfield and Blew, In re*, 73 L. J. Ch. 797; [1904] 2 Ch. 665; 91 L. T. 783, *per Romer, L.J.*

Retainer by District Council.—See *Brooks v. Torquay Corporation, ante*, LOCAL GOVERNMENT, col. 1810.

4. PRIVILEGE.

Person from whom Documents Received.—In the liquidation of a company a witness at his private examination under section 115 of the Companies Act, 1862, was represented by a solicitor. The solicitor had had in his possession documents belonging to the company which were wrongfully handed to him by a servant or servants of the company:—*Held*, that his privilege as solicitor excused his answering from whom he received such documents. *London and Northern Bank, In re; Hoyle's Case*, 50 W. R. 386—Byrne, J.

5. CLIENT AND SOLICITOR.

Relation to Client—Commission—Disclosure of Fact—Duty to Advise—Acting for both Parties—Right to Recover.—The owner of a patent gave a commission note to his solicitor agreeing to pay him a commission out of the purchase money if he introduced a purchaser. The solicitor introduced another client as purchaser, to whom he shewed the commission note, to which the purchaser consented, and further agreed to pay a reasonable commission himself to the solicitor if, owing to any defect in the commission note, the solicitor could not recover it from the vendor. The purchase was completed and the solicitor sued the vendor for the commission, who paid 210*l.* into Court, which the solicitor accepted. On a summons to tax the solicitor's bill by the purchaser's executors, the latter sought to surcharge the solicitor with the 210*l.*:—*Held*, that, though under the circumstances the vendor could have resisted payment of the commission, yet the solicitor, having received it with full knowledge on the part of the purchaser, was not bound to account for it to the purchaser. *Haslam and Hier Evans, In re*, 71 L. J. Ch. 374; [1902] 1 Ch. 765; 86 L. T. 663; 50 W. R. 444—C.A.

Per STIRLING, L.J.—The rule applicable to such a transaction is analogous to the rule which governs the validity of a purchase by a solicitor from his client, and not to the more stringent rule which governs the validity of a gift by the client to the solicitor, except so far as the solicitor bargained for payment of commission by the purchaser in the event of its not being recoverable from the vendor. *Ib.*

Fiduciary Relation—Lease with Option to Purchase from Client to Solicitor—Improper Covenants—Undue Influence—Independent Advice.—C., a solicitor who carried on business

as a brewer, acting in connection with his brewery business, took a lease of a public-house, with an option to purchase at the end of the term at a fixed price, from A., who from time to time, to a small extent, employed him as his solicitor. After A.'s death his widow and executors brought an action to have the lease set aside on the grounds that the lease was not a proper one, in that it did not contain any power of re-entry on the part of the lessor on the lessee making default in payment of rent, that C. acted as solicitor for both parties in the transaction, and that A. had no independent advice:—*Held*, that at the time of the transaction C. had no personal influence over A., and that therefore C. was not acting as his solicitor *in hac re*. *Allison v. Clayhills*, 97 L. T. 709—Parker, J.

Mortgage—Priority—Joint Advance—Trust Moneys and also Moneys of Solicitors—Security not in Names of Trustees—"Residue"—Breach of Trust—Inadequacy of Security.—A firm of solicitors advanced on mortgage of certain freeholds a sum of money which was expressed in the mortgage-deed to belong to the mortgagees (one of whom was a member of the firm) on a joint account. The money was in fact advanced as to one moiety by trustees out of trust funds, and as to the other moiety by the firm out of their partnership assets. The security contemplated advances on the footing of equality, and contained no unusual provisions. The firm acted on the occasion of the mortgage as the solicitors of the trustees, and advised the investment, and subsequently became bankrupt. The mortgaged property was not at any time a sufficient security for the money advanced:—*Held*, that the firm were involved in a breach of trust, on the ground that the security was inadequate, and that it ought to have been taken in the names of the trustees, and that for omitting to advise the trustees that the investment was a breach of trust the firm might be answerable in damages, but that the benefit acquired by the firm under the security was one which was in the contemplation of the parties at the time of the advance, and was not a sufficient ground for declaring the firm to be trustees in the whole or in part of their moiety of the mortgage debt and security, and that consequently the trustees were not entitled to be paid out of the security in priority to the persons claiming under the firm. *Stokes v. France*, 67 L. J. Ch. 69; [1898] 1 Ch. 212; 77 L. T. 595; 46 W. R. 183—Stirling, J.

—Transfer of Solicitor's own Security—Insufficient Security.—In July, 1892, the trustees of an indenture of settlement, dated September 3, 1890, had a fund of 1,100*l.* for investment. By an indenture dated February 15, 1877, a sum of 2,100*l.* had been secured, but part of the mortgaged premises had been sold for 1,000*l.* The balance consisted of three brick and stucco houses, held for ninety-nine years at a ground-rent of 9*l.* 2*s.* 6*d.* S., the solicitor of the trustees, transferred this mortgage to the trustees and received the 1,100*l.*, without explaining what he was doing. It was alleged that at this time the property, which was in one of the worst districts in the town, was only worth 200*l.*, and the evidence for the defence did not prove that it was worth more than 600*l.* in 1892. S. paid interest until his death, and

this action was brought by the trustees claiming that the security should be realised and the balance made good by S.'s executor. The Trustee Act did not apply, it was said, as S. retained the money and converted it to his own use. For the defendant it was said the claim was one for negligence, and was barred by the Statute of Limitations. The money was not still held by a trustee. Even if S. ought to have had a valuation made, his omission to do so was a mere common-law tort:—*Held*, that the property was now, and also at the date of the transfer, an insufficient security for 1,100*l.*, and that the solicitor had transferred a security belonging to himself with knowledge that to take the security involved a breach of trust; that the trustees never knew the facts, and that S. had received the 1,100*l.* as cash, and that, the defendant admitting assets, an order must be made for the realisation of the security, and that the defendant must make up the deficiency and pay the costs of the action. *Mitchinson v. Spencer*, 86 L. T. 618—Swinfen Eady, J.

Investigation of Title by Solicitor—Title of Solicitor to Part of Land Conveyed—Ignorance of both Parties at Time of Conveyance.—A solicitor was instructed by the plaintiff to investigate the title to and prepare the conveyance of property which the plaintiff had contracted to buy. The solicitor was himself the owner of adjoining property, and had, in fact, encroached and built part of his greenhouse on the property comprised in the conveyance to the plaintiff, and had acquired a title by adverse possession to the encroached land. The fact of the encroachment was not known either to the plaintiff or to the solicitor, though the solicitor might have discovered it by testing the measurements of the property on investigating the title. The plaintiff, who had no notion at the time that he was buying any part of the encroached land, subsequently discovered the fact and brought an action claiming the encroached land as against the solicitor's representatives:—*Held*, by BUCKLEY, J., that the solicitor was estopped by representation and by breach of duty from setting up his own title to the encroached land as against the plaintiff. *Held*, on appeal (reversing BUCKLEY, J.), that, assuming the solicitor's conduct to have amounted to a representation on which an estoppel could be founded (as to which *quære*), still the action could not be maintained by the plaintiff, since he had in no way acted to his detriment on the faith of the alleged representation. *Bell v. Marsh*, 72 L. J. Ch. 360; [1903] 1 Ch. 528; 88 L. T. 605; 51 W. R. 325—C.A.

Liability for Costs—Acting for Defendant Company Dissolved under Companies Act, 1862, ss. 142 and 143, before Trial of Action—No Knowledge of Dissolution—Want of Due Diligence.—The principle laid down in *Smout v. Ilbery* (12 L. J. Ex. 357; 10 M. & W. 1) and approved of in "Story on Agency," § 265*a*, as to the responsibility of an agent whose agency has been determined by the death of the principal, applies to a solicitor appearing for a party to an action, for he is an agent of a special kind, and known to the opposite party as such, and it applies just as much in the case of the dissolution of a legal entity, such as a corporation, as in that of the death of a living person. *Salton*

v. New Beeston Cycle Co. (No. 2), 69 L. J. Ch. 20; [1900] 1 Ch. 43; 81 L. T. 437; 48 W. R. 92; 7 Manson, 74—Stirling, J.

Where, therefore, a plaintiff had obtained judgment in an action against a company, and on proceeding to enforce his judgment discovered that, after the action had been set down for trial, but before the hearing, the company had been dissolved under sections 142 and 143 of the Companies Act, 1862, the solicitors who appeared for the company, and who at the hearing did not know of the actual dissolution of the company, were ordered to pay to the plaintiff his costs as between solicitor and client as from the date of the hearing only, on the ground that they had not at that date used due diligence to ascertain whether the company was dissolved or not. *Whiteley Exerciser, Lim. v. Gamage* (67 L. J. Ch. 560; [1898] 2 Ch. 405) explained and distinguished. *Ib.*

Work done before Formation of Company by Solicitor—Adoption of Work by Company—Fees on Registration—Liability of Company.]—A company is under no liability in equity to pay for work done before its formation merely because it has adopted and derived benefit from such work. Where, therefore, solicitors have done work in connection with the formation of a company which is subsequently incorporated, they must, in order to recover their costs of such work from the company, establish a legal claim against the company either on their own behalf or on behalf of some person in whose shoes they are entitled to stand. *English and Colonial Produce Co., In re*, 75 L. J. Ch. 831; [1906] 2 Ch. 435; 95 L. T. 580; 13 Manson, 387; 22 T. L. R. 669—C.A.

Per BUCKLEY, J.—They can, however, recover the fees paid by them on the registration of the company inasmuch as the company is under a statutory liability to pay the same. *Ib.*

Hereford and South Wales Waggon and Engineering Co., In re (45 L. J. Ch. 461, 463; 2 Ch. D. 621, 624), explained and *dictum* discussed. *Ib.*

Custody of Title-deeds—Legal and Equitable Owners.]—The legal owner of property is entitled to the custody of the title-deeds, even though only a bare trustee. Solicitors who hold title-deeds are under no duty to keep possession of them until the equitable owner joins with the legal owner in demanding them, or to refuse to hand them over to the legal owner without such concurrence. *Tendring Hundred Waterworks Co. v. Jones*, 73 L. J. Ch. 41; [1903] 2 Ch. 615; 52 W. R. 61—Farwell, J.

Settled Accounts—Re-opening—Statutes of Limitation.]—The time within which a client must assert his right as against his solicitor to obtain, or, in the case of error, to open an account, is not limited to six years or to any other definite period. *Hindmarsh, In re* (1 Dr. & S. 129) and *Mainland v. Upjohn*, 58 L. J. Ch. 361; 41 Ch. D. 126) distinguished. *Cheese v. Keen*, 77 L. J. Ch. 163; [1908] 1 Ch. 245—Neville, J.

Bargain with Client.]—*See* FRAUD AND MISREPRESENTATION, col. 875.

Gift by Ward to Guardian.]—*See* col. 912.

Mortgage to Secure Advances—State of Account—Transferee—Constructive Notice.]—*See* MORTGAGE.

Setting Aside Gift to.]—*See* FRAUD AND MISREPRESENTATION, col. 875.

6. UNDERTAKING BY.

Appearance—Undertaking by Solicitor in Writing to Appear—Duration of Undertaking—Motion for Attachment.]—Although, under Order VIII. rule 1, a writ of summons is not available for service, unless renewed, for more than a year from the date of its issue, it is not intended by that rule that the writ is not to be in force for any purpose after the lapse of that time. *Kerly, In re*, 70 L. J. Ch. 189; [1901] 1 Ch. 467; 83 L. T. 699; 49 W. R. 211—C.A.

The writ in an action was in February, 1899, sent to the defendants' solicitors, and they, with the authority of their clients, indorsed it, "We accept service for the defendants . . . and will enter an appearance in due course." Negotiations for a settlement followed. The defendants' solicitors made an offer. The plaintiff's solicitors replied that they were prepared to stay further proceedings pending further instructions from their client. The defendants' solicitors wrote that their clients' offer remained open for two months. By consent the time for entering appearance was extended to April 30. Nothing further was done in the action until October 24, 1900, when the plaintiff's solicitors wrote definitely declining the defendants' offer, and calling on their solicitors to enter an appearance according to their undertaking. The defendants instructed their solicitors, having regard to the long delay, not to enter an appearance, and they accordingly declined to do so. The plaintiff moved to attach the solicitors:—*Held*, that, looking at all the circumstances of the case, the delay had not been so great as to deprive the plaintiff of the right of having the writ treated as still an effective writ as regards service; and that an appearance to it ought to be entered forthwith. *Ib.*

Per FARWELL, J.—An undertaking by a solicitor to enter an appearance to a writ of summons remains in force for a period of six years. *Ib.*

A defendant who has authorised his solicitor to enter an appearance for him is not at liberty to withdraw such authority after the solicitor has entered into an undertaking with the plaintiff to enter such appearance. *Ib.*

To Deposit Documents on Oath—Breach—Attachment—Committal—Notice—Service.]—On a motion made in an action the defendants gave an undertaking on or before a certain date to deposit in the central office upon oath any papers or documents in their possession handed to them by certain clients and belonging to certain estates. In pursuance of that undertaking the defendants deposited certain documents in the Central Office, but their affidavit did not shew that they had not in their possession others to which the plaintiffs' application related, and, as the documents were required for an examination to be held on the

day following the deposit, the plaintiffs on that day moved to attach the defendants for breach of their undertaking. The defendants opposed the motion on the ground (*inter alia*) that the order containing their undertaking had not been served upon them; that the notice of motion for attachment had not been personally served upon them; and that the proper remedy for breach of an undertaking was committal and not attachment:—*Held*, that service of the order containing the undertaking was unnecessary; that personal service of a notice of motion for committal was necessary; and that an undertaking, whether positive or negative, must be enforced by committal and not by attachment. *D. v. A. & Co.*, 69 L. J. Ch. 382; [1900] 1 Ch. 484; 82 L. T. 47; 48 W. R. 429—Cozens-Hardy, J.

To Stamp Documents—Liability—Practice.]—Where judgment was pronounced, after the admission in evidence of unstamped documents, upon the usual undertaking by the solicitors to stamp them, but the order could not be drawn up owing to the failure of the solicitors to comply with their undertaking, THE COURT, upon the application of the successful litigant, directed the order to be drawn up without the insertion of the documents in question, and the solicitors were ordered to produce the documents, properly stamped, to the Registrar, within four days. *Coolgardie Gold Fields, In re; Fleming, ex parte*, 69 L. J. Ch. 215; [1900] 1 Ch. 475; 82 L. T. 23; 48 W. R. 461—Cozens-Hardy, J.

The practice as to the admission of unstamped documents traced and explained. *Ib.*

And see cols. 2480-1.

7. COUNTRY SOLICITOR.

Auctioneer Employed by Country Solicitor—Costs Received by London Agent—Action by Auctioneer against London Agent—Privity of Contract.]—H. had been employed in a foreclosure action by D. and B., a country firm of solicitors, as auctioneer, and when the costs came to be taxed by the London agent S. he received a voucher from H. for his fees. S. thereupon took the money out of Court after taxation, which included this item of H.'s fees. Before he received this money it came to his knowledge that H. had not been paid. In an action by H. against S. to recover these fees as money had and received—*Held*, that there was no privity of contract between them, and the action therefore failed. *Hannaford v. Syms*, 79 L. T. 30—Channell, J.

Country Agent—Scope of Delegated Authority—Power to Compromise.]—A solicitor who is employed in the general conduct of a cause, or matter, as the town or country agent of another solicitor, possesses the same general authority in the conduct of the cause, or matter—including the power to compromise in a *bona fide* and reasonable manner—as is possessed by the principal solicitor by whom he is employed, unless this general authority has been expressly limited. *Dicta in Withers v. Parker* (28 L. J. Ex. 292; 29 L. J. Ex. 320; 4 H. & N. 524; 5 H. & N. 725) considered and followed. *Newen, In re; Carruthers v. Newen*, 72 L. J. Ch. 356; [1903] 1 Ch. 812; 88 L. T. 264; 51 W. R. 297—Farwell, J.

Lien of Town Agents for Country Solicitors—Bankruptcy of Country Solicitors—Taxation of Country Solicitors' Bill by Client—Right of Country Solicitors to Production of Documents.]

—Country solicitors owed their London agents more than 100l. for general agency business, which included the agency charges in a bill of 24l. owing to the country solicitors from their client E. The country solicitors became bankrupt, and their trustee delivered a bill of costs to E., who obtained an order of course to tax the same against the trustee, the order being obtained through the London agents, who were acting in the matter as agents for another firm of country solicitors. The London agents were afterwards changed, and ceased to act in the matter. In the course of the taxation it became necessary for the trustee to produce documents in the hands of the London agents on which they claimed a lien for their general agency charges, and the Taxing Master directed the trustee to issue a subpoena, on which the London agents attended and refused to produce the documents on the ground of their lien:—*Held*, by Joyce, J., that the London agents were not bound to produce the documents at the instance of the country solicitors or their trustee except upon payment of the whole of their general agency charges, and that it made no difference that the London agents had acted in obtaining the order for taxation on behalf of E. An appeal from this decision was settled by the London agents delivering the documents to the trustee upon his undertaking to pay to them the whole amount received from E., less the costs of taxation. *Jones & Roberts, In re*, 74 L. J. Ch. 458; [1905] 2 Ch. 219; 92 L. T. 562; 54 W. R. 22—C.A.

Unqualified or Unauthorised Person—Entering Caveat—Ministerial Act.]—Any person may enter a *caveat* on behalf of a country solicitor, and in doing so it is not necessary for him to give a London address. Entering a *caveat* is a ministerial act only, and a lay person who does so on behalf of another is not liable to attachment as an unqualified person under section 26 of the Solicitors Act of 1860. *Panton, In re*, 70 L. J. P. 95; [1901] P. 239; 84 L. T. 725—Jeune, P.

8. COVENANT AS TO PRACTICE.

Articles of Clerkship—Covenant not to Practice within Certain Radius—Breach—Work usually done by Solicitors.]—The defendant had bound himself to a solicitor practising at M. by articles for a term, and covenanted that he would not at any time act for or on behalf of any persons or do any work usually done by solicitors within a radius of fifteen miles from M. without written permission. The defendant took proceedings to obtain probate of the will of a person within the prohibited radius, and corresponded from H. with a witness within the prohibited radius with a view to obtaining his evidence in order to enable probate to be obtained. He signed the *præcipe* directing a plaint note to be issued for a County Court summons at a Court in the prohibited area on behalf of a plaintiff residing therein, and conducted the proceedings until receipt of the amount paid into Court. He prepared the will of a testatrix residing within the area on

instructions received outside the area, and received a small fee therefor, but was present when she executed it within the area; and, lastly, he advertised in a paper circulating within but published outside the area a farm for letting within the prohibited district:—*Held*, in an action to restrain the defendant from practising within the prohibited limit, that the covenant might be broken although the defendant or his clerks did not go professionally within such limit. That therefore the proceedings in connection with the collection of the debt through the County Court infringed the covenant. Also the acts done in relation to the execution of the will, which must be held to have been done by the defendant in his character of a solicitor, constituted a breach of such covenant, but that those as to advertising the farm did not break it. *Quere*, as to applying for the proof of evidence infringing the covenant. *Edmundson v. Render* (No. 1), 90 L. T. 814—Kekewich, J.

Prohibited Area—Acts Done Within by Letters from Without.—A covenant by a solicitor that he will not do any professional work within a radius of so many miles from a place is broken if he writes as a solicitor and sends to addresses within the radius, letters, for example, demanding payment from the addressee or giving advice to the addressee, for in such case the demand is made or the advice given at the place at which the letter is received. *Edmundson v. Render* (No. 2), 74 L. J. Ch. 585; [1905] 2 Ch. 320; 93 L. T. 124; 53 W. R. 632—Buckley, J.

9. UNCERTIFICATED SOLICITOR.

Right to Recover Costs—Father and Son—Son's Certificate Omitted to be Taken Out—Work Done by Father.—P. and P. junior, who were father and son, carried on business together as solicitors at A., under the name of J. E. P. & Son. P. junior had served his apprenticeship to his father, and had been admitted a solicitor about five years. There was no deed of partnership between them, no division of profits, and no account of profits between them. An action was commenced in 1902 by the plaintiff with J. E. P. & Son as his solicitors; it was tried in the summer of 1902 and resulted in judgment for the plaintiff with costs. By an oversight of the town agent of J. E. P. & Son the duty was not paid on the certificate of P. junior for 1902 till October of that year, when the omission was discovered and the duty paid. The duty for the certificate of P. senior was duly paid. On taxation of the costs the defendant objected to such of the items of the bill of costs as represented work done while the duty on the certificate of P. junior remained unpaid. P. senior deposed that all the work in the case had been done by himself:—*Held*, that P. senior was entitled to recover the whole costs. *Martin v. Sherry*, [1905] 2 Ir. R. 62—C.A.

Submission by Client to Pay.—Where a client has obtained an order of course for taxation of his solicitor's bill of costs, with the usual submission to pay what should appear to be due, the solicitor under section 12 of the Attorneys and Solicitors Act, 1874, cannot be allowed items in the bill for business done while he was

without a certificate. *Jones, In re* (89 L. J. Ch. 88; L. R. 9 Eq. 63), distinguished. *Sweeting, In re*, 67 L. J. Ch. 159; [1898] 1 Ch. 268; 78 L. T. 6; 46 W. R. 242—North, J.

10. BILL OF COSTS AND TAXATION.

Oral Agreement to Charge Less than Ordinary Costs—Validity of.—An agreement by a solicitor to charge a client less than ordinary costs is not required by section 4 of the Solicitors Act, 1870, when set up by the client, to be in writing. *Clare v. Joseph*, 76 L. J. K.B. 724; [1907] 2 K.B. 369; 96 L. T. 770; 23 T. L. R. 498—C.A.

Contentious Business—Agreement in Writing—Examination by Taxing Master.—An agreement in writing between a solicitor and client agreeing remuneration to be paid by the client to the solicitor for contentious business previously done by him is a sufficient agreement within section 4 of the Attorneys and Solicitors Act, 1870, if it is signed by the client only, and it must be referred to the Taxing Master for examination. *Pontifex v. Farnham* (62 L. J. Q.B. 344) doubted. *Bake v. French* (No. 2), 76 L. J. Ch. 605; [1907] 2 Ch. 215; 97 L. T. 750—Warrington, J.

Solicitor—Trustee—Power to Charge Profit-Costs—Insolvent Estate.—Where a solicitor is appointed executor and trustee of a will and is empowered by the testator to make professional charges as solicitor to the estate, he will not, if the estate is insolvent, as against creditors, be entitled to his profit-costs in relation to an administration action brought against him by a creditor, or otherwise incurred in the administration of the estate. *White, In re; Pennell v. Franklin*, 67 L. J. Ch. 502; [1898] 2 Ch. 217; 78 L. T. 770; 46 W. R. 676—C.A.

Solicitor—Mortgagee.—See *Cheese v. Keen*, 77 L. J. Ch. 163; [1908] 1 Ch. 245—Neville, J., and MORTGAGE, col. 1732.

Disbursements—Estate Duty Paid on Obtaining Probate for Client.—A payment for estate duty made by a solicitor when obtaining probate of a will on behalf of a client ought not to be included in the solicitor's bill of costs as a disbursement. *Lamb, In re* (58 L. J. Q.B. 455; 23 Q.B. D. 5), overruled. *Kingdon & Wilson, In re*, 71 L. J. Ch. 604; [1902] 2 Ch. 242; 86 L. T. 639; 50 W. R. 533—C.A.

Estate duty is not, like probate duty, merely a stamp duty, but is a duty for which the executor is personally accountable. *Id.*

Bill Improperly Headed—Sufficiency of Bill—Costs of Proceedings before Justices.—The plaintiffs had acted as solicitors for the defendant's wife in a petition for judicial separation in the High Court, and subsequently in proceedings before Justices under the Summary Jurisdiction (Married Women) Act, 1895. The petition in the High Court was dismissed, but the defendant was ordered to pay the costs as between party and party, which he did. The proceedings before Justices were successful, and the defendant was ordered to pay a certain fixed sum for costs, which he paid accordingly. The

plaintiff then delivered to the defendant the bill of costs on which the present action was brought, which was headed "In the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce)," and which contained not only the items of extra costs as between solicitor and client in the proceedings in that Court, but also items of costs in advising the wife as to her differences with the defendant and items of costs in respect of the proceedings before justices. The items allowed on taxation in the party and party bill of costs in the High Court were not included in the bill:—*Held*, that the bill was not invalid, since in respect of the High Court costs it might be regarded as having been delivered in two parts, and in respect of the other items it gave the defendant all the information he could reasonably require, although those items were not separately headed. *Cobbett v. Wood*, 77 L. J. K.B. 406; [1908] 1 K.B. 590; 98 L. T. 45—Pickford, J.

Held, also, on the authority of *Cale v. James* (66 L. J. Q.B. 249; [1897] 1 Q.B. 418), that the costs in respect of the proceedings before Justices could not be recovered. *Id.*

Drawing Bills of Costs—Costs of.—Costs of drawing bills are allowed where there is litigation or quasi-litigation, but not where bills already delivered are ordered to be taxed or the order is one between a solicitor and his own client for delivery and taxation. *National Bank of Wales, In re*, 71 L. J. Ch. 679; [1902] 2 Ch. 412; 87 L. T. 436; 50 W. R. 541—Buckley, J.

Claim for Costs against Client—Cross-claim by Client—No Signed Bill—Adjustment of Accounts and Balance Struck in Favour of Solicitor—Account Stated.—Where a solicitor has a bill of costs against a client, and the client has a *contra* account against the solicitor for work done as a tradesman, and the parties adjust their accounts and a balance is struck in favour of the solicitor, he is entitled to sue for such balance on an account stated, although no signed bill of costs was delivered, and although there was no written agreement as to the costs within the meaning of the Solicitors Acts. *Turner v. Willis*, 74 L. J. K.B. 365; [1905] 1 K.B. 463; 92 L. T. 412; 53 W. R. 348—D.

Bill of Costs Paid by Executor—Right of Creditor to Taxation—"Party interested."—A creditor is entitled, as "a party interested" in his deceased debtor's estate, to apply for taxation of a bill of costs paid by the executor out of the estate, within section 39 of the Solicitors Act, 1843. *Dictum* of SIR GEORGE JESSEL, M.R., in *Leadbitter and Harvey, In re* (48 L. J. Ch. 242; 10 Ch. D. 388), as to the meaning of "party interested," explained. *Roberts-Jones and Everett, In re*, 73 L. J. Ch. 706; [1904] 2 Ch. 363; 91 L. T. 286; 53 W. R. 59—Buckley, J.

Security for Costs of Discovery and Interrogatories.—Payments by a solicitor out of his own pocket into the "Security for Costs Account" in respect of discovery and interrogatories under Rules of the Supreme Court, Order XXXI. rules 25-27, are not payments

by him as solicitor for his client, and ought not to be included in his bill of costs as disbursements. They are, in effect, loans to the client, and should be entered in the cash account. The rule laid down in *Remnant, In re* (18 L. J. Ch. 374, 377; 11 Beav. 603, 611), applied. *Buckwell and Berkeley, In re*, 71 L. J. Ch. 713; [1902] 2 Ch. 596; 87 L. T. 215; 51 W. R. 21—C.A.

Amended Bill—Action to Recover Costs—Reference for Moderation after Verdict.—A reference of a bill of costs for moderation to a Taxing Master directed by a Judge at the trial after verdict for the plaintiff in an action to recover the amount of the bill is not a reference under section 37 of the Solicitors Act, 1843. Where a solicitor, having sent in a bill of costs, subsequently sends in a corrected or amended bill for a larger amount, and brings an action to recover the amount of the second bill, the first bill is cogent but not conclusive evidence of the amount due to him. After verdict for the plaintiff, the Judge at the trial is not bound to refer the first, and only the first bill, but may and ought under ordinary circumstances to refer the second bill to a Taxing Master for moderation. *Heather & Co., In re* (39 L. J. Ch. 781; L. R. 5 Ch. 694), and *Thompson, In re* (55 L. J. Ch. 138; 30 Ch. D. 441), distinguished. *Lumsden v. Shipcote Land Property Co.*, 75 L. J. K.B. 665; [1906] 2 K.B. 433; 95 L. T. 17; 54 W. R. 461; 22 T. L. R. 559—C.A.

Order for Delivery of Bill of Costs—Order for Extension of Time not Drawn up—Non-compliance—Motion for Attachment—Service of Orders.—Before a client, who has obtained an order against his solicitor for delivery of his bill of costs within a fixed time, which time is afterwards extended by order, can obtain leave to issue a writ of attachment for non-compliance with the orders, both orders must be drawn up and served, or a four-day order obtained. *Seal, In re; Seal and Edgelow, In re*, 72 L. J. Ch. 58; [1903] 1 Ch. 87; 87 L. T. 731; 51 W. R. 164—Byrne, J.

Delivery of Bill—Disclaimer by Solicitor of Right to Costs.—Where a solicitor disclaims all right to be paid costs, whether by way of set-off against money of his client in his hands or otherwise, he cannot, under the common order to tax, be compelled to deliver a bill of costs merely in order that the client may obtain an account of cash advanced to the solicitor. *Landor, In re*, 68 L. J. Ch. 373; [1899] 1 Ch. 818; 80 L. T. 643; 47 W. R. 457—North, J.

Common Order to Tax—Suppression of Material Facts—Agreement to Refer.—An agreement was made to pay reasonable and proper costs, and a bill of costs was delivered. The only real question was whether the negotiation fee was properly chargeable. It was agreed to refer the question to the council of the Law Society, and a case was submitted to the respondents for approval. The respondents said they would have altered the case by stating that no negotiation in fact took place, and refused to proceed with the reference, and obtained the common order to tax. For the applicants it was said that an order of course would not have been made if the agreement to refer had been dis-

closed. The respondents said that only a special agreement going to the whole bill required to be mentioned, not an agreement as to one item, even if such an agreement was in fact concluded:—*Held*, that the test was that stated in *Gedye, In re* (15 Beav. 254, at p. 257): Was the matter omitted of sufficient moment and importance to require grave consideration or discussion? Only matters of real moment and importance require to be mentioned, and the fact that at one time the parties intended to refer the question to the Law Society was not such a matter. *Collyer-Bristow & Co., In re; Fletcher, ex parte*, 81 L. T. 110—North, J.

Bill Delivered More than One Month—Common Order—Expiration of Time Limit—Proceeding with Taxation—Jurisdiction.]—Under the common order for taxation obtained by the client when the bill has been delivered more than one month and less than twelve months—which directs the Taxing Master to make his certificate within a month (unless he shall extend the time), or the order is to be of no effect—by virtue of Order LXV. rule 27, sub-rule 57 of the Rules of the Supreme Court, 1883, the Taxing Master can in his discretion extend the time, though the application is not made to him to do so till after the month has elapsed, and even though the order was not served on the solicitor till after that date; but, under such circumstances, an extension of time ought not to be granted by the Taxing Master as a matter of course. *Macintosh, Dixon & Co., In re*, 72 L. J. Ch. 609; [1903] 2 Ch. 394; 88 L. T. 820; 51 W. R. 659—C.A.

Third-Party Order for Taxation.]—A third-party order for taxation does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based. Where such an order has been made for the taxation of a lessor's bill of costs, at the instance of a lessee, the Court is bound to look at the nature of the items in the bill and to consider whether, apart from the order, the applicant is bound to pay them. The lessee does not by obtaining the order render himself liable to pay the whole bill. *Negus, In re* (64 L. J. Ch. 79; [1895] 1 Ch. 73) applied. *Gray, In re*, 70 L. J. Ch. 133; [1901] 1 Ch. 239; 84 L. T. 24; 40 W. R. 298—Cozens-Hardy, J.

— Arbitration—Umpire's Solicitor's Costs of Preparing Award—Payment on Taking up Award—“Special circumstances.”]—An umpire, in an arbitration under the Lands Clauses Consolidation Acts for the purpose of assessing the compensation payable upon a compulsory purchase of land, directed by his award that the purchaser should pay to the vendor his costs of the reference and the costs of the award, including the umpire's own fee, and in addition the costs and expenses of and incidental to preparing and perfecting the award. The purchaser having, upon taking up the award, paid to the umpire's solicitors the amount demanded for the umpire's fee and their charges, applied in the King's Bench Division for an order for the delivery by the umpire's solicitors of their bill of costs and for its taxation under section 38 of the Solicitors Act, 1843:—*Held*, that, the bill of costs being between solicitor and client, and the purchaser being a person not chargeable therewith who had paid it, the case fell within section 38, and

that the impossibility of the purchaser knowing the effect of the award when he took it up constituted a “special circumstance” justifying the order for taxation after payment of the bill; but that the application ought to have been made in and must be transferred to the Chancery Division. *Collyer-Bristow & Co., In re*, 70 L. J. K.B. 941; [1901] 2 K.B. 382; 85 L. T. 208; 50 W. R. 4—C.A.

— Mortgagor and Mortgagee—Practice.]—On taxation under the common order of the mortgagee's solicitor's bill, under section 38 of the Solicitors Act, 1843, the mortgagor is entitled to have the taxation limited to such items of costs as have been incurred by the client, the mortgagee, strictly in his position of mortgagee. *Gray, In re* (70 L. J. Ch. 133; [1901] 1 Ch. 239), approved and followed. *Per ROMER, L.J.*—The scope and effect of section 38 considered. *Longbotham & Sons, In re*, 73 L. J. Ch. 681; [1904] 2 Ch. 152; 90 L. T. 801; 52 W. R. 660—C.A.

Taxation by Cestui que Trust—Twelve Months after Payment.]—The discretion given to the Court by section 39 of the Solicitors Act, 1843, to order taxation at the instance of a *cestui que trust* of a bill of costs which has been paid by a trustee is limited by the proviso in section 41 that the application must be made within twelve months after payment. *Downes, In re* (13 L. J. Ch. 159; 5 Beav. 425), followed. *Wellborne, In re*, 70 L. J. Ch. 172; [1901] 1 Ch. 312; 83 L. T. 611; 49 W. R. 113—C.A.

Order for Taxation Obtained by Solicitor—Disputing Retainer.]—*Quere*, whether, on an order for taxation obtained by the solicitor under the Solicitors Act, 1843, s. 37, containing a specific statement of a retainer in a particular transaction, it is open to the client who chooses to go in under the order to dispute such retainer. *Jones, In re* (56 L. J. Ch. 720; 36 Ch. D. 105), considered on this point. *Wingfield and Blew, In re*, 73 L. J. Ch. 797; [1904] 2 Ch. 665, *per Romer, L.J.*

Solicitor Acting as Parliamentary Agent—Charges for Obtaining a Bill in Parliament.]—Where a parliamentary agent who is also a solicitor is employed to do work in his capacity of parliamentary agent, and delivers a bill of costs containing only charges which might be made by a person acting as a parliamentary agent, and there is nothing to show that the relation of solicitor and client exists between the parties, the bill of costs is not taxable in the High Court under the Solicitors Act, 1843. *Sadlow, In re* (18 L. J. Ch. 182; 11 Beav. 400), and *Strother, In re* (26 L. J. Ch. 695; 3 K. & J. 518), explained. *Baker, Lees & Co., In re*, 72 L. J. K.B. 186; [1903] 1 K.B. 189; 87 L. T. 662; 51 W. R. 246—C.A.

Non-professional Work.]—The solicitors to a trust presented a bill of costs, one of the items of which was commission at the rate of 5 per cent. for the collection of the rents of the trust estate. There was no agreement between the solicitors and the trustees as to the remuneration to be paid for the collection of these rents:—*Held*, that if the collection of rents were non-professional work, this commission ought not to be included in a bill of costs submitted for taxation; and that, on the other hand, if the

collection of rents were professional work, it was not open to the Taxing Master, in the absence of agreement as to remuneration, to allow this commission as a lump sum without reference to the items. *Held*, accordingly, that the commission must, in either case, be struck out of the bill, without prejudice to the right of the solicitors to recover proper remuneration, in a proper manner, for the collection of the rents. *Swilson, Coope & Co., In re*, 73 L. J. Ch. 541; [1904] 1 Ch. 837; 90 L. T. 641; 52 W. R. 556; 20 T. L. R. 418—Swinfen Eady, J.

Bill of Sale—Bankruptcy of Grantor—Costs of Preparation and Redemption.—The grantor of a bill of sale became bankrupt, and the grantee, having sold the chattels therein comprised, realised a sum more than sufficient to discharge the amount secured by the bill of sale. By an antecedent agreement the grantor was liable to pay all the expenses of the bill of sale, and the grantee now claimed to deduct out of the fund in his hands his solicitor's costs in connection with the preparation and redemption of the bill. The official receiver, as trustee, having paid the costs under protest, moved in the bankruptcy for a declaration that certain heads of these costs could not be charged:—*Held*, that the Court having jurisdiction in the bankruptcy had a discretionary power under the Bankruptcy Act, 1883, s. 102, to tax the costs of the grantee's solicitor, and that the third-party taxation provided by the Solicitors Act, 1843, s. 38, did not exclude this discretionary jurisdiction. *Ford, In re; Official Receiver, ex parte*, 84 L. T. 829—D.

Bills of Fees, Charges, and Disbursements—Subsequent Addition of Item by Master—Correction of Arithmetical Error.—A solicitor's bill contained an item not properly chargeable, but omitted a second item properly chargeable, and also of greater amount. It further contained an arithmetical error:—*Held*, that the Taxing Master was not at liberty to allow the improper item as standing *pro tanto* in the place of the proper item omitted, but that he was justified in correcting the arithmetical error. *Grant, Bulcraig & Co., In re*, 75 L. J. Ch. 106; [1906] 1 Ch. 124; 93 L. T. 760; 54 W. R. 165; 22 T. L. R. 96—Farwell, J.

Deposit under Rule 147 of the Bankruptcy Rules, 1883 and 1890—Inclusion in Bill of Costs.—A deposit paid under rule 147 of the Bankruptcy Rules, 1883 and 1890, on the presentation of a petition is properly included in a solicitor's bill of costs by virtue of rule 112, sub-rule 1 of the same Rules, and of the scale of costs thereunder. *Id.*

Payment on Account.—The plaintiff had paid the amount of an account sent in by his solicitor, which account was not, however, a "bill of costs," inasmuch as it did not set out the particular items charged. More than twelve months after such payment the plaintiff took out a summons for delivery and taxation of the solicitor's bill of costs. No bill of costs had been delivered at the date of the hearing of the summons:—*Held*, that the payment on account could not in the circumstances be made referable to the bill of costs which would be delivered after the hearing of the application; and that the plaintiff was entitled to the common form

order for delivery and taxation, notwithstanding the payment made upwards of twelve months before the issue of the summons. *Callis, In re*, 49 W. R. 316—Joyce, J.

Statute-barred Items—Fund Recovered for Client—Lien—Set-off—Right to Appropriate.—In an action brought in 1902 upon a solicitor's bill of costs for the period from 1878 to 1899, which bill, together with a cash account, was delivered to the defendant in 1899, the Statute of Limitations (21 Jac. 1, c. 16), s. 3, was pleaded as a defence. At the trial the Judge held that the defence was good as to all items incurred before 1893, and ordered the bill to be referred for taxation, and to take the cash account from 1893, and that the plaintiff should give credit for all sums received on account of the defendant "in respect of, or which ought to be treated as reducing or discharging, the bill of costs." On the taxation the defendant brought in a surcharge for 66l. 3s. 8d. received by the solicitor on May 9, 1894, as solicitor for the defendant in an action brought by him against a third party. The surcharge was valid, and had been omitted through inadvertence from the cash account delivered. The plaintiff contended that this sum ought not to be treated as reducing the bill of costs under taxation, but as applied in payment of what was due to the solicitor from the defendant on May 9, 1894, in respect of statute-barred items:—*Held*, that the plaintiff was not entitled so to treat the sum—either on the ground of lien, since the lien of a solicitor on a fund recovered is confined to the costs of the action in which it is recovered, and none of these were in the present case among the statute-barred items; or upon the ground of set-off, since no debts can be used by way of set-off except such as are recoverable by action, and the statute-barred items were not so recoverable; or upon the ground of appropriation, since, assuming the right to appropriate, no appropriation had been in fact made, and after the judgment in the action it was no longer open to the plaintiff to make an appropriation. *Smith v. Betty*, 72 L. J. K.B. 853; [1903] 2 K.B. 317; 89 L. T. 258; 52 W. R. 137—C.A.

Administration Action—Infant—Guardian ad Litem—Order for Costs to Come out of Estate—Infant Coming of Age before Taxation—Discretion of Taxing Master to Order Attendance of Guardian.—An order was made in an administration action that the costs of the plaintiff and of the defendants should be taxed as between solicitor and client and be paid out of the testator's estate. One of the defendants was an infant, who appeared by her guardian *ad litem*. After the order for taxation the infant came of age and changed her solicitors. The Taxing Master thereupon directed that the guardian *ad litem* should attend before him by his solicitors upon the taxation:—*Held*, that the Master had a discretion under Order LXV, rule 27, sub-r. 27, to make the order, and the Court would not interfere. *Salmond, In re; Rydon v. Williams*, 22 T. L. R. 161—Farwell, J.

Winding-up of Company—Liquidator's Costs, Charges, and Expenses—Inclusion of Disbursements as well as Professional Charges—Inclusion of Costs already Paid—Reduction by One-sixth Taxed off.—For the purpose of ascertaining

whether a bill of costs has been reduced on taxation by one-sixth, under Order LXV. rule 27, sub-rule 38B, professional charges only, and not also disbursements, are to be considered. The present practice in the Taxing Office (of including disbursements) is wrong. *Mercantile Lighterage Co., In re*, 75 L. J. Ch. 171; [1906] 1 Ch. 491; 94 L. T. 405; 54 W. R. 389; 22 T. L. R. 250—Warrington, J.

A bill carried in for taxation as between solicitor and client properly includes party and party costs already taxed and paid by a third party, credit being given for the amount so received. *Ib.*

Order on Summons for Delivery and Taxation of Bill of Costs—Whether Final or Interlocutory Order.]—*See* APPEAL, col. 22.

Order Refusing Review of Taxation—Appeal—Leave.]—*See* APPEAL, col. 23.

Solicitor-Trustee—Power to Charge for Services.]—*See* TRUST AND TRUSTEE.

11. SCALE OF ALLOWANCES.

Action Brought in Mayor's Court—Amount Recovered under 50*l.*—Award of Costs by Judge on Higher Scale.]—The plaintiff in an action in the Mayor's Court having recovered an amount exceeding 20*l.* and under 50*l.*, the Judge, under rule 13 of the Mayor's Court Rules, 1890, awarded costs on the scale applicable to cases in which the amount recovered was 50*l.* and above. The unsuccessful defendants obtained an order under the Solicitors Act, 1843, to tax in the High Court their solicitors' bill of costs in the action:—*Held*, that the Taxing Master was right in taxing these costs upon the higher scale. *Briggs & Son, In re*, 72 L. J. K.B. 644; [1903] 2 K.B. 156; 89 L. T. 7; 51 W. R. 577—C.A.

Building Lease.]—A lease for seven hundred years at the yearly rent of 50*l.*, with a covenant on the part of the lessee to expend within five years the sum of 500*l.* in building and in effecting permanent improvements, buildings or improvements in corrugated iron to be deemed permanent improvements; and also a covenant to keep the premises and improvements in repair, and a covenant to insure,—*Held*, to be a building lease within the General Order, 1884, made under the Solicitors' Remuneration Act, 1881. *Hall to Sutton*, [1900] 1 Ir. R. 137—V.O.

— **Scale of Charges.]—**A lease of a house in a town was made to a municipal corporation for the purpose of a technical school, for thirty-five years, at the yearly rent of 35*l.*, with a covenant by the lessees to expend 250*l.* within two years from the date of the lease in improvements and alterations, according to the specification of an engineer. The matters provided for in the specification did not involve rebuilding, but comprised a good deal of new work and structural alterations in addition to repairs:—*Held*, that the lease was a building lease within the General Order, and that the costs of the lessor's solicitor for preparing it were to be taxed accordingly. *Kilkenny Corporation, In re*, [1904] 1 Ir. R. 570—M.R.

Compromise of Litigation—Agreement to Pay Costs.]—On a taxation at the instance of a third party under section 38 of the Solicitors Act, 1843, according to the rule established by *Longbotham & Sons, In re* (73 L. J. Ch. 681; [1904] 2 Ch. 152), the Taxing Master is right in disallowing, as against the third party, any unusual and unnecessary costs, though incurred by the special instructions of the person chargeable, which apart from such special instructions would not have been allowed against the person chargeable on an ordinary taxation between solicitor and client; and it makes no difference whether the liability of the third party arises out of an implied contract, as in the case of mortgagor and mortgagee, or under an express agreement by the third party to pay the costs, not amounting to a complete indemnity to the person chargeable. *Holliday and Godlee, In re* (58 L. T. 301), overruled. *Cohen & Cohen, In re* (No. 2), 74 L. J. Ch. 517; [1905] 2 Ch. 137; 92 L. T. 782; 53 W. R. 529—C.A.

Disbursements—Stamp Duty on Capital of Company—Practice.]—A solicitor retained in the matter of the formation and registration of a joint-stock company paid on behalf of his client the *ad valorem* stamp duty payable under section 112 of the Stamp Act, 1891, and section 7 of the Finance Act, 1899, on the statement of the amount of nominal share capital of the company. In the bill of costs delivered to the client the amount so paid appeared as a professional disbursement. On taxation of the bill of costs the Taxing Master disallowed this item:—*Held*, that the payment was made by the solicitor as agent for his client, and not in pursuance of his duty as solicitor; that there was no general custom or practice in the profession to regard such a payment as a professional disbursement; and therefore that the amount was not properly included as a professional disbursement in the bill of costs. *Remnant, In re* (18 L. J. Ch. 374; 11 Beav. 603), and *Kingdon and Wilson, In re* (71 L. J. Ch. 604; [1902] 2 Ch. 242), followed. *Blair and Girling, In re*, 75 L. J. K.B. 624; [1906] 2 K.B. 131; 94 L. T. 873; 54 W. R. 549; 22 T. L. R. 547—C.A.

Fees of Counsel—Brief—Instructions of Client not to Brief Counsel who has Advised during Action—Professional Etiquette.]—The rules of etiquette as between members of the legal profession have no effect beyond their relations *inter se*, and do not in any way affect the legal relations between solicitor and client. If such rules are enforceable, it is only because the members of the profession choose to govern their conduct by reference to them. A solicitor cannot therefore brief a counsel whom his client has instructed him not to brief, and charge the client with the fees and other expenses incurred in delivering the brief, merely because the counsel is entitled to a brief under the rules of professional etiquette. The solicitor's proper course in such circumstances is either to explain the rule to the client and say that he must state the facts to any other counsel whom he briefs, and that such counsel may probably return the brief, or to say that he is himself so clearly governed by the rules and etiquette of the profession that if he is not allowed to brief the counsel in question he must throw up his retainer. *Harrison, in re*, 77 L. J. Ch. 143; [1908] 1 Ch. 282; 97 L. T. 902—Parker, J.

Fee-farm Grant—Filling in Printed Form—Scale Charge.—A solicitor prepared a series of fee-farm grants, following a printed form previously approved by the grantee, and annexed to the agreement for the grants, adding a recital of the grantor's title, filling in the names of the parties, parcels, rents, &c., and adding a map to each grant:—*Held*, that he was entitled for each conveyance to the remuneration for preparing, settling, and completing conveyances provided by the scale of charges in Schedule I. Part 2 of the General Order, 1884, under the Solicitors' Remuneration Act, 1881. *Aiken, In re; Shannon, ex parte*, [1902] 1 Ir. R. 1—M.R.

Lease "not at a rack rent"—Fine.—A firm of solicitors, acting for the lessor, prepared, settled, and completed a lease of premises for a term of one hundred years, in consideration of a fine of 500*l.* and a rent of 30*l.* per annum; no abstract of title was made out:—*Held* (FITZ-GIBBON, L.J., dissenting), that the solicitors were entitled to charge 10*l.*, being the scale fee on the rent reserved, and also 7*l.* 10*s.*, being the scale fee on the fine, the fine being treated as if it were the purchase-money paid on a sale. *Robson, In re* (59 L. J. Ch. 627; 45 Ch. D. 71), followed; *Ferguson, Ex parte* (21 L. R. Ir. 392), dissented from. *Connolly to Sheridan and Russell, Ex parte*, [1900] 1 Ir. R. 1—C.A.

Lease—Renewal—Scale Fee.—In 1906 the Corporation of the City of London granted a renewal of the lease to the trustees of the will of their original lessee, with whom in 1892 it had covenanted to renew the lease "at the request, costs and charges" of him, his executors and assigns. The probate of his will and a deed of appointment of new trustees had both been previously registered with the Corporation, but upon the renewal of the lease the solicitor for the Corporation delivered a bill not only for a scale fee for the new lease and counterpart, but also for items for investigation of title and searches, which latter items the Taxing Master struck out as charges for business connected with the lease and on the ground that they were not covered by "costs and charges" in the covenant:—*Held* (reversing the Taxing Master), that the costs of investigation of the title of the applicants to a renewal were costs reasonably incurred within the meaning of "costs and charges" in the covenant for renewal, and that they were not covered by the scale fee under Part II. of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881. *Baylis, In re*, 76 L. J. Ch. 358; [1907] 2 Ch. 54; 96 L. T. 812—Kekewich, J.

Concurring Parties—Separate Solicitors—Collective Costs included in Lessor's Solicitor's Bill—"Disbursement"—"Cash account."—There is no general custom binding a lessee to pay more than one set of costs where there are several lessors represented by different solicitors. If, however, the lessee has agreed to pay all those costs he is entitled to have all the bills taxed. If the solicitors of one of the lessors include the costs of the other separate solicitors in their bill, and more than one-sixth is taxed off the whole bill, the costs of taxation will be disallowed, although less than one-sixth is taxed off those solicitors' own charges. *Remnant, In re* (18 L. J. Ch. 374; 11 Beav. 603),

distinguished. *Fletcher & Dyson, In re*, 72 L. J. Ch. 791; [1903] 2 Ch. 688; 89 L. T. 473; 52 W. R. 27—Swinfen Eady, J.

Mining Lease—Negotiations—Scale Fee.—A lessor who has paid his solicitor's bill of costs in relation to the lease can recover what he has paid from the lessee except charges for matters antecedent to the instructions for the lease, such as fees paid to a mining expert in the case of a mining lease. *Gray, In re*, 70 L. J. Ch. 133; [1901] 1 Ch. 239; 84 L. T. 24; 49 W. R. 298—Cozens-Hardy, J.

Sale of Leasehold Property by Original Lessee—Abstract of Lease—Vendor's Solicitor—Scale Fee for Deduction of Title—General Order under Solicitors' Remuneration Act, 1881, Schedule I. Part I.—The vendor's solicitor who, on a sale of leasehold property by the original lessee, simply delivers an abstract of the lease under which the lessee holds, does not "deduce" title within the meaning of Schedule I. Part I. of the General Order under the Solicitors' Remuneration Act, 1881, and consequently is not entitled to charge the scale fee. *Welby v. Still* (63 L. J. Ch. 931; [1894] 3 Ch. 641) approved and followed. *Webster and Jones, In re*, 71 L. J. Ch. 749; [1902] 2 Ch. 551; 87 L. T. 213—C.A.

Employment by Local Authority—Conveyancing Business—Remuneration—Election.—A solicitor employed by a school board in a purchase of real estate duly elected under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, to charge under Schedule II. to the Order instead of taking the scale charge under Schedule I. The board assented to the election, but on taxation of the bill for the purposes of public audit the Taxing Master disallowed all the items, and in lieu thereof allowed only the scale fee, on the ground that a public authority dealing with public moneys occupied a fiduciary position and was not entitled to employ a solicitor for ordinary conveyancing work on other than usual terms. On a summons for a review of taxation,—*Held*, that there was no justification for modifying the express provisions of rule 6 so as to except from their operation local authorities or other public bodies, and that the bill must go back for taxation on the basis of the election. *Evans, In re*, 74 L. J. Ch. 204; [1905] 1 Ch. 290; 92 L. T. 151; 69 J. P. 104; 3 L. G. R. 169—Farwell, J.

Mortgage—Negotiating—Solicitor Himself Mortgagee—Scale Fee for Negotiation.—A solicitor is entitled under the General Order under the Solicitors' Remuneration Act, 1881, Sched. I. Part I. rule 11, and under section 2 of the Mortgagees' Legal Costs Act, 1895, to the scale fee provided for negotiating a mortgage, even in cases in which he himself advances the mortgage-money. *Norris, In re*, 71 L. J. Ch. 187; [1902] 1 Ch. 741; 86 L. T. 46, 616; 50 W. R. 316—Swinfen Eady, J.

Present Advances—Future Possible Advances.—The remuneration of solicitors by way of scale fee, as provided for by the Solicitors' Remuneration Act, 1881, Schedule I. and the General Order thereunder, does not apply to work done as to securities for loans,

which consist partly of present advances and partly of future possible advances. *Barton to Irvine*, [1899] 1 Ir. R. 515—C.A.

— **Transfer of—Costs of Transferor's Solicitor—Solicitors' Remuneration Act.**—The solicitor for the transferor of a mortgage is to be remunerated for shewing any title required and for approving of the transfer under the old system as altered by Schedule II. of the General Order, 1884. *Briscoe & Smith, In re*, [1908] 1 Ir. R. 29—M.R.

“**Negotiating loan.**” — Under the words “mortgagee's solicitor for negotiating loan” in the General Order made under the Solicitors' Remuneration Act, 1881, Schedule I., Part I., a solicitor is entitled to charge the scale fee there mentioned for negotiating mortgages, notwithstanding that they are not exclusively upon “freehold, copyhold, or leasehold property.” The word “loan” in the schedule means a loan on mortgage, and not any other sort of loan. *Furber, In re; Furber, ex parte*, 67 L. J. Ch. 598; [1898] 2 Ch. 538; 79 L. T. 266; 47 W. R. 184—Kekewich, J.

Negotiating Purchase—Re-sale—Investigating and Deducing Title—Scale Fee—General Order under Solicitors' Remuneration Act.—To be entitled to the scale fee, under Schedule I. Part I. of the General Order under the Solicitors' Remuneration Act, 1881, for negotiating a purchase or sale, a solicitor must substantially do the whole of the negotiation. *MacGowan, In re; MacGowan v. Murray* (60 L. J. Ch. 118; [1891] 1 Ch. 105), and *Withall, In re* (61 L. J. Ch. 14; [1891] 3 Ch. 8), applied. *Romain, In re*, 72 L. J. Ch. 309; [1903] 1 Ch. 702; 88 L. T. 125; 51 W. R. 346—Buckley, J.

To be entitled to the scale fee for investigating title and preparing and completing conveyance on a purchase, or, on a sale, for deducing title and perusing and completing conveyance, he must do, respectively, all those things. *Ib.*

L., having contracted to buy a property for 3,350*l.*, agreed the next day to sell it to D. for 3,700*l.* L.'s solicitor received an abstract of title from the vendor's solicitor and passed it on to D.'s solicitor, and, similarly, passed on to the vendor's solicitor requisitions received from D.'s solicitor. The conveyance was made direct from the vendor to D., L. being a party:—*Held*, that L.'s solicitor was not entitled to the scale fee for investigating title and preparing and completing conveyance on the purchase by L., or for deducing title and perusing and completing conveyance on the re-sale. *Lacey & Sons, In re* (53 L. J. Ch. 287; 25 Ch. D. 301), followed. *Read, In re* (63 L. J. Ch. 831; [1894] 3 Ch. 238), distinguished. *Ib.*

Purchase of Land in Register County—“Completing conveyance”—Charges for Registration.—The scale fee allowed to the purchaser's solicitor on a purchase of land by part 1 of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, covers, in the case of a purchase of land in a register county, the solicitor's charges for preparing the memorial of the deed of conveyance for registration, and registering it at the proper office. Such services are included under the

expression “completing conveyance.” *Grey v. Curtrice*, 63 L. J. Ch. 60; [1899] 1 Ch. 121; 79 L. T. 713; 47 W. R. 294—C.A.

Sale of Land in Lots—One Title—“Transaction”—Scale of Charges—General Order under Solicitors' Remuneration Act, 1881.—Where freehold property held under one title is sold by auction and separate abstracts are delivered to the respective purchasers, the sale of each lot is a separate transaction within rule 8 of the rules annexed to Schedule I. part 1 of the Solicitors' Remuneration Act, 1881, and consequently the prescribed remuneration to which the solicitor for the vendor is entitled is 3*l.* in respect of each such transaction under 100*l.* *Thomas, In re; Evans v. Griffiths*, 69 L. J. Ch. 219; [1900] 1 Ch. 454; 82 L. T. 105; 48 W. R. 299—Stirling, J. And see *Simmons' Contract, In re*, 77 L. J. Ch. 215; [1908] 1 Ch. 452; 98 L. T. 185—Parker, J.

Shorthand Notes—Personal Liability of Solicitor.—Where a solicitor employs a shorthand-writer to take shorthand notes of a case in which the solicitor is acting for a client, in the absence of a special arrangement the solicitor is personally liable to the shorthand-writer for the costs of the notes. *Cocks v. Bruce, Searl & Good*, 21 T. L. R. 62—Channell, J.

— **of Evidence—Patent Action.**—At the trial of an action for the infringement of a patent an arrangement was made in open Court between the counsel for the parties, at the instance and with the sanction of the Judge, that a shorthand note of the evidence should be taken at the joint expense of the parties, and should constitute the record of the evidence for the purposes of the trial. The defendants' solicitor did not inform them that the cost of the shorthand note might not be allowed on taxation between party and party:—*Held*, that the rule laid down in *Blyth and Fanshawe, In re* (52 L. J. Q.B. 186; 10 Q.B. D. 267), did not apply, and that the solicitor was entitled to be allowed, on taxation between solicitor and client, the amount disbursed by him as the defendants' share of the expense of taking the shorthand note. *Osmond v. Mutual Cycle and Manufacturing Supply Co.*, 68 L. J. Q.B. 1027; [1899] 2 Q.B. 488; 81 L. T. 254; 48 W. R. 125—C.A.

Translations of Foreign Documents.—It is within the scope of a solicitor's duties, if he has a staff competent for the purpose, to assist the Court by translating documents originally in a foreign language which have to be brought to the notice of the Court, and which are entered as read in the orders of the Court; and he is consequently entitled to be allowed, on taxation of his bill of costs, reasonable costs in respect of such translations. *Bowes, In re; Strathmore (Earl) v. Fane*, 69 L. J. Ch. 544; [1900] 2 Ch. 251; 82 L. T. 673; 48 W. R. 604—Gozens-Hardy, J.

Winding up of Estate—Special Costs Incurred by Particular Beneficiaries—Anticipatory Costs.—On a taxation under section 39 of the Solicitors Act, 1843, of the costs of winding up an estate, it is right to allow all costs properly and reasonably incurred by the trustees or executors, even though certain items of these

costs have been occasioned by the action of particular beneficiaries, and even though it be right that these items should be ultimately charged against the share of these particular beneficiaries. The question whether these items ought ultimately to be charged against the shares of these particular beneficiaries does not arise on a taxation under section 39. Such reasonable and proper charges as will be incurred in carrying out the final division of an estate may be allowed on a taxation under section 39 by anticipation, if the costs to be taxed are those of the final division and settlement of the estate, but not if they are those of an interim division and settlement. *Miles, In re*, 72 L. J. Ch. 704; [1903] 2 Ch. 518; 88 L. T. 863; 52 W. R. 47—Swinfen Eady, J.

Solicitor and Client Scale.—The taxation of the costs of parties as between solicitor and client should still in a proper case be expressly directed by the Court, notwithstanding the provisions of the new regulation in the Rules of the Supreme Court, Order LXV. rule 27 (29) (January, 1902, rule 10). *Bradshaw, In re; Bradshaw v. Bradshaw*, 71 L. J. Ch. 280; [1902] 1 Ch. 436; 86 L. T. 253—Kekewich, J.

—**Electric Lighting Works.**—The erection of works for the purpose of supplying electric light by a municipal corporation under a provisional order obtained under the Electric Lighting Act, 1882, is "an act done in pursuance, or execution, or intended execution of a public duty or authority" within the meaning of section 1 of the Public Authorities Protection Act, 1893. The corporation therefore will be entitled to their costs as between solicitor and client from the plaintiff where they obtain judgment in an action brought against them for damages for injury caused by such works. *Ambler v. Bradford Corporation*, 71 L. J. Ch. 744; [1902] 2 Ch. 585; 87 L. T. 217; 66 J. P. 708—C.A.

12. ACTION FOR COSTS.

Statute-barred Items—Fund Recovered for Client—Lien—Set-off—Right to Appropriate.—In an action brought in 1902 upon a solicitor's bill of costs for the period from 1878 to 1899, which bill, together with a cash account, was delivered to the defendant in 1899, the Statute of Limitations (21 Jac. 1, c. 16), s. 3, was pleaded as a defence. At the trial the Judge held that the defence was good as to all items incurred before 1893, and ordered the bill to be referred for taxation, and to take the cash account from 1893, and that the plaintiff should give credit for all sums received on account of the defendant "in respect of, or which ought to be treated as reducing or discharging, the bill of costs." On the taxation the defendant brought in a surcharge for 66l. 3s. 8d. received by the solicitor on May 9, 1894, as solicitor for the defendant in an action brought by him against a third party. The surcharge was valid, and had been omitted through inadvertence from the cash account delivered. The plaintiff contended that this sum ought not to be treated as reducing the bill of costs under taxation, but as applied in payment of what was due to the solicitor from the defendant on May 9, 1894, in respect of statute-barred items:—

Held, that the plaintiff was not entitled so to treat the sum—either on the ground of lien, since the lien of a solicitor on a fund recovered is confined to the costs of the action in which it is recovered, and none of these were in the present case among the statute-barred items; or upon the ground of set-off, since no debts can be used by way of set-off except such as are recoverable by action, and the statute-barred items were not so recoverable; or upon the ground of appropriation, since, assuming the right to appropriate, no appropriation had been in fact made, and after the judgment in the action it was no longer open to the plaintiff to make an appropriation. *Smith v. Betty*, 72 L. J. K.B. 853; [1903] 2 K.B. 317; 89 L. T. 258; 52 W. R. 137—C.A.

Solicitor Employed at Fixed Salary.—A district council appointed as their clerk a solicitor who by the terms of his appointment was to act as their solicitor and do other work, in consideration of an inclusive salary of 400l. a year, and his out-of-pocket expenses. In an action against the council, in which the clerk acted as their solicitor, the plaintiff was ordered to pay their costs. Their bill of costs amounted to 17l. 8s. 1d., of which part was claimed in respect of out-of-pocket expenses, and part in respect of the clerk's services as solicitor in the action:—*Held*, that the council were not prevented by the proviso to section 5 of the Solicitors Act, 1870, or otherwise, from recovering the costs claimed in respect of such services. *Henderson v. Merthyr Tydfil Urban Council*, 69 L. J. Q.B. 335; [1900] 1 Q.B. 434; 48 W. R. 332—D.

Action in County Court on Bill of Costs—Statutory Defence—No Bill Delivered.—*See* COUNTY COURT, col. 606.

Bill of Costs—Account Stated—Bankruptcy of Client—Proof.—*See* BANKRUPTCY, col. 136.

13. LIEN AND CHARGING ORDER.

Common-law Lien—Infant Clients—Compromise of Action.—The effect of the sanction of the Court on behalf of infants to a compromise of an action is, as regards their solicitor's lien for the costs of the action, only to place the infants in the same position as parties *sui juris*, and the sanction does not in itself prejudice the lien. *Wright's Trusts, In re; Wright v. Sanderson*, 70 L. J. Ch. 119; [1901] 1 Ch. 317; 83 L. T. 515—C.A.

Payment of Money out of Court—Sanction of Compromise by Court on Behalf of Infants.—In an action brought by infant *cestuis que trust* against trustees in respect of alleged breaches of trust, a compromise was arrived at and sanctioned by the Court on behalf of the infants, and an order was made in pursuance thereof directing certain of the trust funds which had been brought into Court to be paid out to new trustees. The defaulting trustee was ordered to pay to the next friend of the infants their party and party costs, and the difference between those costs and the solicitor and client costs was ordered to be raised by the new trustees out of the trust funds and paid to the next friend. There was no mention in the order of the right to costs of the solicitor who had acted

for the infants:—*Held*, that there was nothing in the order to interfere with the solicitor's common-law lien for his costs. *Ib.*

Documents—Administration Action—Solicitor Acting for Parties to the Cause—Documents Received before Commencement of Litigation—Production for Inspection.]—Solicitors acting for executors who are parties to an administration action may, as officers of the Court, be ordered at the instance of a creditor to produce for inspection documents in their possession on which they have a lien for costs, if such inspection is necessary for the purposes of the action, although the documents came into their possession from the executor's testator, and the lien was acquired before the commencement of the proceedings. *Hawkes, In re; Ackerman v. Lockhart*, 67 L. J. Ch. 284; [1898] 2 Ch. 1; 78 L. T. 336; 46 W. R. 445—C.A.

Partnership Action—Receiver—Judgment Creditors—Charges on Assets—Priority—“Property recovered or preserved.”]—A receiver was appointed in a partnership action, and three judgment creditors obtained charging orders in respect of the amounts of their judgments over the assets of the firm represented by money in Court and in the hands of the receiver, and they undertook to deal with their charges according to order of the Court:—*Held*, that the lien of the solicitor of the plaintiff in the partnership action for his costs in respect of “property recovered or preserved” and his right to a charge in respect thereof took priority over the other charges, the persons entitled to them not being purchasers for value without notice, within section 28 of the Solicitors Act, 1860. *Kewney v. Atrill* (56 L. J. Ch. 448; 34 Ch. D. 345) commented on. *Ridd v. Thorne*, 71 L. J. Ch. 624; [1902] 2 Ch. 344; 86 L. T. 655; 50 W. R. 542—Joyce, J.

Fund in Court—Jurisdiction—Delay—Intervening Rights.]—Under section 28 of the Solicitors Act, 1860, the Court has a discretionary jurisdiction to aid with a charging order a solicitor's common-law lien for his costs over a fund in Court recovered through his exertions. Mere delay of three years on the part of the solicitor in enforcing his lien will not of itself disentitle him to the charging order when there are no intervening creditors whose rights might be thereby prejudiced. *Born, In re; Curnock v. Born*, 69 L. J. Ch. 669; [1900] 2 Ch. 433; 83 L. T. 51; 49 W. R. 23—Farwell, J.

Charge Given by Client—Waiver of Lien.]—A lady (on the day on which she came of age) wrote a letter to her solicitor requesting him to negotiate for her a loan, upon the security of a reversionary interest to which she was entitled. By the letter she charged this reversionary interest with the payment of the solicitor's costs. A loan was procured by the solicitor for the lady upon a mortgage of her reversionary interest. Subsequently the lady applied that the solicitor might be ordered to deliver up to her all her papers then in his possession:—*Held*, that the order asked for must be made, as the solicitor, by taking the charge, had waived his lien for costs. *Douglas, Norman & Co., In re*, 67 L. J. Ch. 85; [1898] 1 Ch. 199; 77 L. T. 552; 46 W. R. 421—North, J.

Effect of Taking Security from Client.]—*Per* LORD ALVERSTONE, C.J.—Where a solicitor takes from his client a security which is in any degree inconsistent with the retention of his lien, it is his duty to give express notice to the client if he intends to retain the lien. If the solicitor fails to give this notice he will be taken to have abandoned his lien. *Morris, In re*, 77 L. J. K.B. 265; [1908] 1 K.B. 473—C.A.

Per BUCKLEY, L.J.—A solicitor does not necessarily waive or release his lien if he takes security for his costs or for part of them without expressly or, having regard to all the facts, impliedly reserving his lien. Where, however, the nature of the security taken is such as to create a new arrangement between creditor and debtor, the existence of the security is inconsistent with the continued existence of the lien. *Ib.*

Semble (*per* KENNEDY, L.J.), if a solicitor who takes from his client any security for costs generally intends to retain his lien, he ought, either by express words or by necessary implication, to make that intention known to the client; and if he fails to prove such a reservation he ought, whatever be the nature of the security he takes, to be treated as having waived or abandoned his lien. *Ib.*

Charging Order—Property Recovered or Preserved.]—A testator by his will bequeathed his household furniture to his second wife and devised and bequeathed the residue of his real and personal estate to his wife for life and after her decease unto and between his natural daughter and his daughter by his first wife in equal shares, and appointed one J. W. executor and trustee of his will. The testator died leaving real estate, but no personalty except household furniture to the value of about 20l. His wife survived him, and the daughters having entered a caveat against the will, the executor brought an action against them to establish it, the result of which was that the will was declared to be proved and judgment entered for the plaintiff with costs:—*Held*, that the solicitor who acted for the executor in the action was entitled under section 28 of the Solicitors Act, 1860, to a charging order for the amount of his costs in the action upon the real and personal estate devised and bequeathed by the will, as “property preserved” by his instrumentality within the meaning of the section. *Tweed, Ex parte*, 68 L. J. Q.B. 794; [1899] 2 Q.B. 167; 81 L. T. 1; 48 W. R. 5—C.A.

— — — Action Compromised.]—The plaintiff recovered judgment against the defendants for extras under a building contract and in respect of certain retention money. Three months prior to the issue of the writ in the action a portion of the retention money coming to the plaintiff was assigned by him for value to W. G., a member of the defendant council. Pending an appeal in the action, a consent was signed by the parties, by which the defendants were to pay the plaintiff a portion of the sum claimed in full satisfaction, the plaintiff paying the defendants their taxed costs of the action. Upon an application by the plaintiff's solicitor in the action for a charging order for his costs under 39 & 40 Vict. c. 44, s. 3,—*Held*, first, that

the money payable under the consent was money "recovered or preserved in the action" by the instrumentality of the plaintiff's solicitor; and secondly, that the assignee, having known of and adopted the proceedings, and now seeking payment out of the money so recovered, was not entitled as a *bona fide* purchaser for value without notice to payment in priority over the costs of the plaintiff's solicitor. *M'Larnon v. Carrickfergus Urban Council*, [1904] 2 Ir. R. 44—K.B. D.

— — — **Trustees' Costs, Charges, and Expenses — Priorities.**] — Property is "preserved" within the meaning of section 28 of the Solicitors Act, 1860, if it is managed and retained for the benefit of the parties entitled. Accordingly an estate which has been taken care of and administered under a compromise in an administration action is preserved within the meaning of the section. *Baile v. Baile* (41 L. J. Ch. 300; L. R. 13 Eq. 497) applied. It does not matter that the property, when preserved for the benefit of the parties entitled, yields little or nothing for them. The power of the Court to make a charging order is discretionary, and it will not be made if the effect is to deprive trustees of their costs, charges, and expenses when they have done nothing to disentitle themselves to the consideration of the Court. *Turner, In re*; *Wood v. Turner*, 76 L. J. Ch. 492; [1907] 2 Ch. 126, 539; 96 L. T. 798; 23 T. L. R. 524—C.A.

— — — **Ship—Sale by Client—Purchaser without Notice—Discharge of Order—Discretion.**] — The master of a ship brought an action against the owners for wages, and recovered judgment for a less amount than that claimed; and on payment by the owners of the amount due under the judgment, the ship, which had been arrested at the commencement of the action, was released. The owners afterwards transferred the ship to a limited company consisting in part of the same persons as themselves, and having as its managing director the former managing owner; and the company mortgaged the ship to a bank to secure an account current; both the transfer and the mortgage being registered. Subsequently, the solicitors who had represented the owners in the action delivered their bill of costs, which not having been paid, the solicitors, alleging that to the extent of the difference in amount between the claim and the judgment they had recovered or preserved the property of the owners, obtained *ex parte*, and without giving notice to the company or the bank, a charging order under section 28 of the Solicitors Act, 1860, for their costs upon the ship:—*Held*, by GORELL BARNES, P., and by the COURT OF APPEAL, that these facts were not sufficient to fix the company as transferees of the ship, or the bank as mortgagees with notice of the solicitors' prior right to a charge; that they were *bona fide* purchasers for value without notice within the meaning of the section; and therefore that the charging order could not prevail against the transfer or the mortgage, and must be set aside. *The Birnam Wood*, 76 L. J. P. 1; [1907] P. 1; 96 L. T. 140; 10 Asp. M.C. 325; 23 T. L. R. 58—C.A.

Per GORELL BARNES, P.—The charging order did not relate back, so as to take precedence of the transfer or the mortgage. *Ib.*

— **Ex parte Application.**] — A charging order under the Solicitors Act, 1860, ought not to be made on an *ex parte* application except in very special circumstances. *Ib.*

— — — **Company—Scheme of Arrangement.**] — A limited company being unable to meet its liabilities, executions were levied on the company's property by creditors, and other creditors threatened actions. An extraordinary meeting of the company was then held, and resolutions were duly passed to wind up the company voluntarily. It was further resolved that the liquidator should submit a proposal for the reconstruction of the company. A scheme of arrangement, sanctioned by order of the Court, under the Joint Stock Companies Arrangement Act, 1870, provided that a new company should be incorporated; that one of its objects should be the acquisition and undertaking of the assets and liabilities of the company; that the new company should discharge the unsecured debts of the company by allotting to the unsecured creditors fully paid-up shares in the new company in full discharge of their claims against the company; and that the shareholders of the company should receive partly paid-up shares in the new company. It was also provided that the new company should pay all the costs of the winding-up and of the scheme of arrangement. In pursuance of this order an agreement, subsequently adopted by the new company, was made between the liquidator and the trustee of the future new company whereby it was provided that part of the consideration payable by the new company to the liquidator should be cash. The new company did not pay cash, and the assets of the company accordingly were not transferred to the new company:—*Held*, that the company's assets purchased by the new company and retained by the liquidator were to be charged with the costs of the company's solicitor which had arisen in connection with the winding-up and reconstruction of the company, the company's property having been "recovered or preserved" through the instrumentality of the solicitor within the meaning of section 28 of the Solicitors Act, 1860. *Clayton, Lim., In re*, 92 L. T. 223—Buckley, J.

— — — **Proceedings other than by Suit, Matter, or Proceeding in Court of Justice.**] — Property recovered or preserved through the instrumentality of a solicitor, in respect of which a charging order for costs may be made in his favour under section 28 of the Solicitors Act, 1860, must be recovered or preserved by the solicitor in some suit, matter, or proceeding in a Court of justice. *Humphreys, In re*; *Lloyd-George, ex parte*, 67 L. J. Q.B. 412; [1898] 1 Q.B. 520; 78 L. T. 182; 46 W. R. 322; 5 Manson, 11—C.A.

The solicitors to the trustee in the bankruptcy of a debtor who had absconded to Australia, taking with him 813*l.*, the proceeds of a sale of his stock-in-trade, applied to the Court having jurisdiction in the bankruptcy for, and obtained, an order for the prosecution of the debtor for offences under the Debtors Act, 1869.

The debtor was arrested in Australia, brought back to this country, tried for the alleged offences, and acquitted. The debtor when arrested had with him the 813*l.*, which was

taken possession of by the police authorities in Australia. The solicitors claimed the money on behalf of the trustee in bankruptcy, and prepared and forwarded to their agent in Australia a power of attorney to enable him to receive the money. This he did, and remitted the amount to the solicitors:—*Held*, that the money, not having been recovered or preserved in the criminal proceedings or in the bankruptcy, was not property in respect of which the solicitors could obtain a charging order under section 28 of the Solicitors Act, 1860. *Ib.*

— **Property Recovered in Chancery Division—Jurisdiction—Bankruptcy.**—A Court exercising bankruptcy jurisdiction has no power under section 28 of the Solicitors Act, 1860, to make a charging order on property recovered in a Chancery action because it is represented by a dividend in bankruptcy. Nor has the Court any power under section 102 of the Bankruptcy Act, 1883, in the absence of the creditor to direct payment of the dividend to the creditor's solicitor on the ground that such dividend represents property recovered by him even on an indemnity. *Cook, In re; Cripps, ex parte*, 68 L. J. Q.B. 597; [1899] 1 Q.B. 863; 80 L. T. 495; 47 W. R. 524; 6 Manson, 185—D.

— **Debenture-holders' Action—Solvent Company—Recovery and Preservation of Assets outside Action—Difference between Party and Party and Solicitor and Client Costs.**—The Court will give the solicitor to the plaintiff in a debenture-holders' action a charging order under section 28 of the Solicitors Act, 1860, on the property recovered in the action for the debenture-holders, for his costs in the action as between solicitor and client, even when the property so recovered proves sufficient for the payment of the debenture-holders in full, provided that there is reason to believe that he will not be able to recover from his own client the difference between solicitor and client and party and party costs. *Dichum of Kay, J., in Harrison v. Cornwall Minerals Railway* (53 L. J. Ch. 596, 597), followed. *Horne & Sons, Lim., In re; Horne v. Horne & Sons, Lim.*, 75 L. J. Ch. 206; [1906] 1 Ch. 271; 54 W. R. 278; 13 Manson, 165—Farwell, J.

Charging Order for Costs made Ex parte—Time for Application to Discharge—Delay.—An application to the Court to set aside a charging order for costs made *ex parte* under section 28 of the Solicitors Act, 1860, must be made with reasonable promptitude. A delay of two months held to be too long. *Deakin, In re; Daniell, ex parte*, 69 L. J. Q.B. 725; [1900] 2 Q.B. 489; 82 L. T. 776; 48 W. R. 678; 7 Manson, 302—C.A.

Jurisdiction to make Order—Property Recovered or Preserved by Order of Court of Appeal—Judge of Division to which Matter Attached—Judge in Bankruptcy.—Where property has been recovered or preserved by means of an order of the Court of Appeal, a Judge of the division of the High Court to which the matter in which the order has been made is attached, can make a charging order for costs under section 28 of the Solicitors Act, 1860. *Ib.*

Semble, where property is recovered or pre-

served in the course of proceedings in bankruptcy, the Judge in bankruptcy would have jurisdiction to make a charging order for costs. Opinion of VAUGHAN WILLIAMS, J., to the contrary, in *Wood, In re; Fanshawe, ex parte* (66 L. J. Q.B. 69; [1897] 1 Q.B. 314), doubted. *Ib.*

Set-off of Damages—Solicitor's Lien—Charging Order.—Where a defendant against whom judgment has been obtained for an amount of damages has an unsatisfied judgment against the plaintiff obtained in a former action, a set-off of damages may be allowed him under Order LXV. rule 14, notwithstanding that the plaintiff's solicitor has upon an *ex parte* application obtained a charging order upon the amount recovered in the action for his costs under section 28 of the Solicitors Act, 1860. *Goodfellow v. Gray*, 68 L. J. Q.B. 1032; [1899] 2 Q.B. 493; 81 L. T. 314—C.A.

Lien for Costs—Effect of Cross-Judgments.—*See* COUNTY COURT, col. 607.

14. MISCONDUCT.

Litigious Proceedings—Conflicting Interests of Clients—Undisclosed Agreement by one Solicitor to Pay Share of Profit to another Solicitor.—Where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice whereby a share of profit, whether called "agency" or by any other name, is paid by one of the solicitors to another is wrong in principle and fraught with risk to the welfare of clients and to the administration of justice. A solicitor who carries on the practice of undisclosed profit-sharing with a solicitor who represents conflicting interests is guilty of professional misconduct. *Lydall, In re; Incorporated Law Society, ex parte*, 70 L. J. K.B. 5; [1901] 1 K.B. 187; 83 L. T. 484; 49 W. R. 219—D.

Offence not in Itself of a Pecuniary Nature—Protection of Public and Profession—Attempt to Murder.—Where a solicitor has been convicted of a crime which is not in itself a pecuniary offence, the Court will, if the crime is of such a character that it is expedient for the protection of the public and the profession that the solicitor should be struck off the roll, order that he be struck off accordingly. Therefore, where a solicitor had lent large sums of money belonging to clients to a third person for speculative purposes, and in consequence of the money having been lost became so depressed that he attempted to murder his wife and afterwards to commit suicide, and he had been sentenced to penal servitude, the Court ordered him to be struck off the roll. *Cooper, In re*, 67 L. J. Q.B. 276—D.

Carrying on Business of Bookmaker—No Certificate taken out while Carrying on Business.—The respondent, a solicitor, who had ceased to practise in 1898 and had not since taken out a certificate, carried on the business of a bookmaker, and in the course of his business had sent circulars to a minor, a married woman, and a bank manager:—*Held*, that the respondent had been guilty of conduct unworthy of a member of the profession, and must be struck off the

rolls, but that it would be open to him, if he *bona fide* abandoned the business, to apply to the Master of the Rolls for reinstatement. *Solicitor, In re; Law Society, ex parte*, 93 L. T. 838; 22 T. L. R. 127—D.

Permitting Name to be Used by Unqualified Person — Punishment — Discretion of Court — Striking off Roll — Suspension — “Shall and may.”—Section 32 of the Solicitors Act, 1843, provides that if any solicitor shall permit his name to be made use of in an action on account of any unqualified person, he “shall and may” be struck off the roll:—*Held*, that the section does not give the Court a discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll. *Kelly, In re* (64 L. J. Q.B. 129; [1895] 1 Q.B. 180), followed. *Burton and Blinkhorn, In re*, 72 L. J. K.B. 752; [1903] 2 K.B. 300; 89 L. T. 549; 51 W. R. 668—D.

Unqualified Person Carrying on Proceeding — Giving Notice of Appearance — Contempt of Court.—An unqualified person giving notice of appearance as agent on behalf of a defendant in an action is “carrying on a proceeding” within the meaning of section 2 of the Solicitors Act, 1843, and is therefore guilty of contempt of Court by virtue of section 26 of the Solicitors Act, 1860. *Ainsworth, In re; Incorporated Law Society, ex parte*, 74 L. J. K.B. 462; [1905] 2 K.B. 103; 92 L. T. 652; 53 W. R. 538—D.

Mortgage-Deed — Execution by Mortgagor Obtained by Fraud of His Solicitor — Receipt in Body of Deed — Production of Deed to Mortgagee — Solicitor's Authority — Valid Deed and Receipt — Estoppel.—A solicitor acting for the plaintiff in a series of purchases of real estate by him, fraudulently and in abuse of the plaintiff's confidence obtained the execution by him of a deed mortgaging some of the property to the defendants. There was a receipt for the consideration-money in the body of the deed. The solicitor afterwards produced the deed to the defendants, who paid the mortgage-money to him and received the deed. The solicitor misappropriated the money. In an action by the plaintiff against the defendants to set aside the deed,—*Held*, that in the circumstances the plaintiff must have known that he was “doing something” with his property within the meaning of *MELLISH, L.J.*'s judgment in *Hunter v. Walte s* (41 L. J. Ch. 175, 185; L. R. 7 Ch. 75, 36), and that he was therefore estopped from denying either the validity of the deed in the hands of the defendants, or the authority of the solicitor to produce the deed and thereby give a good discharge for the consideration-money to the defendants under section 56 of the Conveyancing and Law of Property Act, 1881. *Day v. Woolwich Equitable Building Society* 58 L. J. Ch. 280; 40 Ch. D. 491) commented upon. *King v. Smith*, 69 L. J. Ch. 598; [1900] 1 Ch. 425; 82 L. T. 815—Farwell, J.

Unfounded Defences Placed on Record — Liability of Solicitor to Pay the Costs.—Upon an application by the plaintiff, who was propounding a will for which the Court pronounced, that the defendant's solicitor should be ordered to pay the costs upon the ground that charges of undue influence and fraud had

been unreasonably placed on the record,—*Held*, that, as the facts did not shew that the solicitor had made the case his own and was really the person fighting the case, he ought not to be ordered to pay the costs personally. In such a case there is no difference between the case of a plaintiff and that of a defendant. *Scott v. Hitchcock*, 20 T. L. R. 759—Gorell Barnes, J.

Payment of Special Jury obtained by Plaintiff without Means — Personal Order.—The plaintiff served notice for and obtained a special jury. The jury found for the defendant. In the course of the trial it appeared that the plaintiff was almost without means and that she had given a mortgage to her solicitor upon whatever property she had, to secure his costs:—*Held*, that the Court had jurisdiction under the circumstances to order such solicitor personally to pay the jury fees. *Monseratt v. Scott*, [1899] 2 Ir. R. 551—Gibson, J.

Certificate — Suspension — Discretion of Incorporated Law Society.—Under section 23 of the Solicitors Act, 1843, the Incorporated Law Society, acting as registrar of solicitors, are not bound to issue a certificate to practise as a solicitor, but have a discretion to refuse to issue the same, and if they decline to grant the certificate upon grounds which seem to them to justify the refusal, as, for instance, that the solicitor has been suspended from practice for misconduct, and is at the time of his application for a certificate an undischarged bankrupt, and an application is made to the Court under section 24 of the Act, the Court has power under that section to make such order “as shall be just,” and are not bound to make an order for the certificate to be granted. *Solicitor, In re*, 80 L. T. 720; 47 W. R. 575—D.

Trust Fund in Hands of Solicitor as Private Individual — Constructive Trustee — Solicitor not Party to Action — Officer of Court.—A solicitor who has received trust funds on loan as an investment with a knowledge that they are such—the investment being an improper one as between trustee and *cestui que trust*—may be ordered by the Court to refund the money in the exercise of its summary jurisdiction over its own officers, notwithstanding the fact that he is not solicitor to the trust estate, and notwithstanding that he has not been made a party to the action. *Carroll, In re; Brice v. Carroll; De Mortimer-McIntosh, In re*, 71 L. J. Ch. 596; [1902] 2 Ch. 175; 86 L. T. 862; 50 W. R. 650—Farwell, J.

Breach of Undertaking to Pay Money to Person not a Client — Breach of Trust — Summary Order for Payment.—Where an applicant, although he is not a client, invokes the summary jurisdiction of the Court over a solicitor as one of its officers, and shews conduct towards him which the Court considers dishonourable, or shews that the solicitor, as his trustee, has been guilty of a breach of trust, and also that by such conduct or breach his position had been prejudiced, the Court will exercise such jurisdiction whether or not a remedy by action exists or relief in equity can be obtained in respect thereof, and will make a summary order on the solicitor to pay the applicant money which it considers he ought to pay as an honourable man under

the circumstances. *Solicitor, In re; Hales, ex parte*, 76 L. J. K.B. 931; [1907] 2 K.B. 539; 97 L. T. 212; 23 T. L. R. 573—D. *And see* UNDERTAKING, col. 2454.

Report of Committee of the Incorporated Law Society—Complainant in Person—Appearance by Counsel.—An application to the Court under section 13 of the Solicitors Act, 1888, for an order that a solicitor be struck off the roll or required to answer allegations contained in an affidavit, upon the report of the committee of the Incorporated Law Society, must be made by counsel. *A Solicitor, In re*, 72 L. J. K.B. 643; [1903] 2 K.B. 205; 89 L. T. 118; 51 W. R. 561—C.A.

Enquiry before Committee of Incorporated Law Society—Costs of Enquiry—Application for, whether to Court or Chambers.—An application by a solicitor for the costs of an enquiry into his conduct before the committee of the Incorporated Law Society which has resulted in his favour should be made to the Court and not to a Judge at chambers. *Davidson, In re; Davidson, ex parte*, 68 L. J. Q.B. 836; [1899] 2 Q.B. 103; 81 L. T. 182—D.

Order of Colonial Court Striking Solicitor off Roll.—The fact that a Colonial Court has struck a solicitor off the roll of solicitors of that Court is not of itself sufficient to justify the English Court in striking him off the roll of solicitors in England without making further enquiry. *Incorporated Law Society, Ex parte*, 67 L. J. Q.B. 245; [1898] 1 Q.B. 831; 77 L. T. 661; 46 W. R. 803—D.

15. OTHER MATTERS.

Appearance by Treasury Solicitor—Right to Costs.—*See* COSTS, col. 587.

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Liability for Acts of Partner.—*See* PARTNERSHIP, col. 1772.

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Setting Aside Deed—Undue Influence.—*See* FRAUD AND MISREPRESENTATION, col. 875.

SOVEREIGN STATE.

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SPECIAL CASE.

See ARBITRATION, col. 40, and JUSTICE OF THE PEACE, col. 1171.

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SPECIFIC PERFORMANCE.

1. *Statute*, 2482.

2. *Of what Agreements Granted*, 2482.

3. *Discretion of Court*, 2482.

4. *Misdescription*, 2483.

5. *Mistake*, 2484.

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9. *Title of Vendor*, 2486.

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• 12. *Other Matters*, 2488.

1. STATUTE.

Companies Act, 1907 (7 Edw. 7 c. 50), s. 16.

2. OF WHAT AGREEMENTS GRANTED.

Tenancy Less than from Year to Year.—Specific performance of an agreement for a much shorter tenancy than a tenancy from year to year will be granted in a proper case. *Clayton v. Illingworth* (10 Hare, 451) distinguished. *De Brassac v. Martyn* (11 W. R. 1020) approved. *Lever v. Koffler*, 70 L. J. Ch. 395; [1901] 1 Ch. 543; 84 L. T. 584; 49 W. R. 506—Byrne, J.

Agreement to Lend Money on Debentures.—No action will lie for specific performance of a contract to lend money on the debentures of a company. The only remedy is an action for damages. *South African Territories v. Walington*, 67 L. J. Q.B. 470; [1898] A.C. 309; 78 L. T. 426; 46 W. R. 545—H.L. (E.) *But see now* Companies Act, 1907, s. 16.

3. DISCRETION OF COURT.

Hardship—House Used as a Brothel—Ignorance of both Parties—"Eligible investment"—Relief not Granted.—The Court will not grant specific performance against a purchaser of a contract to buy a property, which, if he takes no steps to prevent it, will expose him as owner to criminal proceedings by reason of its state at the time of sale, unless he knew or ought to have known of the state of the property at the time of the sale. *Hope v. Walter*, 69 L. J. Ch. 166; [1900] 1 Ch. 257; 82 L. T. 30—C.A.

A house sold by auction was described as an "eligible freehold property for investment," let on a quarterly tenancy at 55l. a year. It was discovered before completion that the house at the date of the sale was used by the tenant as a disorderly house, of which fact both the vendors and purchaser were previously ignorant. The agreement of tenancy contained a covenant not to use the house as a disorderly house and a proviso for re-entry on breach of covenant:—*Held*, that the improper use of the house was a sufficient ground for refusing specific performance at the suit of the vendors. *Dictum* of WIGRAM, V.C., in *Lucas v. James* (18 L. J. Ch. 329; 7 Hare, 440, 418) distinguished. *Ib.*

Open Contract—Undisclosed Restrictive Covenants—Innocent Vendor—Compensation not

Assessable—Hardship.—The Court will not, at the instance of the purchaser under an open contract containing no provision for compensation, decree specific performance of the contract with compensation in respect of covenants restricting the building on or user of the land sold. By granting the purchaser such relief, the Court would not only be making a new contract never contemplated by the parties, but would also be extending the equitable doctrine of specific performance with compensation beyond its proper limits. *Rudd v. Lascelles*, 69 L. J. Ch. 396; [1900] 1 Ch. 815; 82 L. T. 256; 48 W. R. 586—Farwell, J.

The extreme difficulty in assessing compensation in respect of covenants of that nature is another consideration which will influence the Court in refusing such relief. *Ib.*

Where the purchaser seeks specific performance with a proportionately large abatement of the purchase-money in respect of defects of which, as the purchaser knew, the vendor was unaware at the time of entering into the contract, the Court will not grant him relief, because of the great hardship which would be thereby imposed upon the innocent vendor. *Ib.*

Agreement for Lease in Consideration of Contract to Rebuild and Repair—Undefined Works.—The defendant agreed to take a lease of certain premises and within twelve months from the date of the agreement to expend the sum of 600*l.* in such substantial repairs and improvements as were mentioned in the schedule—namely, to take down, rebuild, and repair such portions of the premises as the plaintiff's architect should direct, under his direction, and to his satisfaction. The defendant did not execute the repairs and improvements mentioned in the schedule. The plaintiff claimed specific performance of the agreement to rebuild and repair the premises in accordance with the terms of the agreement and damages by reason of the defendant's failure to carry out the agreement:—*Held*, that it was not a case for specific performance, but for an enquiry as to damages. *Wolverhampton Corporation v. Emmons* (70 L. J. K.B. 429; [1901] 1 K.B. 515) discussed. *Rushbrooke v. O'Sullivan*, [1908] 1 Ir. R. 232—M.R.

4. MISDESCRIPTION.

In Particulars—Verbal Rectification by Auctioneer—Statement not Heard by Purchaser—Specific Performance—Compensation—Injustice to Vendor.—The Court will not enforce specific performance of a contract for sale where, owing to a mistake on the part of the defendant, injustice would be done to him by a decree for that purpose. *Hare and O'More's Contract, In re*, 70 L. J. Ch. 45; [1901] 1 Ch. 93; 83 L. T. 672; 49 W. R. 202—Joyce, J.

Accordingly, where in a purchaser's action for specific performance, with compensation for a material misdescription in the particulars of sale, it appeared that the auctioneer had before the biddings commenced drawn attention to and rectified the misdescription, but that the purchaser had not heard his statement, the

Court, notwithstanding a condition for compensation in that behalf, dismissed the action and rescinded the contract. *Manser v. Bach* (6 Hare, 443) applied. *Ib.*

5. MISTAKE.

Bidding for Different Property—Auctioneer—Authority to Sign Contract—Statute of Frauds.

—A purchaser of freehold property at a public auction who has made a mistake, in no way induced by the vendor, in bidding for and becoming the purchaser of a different property from that which he came to buy, will not be relieved from the specific performance of the contract upon the ground of such blunder, where no hardship amounting to injustice is thereby inflicted upon him. *Malins v. Freeman* (2 Keen, 25) considered as modified by *Tamplin v. James* (15 Ch. D. 215) and *Goddard v. Jeffreys* (51 L. J. Ch. 57). *Van Praagh v. Everidge*, 71 L. J. Ch. 598; [1902] 2 Ch. 266; 87 L. T. 42—Kekewich, J.

6. EFFECT OF DELAY.

Contract for Sale of Reversionary Interest—Deposit Paid—Equitable Assignment.—Where a person agrees by a contract, which does not amount to an equitable assignment, to purchase a contingent equitable reversionary interest, and is unable to obtain completion of the purchase at the time, and does nothing until—ten years afterwards—the reversion has fallen into possession, his delay will be a bar to a claim by him for specific performance of his contract. *Levy v. Stogdon*, 68 L. J. Ch. 19; [1899] 1 Ch. 5; 79 L. T. 364—C.A.

Lien for Instalments—Damages.—In 1892 A agreed to sell and B to purchase some land for 150*l.*, B paying 40*l.* on account and the balance by instalments. In case default was made for thirty days in payment of any one instalment, the whole of the remaining instalments were to become due and payable, and, if not paid, A was to be at liberty to re-sell the land and apply the net proceeds in payment of the amount due. B took possession of the land, and by August, 1895, had paid all the instalments but one. In October, 1896, B disappeared without having paid the final instalment. A then resumed possession of the land, which was in a derelict state and worth less than the instalments paid by B, and let it to another person with an option to purchase. In 1898, after the lessee had built a house on the land, B reappeared and desired to pay the final instalments and obtain a conveyance free from the lease. A declined to grant it:—*Held*, that B had lost his right to specific performance by reason of his delay, and was not entitled to a lien on the land for the amount of the instalments which he had paid, or to damages, as his conduct amounted to a repudiation on his part of the contract, and left A free to deal with the land as owner. *Cornwall v. Henson*, 68 L. J. Ch. 749; [1899] 2 Ch. 710; 81 L. T. 113; 48 W. R. 42—Cozens-Hardy, J.

7. MINERALS.

Tenants in Common—Agreement for Lease of Undivided Moiety—Inconvenience.—Where a

tenant in common of an undivided moiety of freehold lands has agreed to grant a lease to work the minerals in or upon such moiety, the Court will in a proper case specifically enforce such contract. *Heater v. Pearce*, 69 L. J. Ch. 146; [1900] 1 Ch. 341; 82 L. T. 109; 48 W. R. 330—Farwell, J.

The comparative convenience or inconvenience of the parties concerned, apart from any considerations of misconduct or hardship, is not by itself a sufficient ground for refusing specific performance of such a contract. *Price v. Griffith* (21 L. J. Ch. 78; 1 De G. M. & G. 80) distinguished. *Ib.*

8. BUILDING CONTRACT.

Contract to Erect Building—Conditions on which Granted—Work Defined—Damages Inadequate—Possession of Site Obtained by the Contract.—The Court has jurisdiction to grant specific performance of a contract to erect a building if, first, the work to be done is defined; secondly, the plaintiff has a substantial interest in its execution which cannot be adequately compensated for by damages; and thirdly, the defendant has by the contract obtained from the plaintiff possession of the land on which the work is to be done. *Cubitt v. Smith* (11 L. T. 298) approved. *Wolverhampton Corporation v. Emmons*, 70 L. J. K.B. 429; [1901] 1 K.B. 515; 84 L. T. 407; 49 W. R. 553—C.A.

Lease—Covenant to Build—Work Defined—Damages Inadequate—Lessee's Conflicting Rights under Different Leases.—The defendant was lessee for a term of ninety-nine years from 1894, at the yearly rent of 50*l.*, of lands in a mining district, except the mines and mineral rights, his lease containing a covenant by him within three years from the commencement of the term to build seven dwelling-houses similar to adjacent houses already built, to keep them in repair, and to deliver them up at the end or sooner determination of the term in such repair. The lease contained an exception and reservation in favour of the persons who would, if the lease had never been executed, for the time being be entitled to the same, of the above mentioned mines and mineral rights, with power to occupy the surface for working such mines without leaving any support for any buildings that might be erected thereon, and generally use the surface, making reasonable compensation to the lessee for the damage done. The defendant was also the lessee under an earlier lease of the mines and minerals, with full working powers, including the right to make pit-hills and spoil-banks on the surface. He declined to perform the covenant to build, on the ground that his powers under the mining lease and the reservation in the surface lease were inconsistent with the covenant to build. The plaintiff, as mortgagee in fee of the premises comprised in the surface lease, required specific performance of the covenant to build in order to protect the security for his debt:—*Held*, that the covenant to build was binding on the covenantor and unaffected by his powers as to covering the surface, and that the plaintiff was entitled to specific performance, notwithstanding the general rule, on the grounds that the work was sufficiently defined, that

there was a definite contract to build, and that damages would not afford an adequate remedy. *Wolverhampton Corporation v. Emmons* (70 L. J. K.B. 429; [1901] 1 K.B. 515) applied. *Molyneux v. Richard*, 75 L. J. Ch. 39; [1906] 1 Ch. 34; 93 L. T. 698; 54 W. R. 177; 22 T. L. R. 76—Kekewich, J.

9. TITLE OF VENDOR.

Adverse Claim—Practice.—When a *bona fide* claim has been made by a third party affecting the vendor's title, although no action to enforce such claim is actually pending, the Court will not make a decree for specific performance of a contract for sale against the purchaser; but will order the vendor's action for specific performance to stand over for a reasonable interval, to see whether the third party will meantime institute proceedings to enforce his claim. On a sale of house property the vendor represented that rates were payable by the tenant. At the date of the sale the vendor knew that the tenant claimed that rates ought to be paid by the landlord. Before completion of the purchase the tenant brought an action against the vendor to enforce his said claim; but this action was dismissed on a technical ground. The tenant, however, expressed an intention of taking further proceedings in the matter against the vendor. The purchaser refused to complete, on the ground that the vendor did not shew a good title. In an action for specific performance brought by the vendor, the Court refused to make an immediate decree for specific performance, and ordered the case to stand over for a definite period in order to see whether the tenant would in the meantime institute new proceedings to enforce his claim. *George v. Thomas*, 90 L. T. 505; 52 W. R. 416—Swinfen Eady, J.

10. VENDOR'S LIEN.

Contract to Purchase Land by Trustee of Settled Estates—Non-payment of Purchase-Money—Entry of Successive Tenants for Life and Payment of Interest.—In 1873 a trustee of a settled estate with power to invest in land and the tenant for life contracted to purchase the glebe lands of a vicarage of which the tenant for life was patron. The purchase-money was never paid, but the successive tenants for life entered into possession and paid interest. The trustee having been long since dead and his estate fully administered, an action for specific performance of the contract was brought by the vendors against the present trustees and tenant for life:—*Held*, that the contract was not enforceable against the persons who had become entitled to the settled property or against the trust estate, and that the vendors were entitled only to their vendor's lien on the land contracted to be sold. *Ecclesiastical Commissioners v. Pinney*, 69 L. J. Ch. 844; [1900] 2 Ch. 736; 83 L. T. 384; 49 W. R. 82—C.A.

11. ACTION FOR.

Practice—Undertaking not to Defend—Lease found Invalid—Leave to Defend.—In an action

for specific performance of an agreement to purchase leasehold houses, the defendant gave an undertaking not to deliver any defence in the event of the plaintiffs undertaking not to move for judgment in default of defence until a date named. The defendant subsequently found that the lease was invalid:—*Held*, that the Court had jurisdiction to give the defendant leave to deliver a defence notwithstanding his undertaking. *Scott v. Mowon*, 81 L. T. 774—Kekewich, J.

Specific Performance Decreed against Purchaser—Default by Purchaser—Vendor's Remedy—Forfeiture of Deposit—Form of Order.]—The contract for the sale of certain property contained a provision that, if the purchaser failed to complete the purchase, the deposit should be forfeited and the vendors should be at liberty to proceed to another sale, the defaulting purchaser to make good any loss occasioned by such re-sale, together with all expenses attending it. The vendors having obtained an order for specific performance, with which the purchaser failed to comply, the Court, on the motion of the vendors, made a declaration that, in pursuance of the above-mentioned provision, the deposit was forfeited and the plaintiffs at liberty to proceed to another sale, the defendant to make good any loss occasioned by such re-sale, together with all expenses attending it; all further proceedings in the action to be stayed except for the recovery of certain costs then or previously ordered to be paid. *Griffiths v. Vezey*, 75 L. J. Ch. 462; [1906] 1 Ch. 796; 94 L. T. 574; 54 W. R. 490—Swinfen Eady, J.

Action Dismissed—Vacating Registration of *Lis Pendens*.]—The Court may on giving judgment dismissing an action by a purchaser for specific performance include in the judgment on the vendor's application an order vacating the registration of the action as a *lis pendens* unless the purchaser sets down an appeal within a limited time. *Baxter v. Middleton*, 67 L. J. Ch. 200; [1898] 1 Ch. 313; 46 W. R. 350—Kekewich, J.

Neglect of Defendant to Comply with Judgment—Rescission of Contract—Form of Order.]—In a vendor's action for specific performance, judgment had been recovered against the defendant in default of appearance, and an order made on further consideration that the defendant should pay the costs; that the usual account of rents, profits, interest, and costs should be taken, and on payment of the balance a conveyance should be executed to the defendant. The accounts had been taken into chambers, but not proceeded with. The vendor now moved, upon evidence that the purchaser had no means and could not complete, for rescission of the contract and stay of all proceedings except for the recovery of costs:—*Held*, that the only order the Court could make was that the contract be rescinded and all proceedings stayed, the defendant to pay the costs of this application. *Henty v. Schröder* (12 Ch. D. 666) explained and followed. *Jeffery v. Stewart*, 80 L. T. 17—North, J.

Vendor Plaintiff—Judgment with Costs—Subsequent Default by Defendant—Order for Rescission—Form of Order.]—The plaintiff, who was

vendor, obtained a judgment for the specific performance of a contract with costs. Upon default of the defendant to pay the purchase-money or the costs, the plaintiff moved for rescission of the contract. *THE COURT* made an order in the form in *Westerman v. Pantlin* (3 Seton on Decrees (6th ed.), p. 2288), and not in the form in *Jeffery v. Stewart* (80 L. T. 17). *Olde v. Olde*, 73 L. J. Ch. 81; [1904] 1 Ch. 35; 89 L. T. 604; 52 W. R. 260—Farwell, J.

Interest on Purchase-money.]—In an action for specific performance, interest on the purchase-money will be given from the date when the Master certifies that a good title was first shewn. *Halkett v. Dudley (Earl)*, 76 L. J. Ch. 330; [1907] 1 Ch. 590; 96 L. T. 539—Parker, J.

12. OTHER MATTERS.

Contract—Formation of.]—See CONTRACT, col. 503.

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Trustee of Settled Estate—Purchase by.]—See *Ecclesiastical Commissioners v. Pinney* (No. 2), 69 L. J. Ch. 844; [1900] 2 Ch. 736, *post*, VENDOR AND PURCHASER.

Trustee in Bankruptcy—Disclaimer.]—See BANKRUPTCY, col. 117.

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Expiring Laws.]—4 Edw. 7 c. 29 is the Expiring Laws Continuance Act, 1904.

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1. *Consolidated Fund (No. 1).*
2. *Army (Annual).*
3. *Licensing (Ireland).*
4. *Finance.*
5. *Mr. Speaker's Retirement.*
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7. *War Stores (Commission).*
8. *Agricultural Rates Act, 1896, &c. Continuance Act.*
9. *Coal Mines (Weighing of Minerals).*
10. *Shipowners' Negligence (Remedies).*
11. *Railway Fires.*
12. *Churches (Scotland).*
13. *Aliens.*
14. *Medical Act, 1886, Amendment.*
15. *Trade Marks.*
16. *Isle of Man (Customs).*
17. *Appropriation.*
18. *Unemployed Workmen.*
19. *East India Loans (Railways).*
20. *Naval Works.*
21. *Expiring Laws Continuance.*
22. *Public Works Loans.*
23. *Provisional Order (Marriages).*

Expiring Laws.]—5 Edw. 7 c. 21 is the Expiring Laws Continuance Act, 1905.

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CHAP.

1. *Consolidated Fund (No. 1).*
2. *Army (Annual).*
3. *Seed Potatoes Supply (Ireland).*
4. *Post Office (Money Orders).*
5. *Seamen's and Soldiers' False Characters.*
6. *Metropolitan Police Commission.*
7. *Police (Superannuation).*
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9. *Indian Railways Act Amendment.*
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11. *Reserve Forces.*
12. *Municipal Corporations (Amendment).*
13. *Wireless Telegraphy.*

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14. *Alkali, &c., Works Regulation.*
15. *Extradition.*
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18. *Isle of Man (Customs).*
19. *Deanery of Manchester.*
20. *Revenue.*
21. *Ground Game (Amendment).*
22. *Post Office (Literature for the Blind).*
23. *Charitable Loan Societies (Ireland).*
24. *Solicitors.*
25. *Open Spaces.*
26. *Appropriation.*
27. *Fertilisers and Feeding Stuffs.*
28. *Crown Lands.*
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30. *Colonial Marriages (Deceased Wife's Sister).*
31. *Local Government (Ireland) Act, 1898, Amendment.*
32. *Dogs.*
33. *Local Authorities (Treasury Powers).*
34. *Prevention of Corruption.*
35. *Fatal Accidents and Sudden Deaths Enquiry (Scotland).*
36. *Musical Copyright.*
37. *Labourers (Ireland).*
38. *Statute Law Revision (Scotland).*
39. *Intoxicating Liquors (Ireland).*
40. *Marriage with Foreigners.*
41. *Marine Insurance.*
42. *Licensing.*
43. *Street Betting.*
44. *Burial.*
45. *Removal of Offensive Matter.*
46. *Recorders, Stipendiary Magistrates and Clerks of the Peace.*
47. *Trade Disputes.*
48. *Merchant Shipping.*
49. *Census of Production.*
50. *National Galleries (Scotland).*
51. *Expiring Laws Continuance.*
52. *Land Tax Commissioners.*
53. *Notice of Accidents.*
54. *Town Tenants (Ireland).*
55. *Public Trustee.*
56. *Agricultural Holdings.*
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58. *Workmen's Compensation.*

LIST OF PUBLIC ACTS, 7 EDW. 7, 1907.

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1. *Revenue.*
2. *Army (Annual).*
3. *Irish Tobacco.*
4. *Destructive Insects and Pests.*
5. *Injured Animals.*
6. *Telegraph (Money).*
7. *Australian States Constitution.*
8. *Assay of Imported Watch Cases (Existing Stocks Exemption).*
9. *Territorial and Reserve Forces.*
10. *Employment of Women.*
11. *British North America.*
12. *Matrimonial Causes.*
13. *Finance.*
14. *Released Persons (Poor Law Relief).*
15. *Salmon and Freshwater Fisheries.*
16. *Evidence, Colonial Statutes.*
17. *Probation of Offenders.*
18. *Married Women's Property.*
19. *Prisons (Ireland).*
20. *Appropriation.*
21. *Butter and Margarine.*
22. *Petty Sessions Clerks (Ireland).*

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23. *Criminal Appeal.*
24. *Limited Partnerships.*
25. *Commissioners for Oaths (Prize Proceedings).*
26. *Isle of Man (Customs).*
27. *Advertisement Regulation.*
28. *Patents and Designs (Scotland) Amendment.*
29. *Patents and Designs.*
30. *Public Health (Scotland) Amendment.*
31. *Vaccination.*
32. *Public Health (Regulations as to Food).*
33. *Qualification of Women (County and Borough Councils).*
34. *Expiring Laws Continuance.*
35. *Council of India.*
36. *Public Works Loans.*
37. *Transvaal Loan (Guarantee).*
38. *Irish Land.*
39. *Factory and Workshop.*
40. *Notification of Births.*
41. *Whale Fisheries (Scotland).*
42. *Sea Fisheries (Scotland) Application of Penalties.*
43. *Education (Administrative Provisions).*
44. *Supreme Court of Judicature (Ireland).*
45. *Lights on Vehicles.*
46. *Employers' Liability Insurance Companies.*
47. *Deceased Wife's Sister's Marriage.*
48. *Qualification of Women (County and Town Councils), Scotland.*
49. *Vaccination (Scotland).*
50. *Companies.*
51. *Sheriff Courts (Scotland).*
52. *Merchant Shipping.*
53. *Public Health Amendment.*
54. *Small Holdings and Allotments.*
55. *London Cab and Stage Carriage.*
56. *Evicted Tenants (Ireland).*

2. AREA OF APPLICATION.

Per LORD SALVESSEN.—Where a British statute prohibits a certain thing to be done within a definite geographical area, there is no presumption that such prohibition shall be confined only to British subjects. If, on examining the subject-matter of the prohibition, it is found that it will be futile or ineffectual unless its operation is general, its generality is not capable of any limitation in favour of persons who do not ordinarily owe obedience to the British Parliament. *Mortensen v. Peters*, 8 F. (Just. Cas.) 93—Ct. of Justy.

3. CONSTRUCTION.

Title.]—The title of an Act of Parliament is to be read as part of the enactments. *Fielden v. Morley Corporation*, 67 L. J. Ch. 611; [1899] 1 Ch. 1; 79 L. T. 231; 47 W. R. 295—C.A.

Long Title.]—The "long title" of an Act of Parliament is to be read as part of the Act. *Att.-Gen. v. Margate Pier and Harbour Co.*, 69 L. J. Ch. 331; [1900] 1 Ch. 749; 82 L. T. 448; 48 W. R. 518; 64 J. P. 405—Kekewich, J.

Construction of Statute not Limited by Title—Probate.]—The operation of section 3 of the Wills Act, 1861, in spite of the expression "British subjects" in the title of the statute, is not limited to British subjects, and enables probate to be granted in this country of the will of an alien testator in spite of his or her marriage since the date of execution of the will,

such marriage, according to the law of the domicile at the time, not effecting a revocation. *Groos, In the goods of*, 73 L. J. P. 82; [1904] P. 269; 91 L. T. 322—Gorell Barnes, J.

Heading to Section—Effect of.—The effect of words in a section of a statute perfectly clear in themselves is not limited by general words in the heading to the section. *Hammer-smith Railway v. Brand* (38 L. J. Q.B. 265; L. R. 4 H.L. 171) distinguished. *Fletcher v. Birkenhead Corporation*, 76 L. J. K.B. 218; [1907] 1 K.B. 205; 96 L. T. 287; 71 J. P. 111; 5 L. G. R. 293; 23 T. L. R. 195—C.A.

Semble, the headings of sections of a statute—for example, the heading to section 104 of the Factory and Workshop Act, 1901—are, as distinguished from marginal notes, part of the statute, and are to be taken into account in construing it. *M'Ewan v. Perth Magistrates*, 7 F. 714—Ct. of Sess.

General Act.—According to the maxim “*Generalia specialibus non derogant*,” the presumption is that where special statutory provision has been made for a special class of cases, a subsequent general enactment is not intended to interfere with such provision. *Barker v. Edger*, 67 L. J. P.C. 115; [1898] A.C. 748; 79 L. T. 151—P.C.

Construction of Earlier by Later Acts.—Where there are two or more Acts of Parliament *in pari materia*, the earlier Act cannot be construed by what is enacted in a later Act. *Bolton Estates Act, In re; Russell v. Meyrick*, 72 L. J. Ch. 55; 88 L. T. 581—Joyce, J. See s.c. in C.A., ante, SETTLED LAND.

Incorporation of Sections of Former Statute with Omission of Certain Words.—Where a statute incorporates a section of a former statute, and directs that it is to apply as if certain words were omitted therefrom, the incorporated section is not to be construed as if such words had never existed therein. The principle of *Att.-Gen. v. Lamplough* (47 L. J. Q.B. 555; 3 Ex. D. 214) applied. *Att.-Gen. v. Smyth*, [1905] 2 Ir. R. 553—K.B. D.

Construction of Codifying Statute.—The principle of construction of codifying statutes considered by Palles, C.B. *Wallis v. Russell*, [1902] 2 Ir. R. 585—K.B. D.

Two Statutes Passed Same Day—Provisional Order.—An Electric Lighting Provisional Order gave a corporation power to purchase compulsorily the undertaking of a company upon the terms of issuing to the company such an amount of corporation stock as would produce, by the dividends thereon, “an annuity of 5 per cent.” upon the capital properly expended by the undertakers. By a Local Government Board Provisional Order, the power (which the corporation then had) to issue irredeemable stock was repealed. Each of the Acts of Parliament which confirmed these orders received the Royal assent on the same day:—*Held*, that the stock to be issued to the company was irredeemable stock; that the corporation had not, by implication, power to issue such stock; and that so long as they were unable to issue such stock their power of compulsory purchase could not be enforced. *Sheffield Corporation v. Sheffield*

Electric Light and Power Co., 67 L. J. Ch. 113; [1898] 1 Ch. 203; 77 L. T. 616; 46 W. R. 485; 62 J. P. 87—North, J.

Whether Permissive or Obligatory.—An Act of Parliament authorising and empowering a person to improve the passage of boats, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require, although intended to serve a public purpose, must be construed to be permissive only, and not obligatory. *Simpson v. Att.-Gen.*, 74 L. J. Ch. 1; [1903] A.C. 476; 91 L. T. 610; 69 J. P. 85; 3 L. G. R. 190; 20 T. L. R. 761—H.L. (E.)

Elimination of Words Preventing Plain Object of Statute being Attained.—The plain object of section 13 of the Salmon Fishery Act, 1873, was to extend to salmon rivers the provisions of section 32 of the Malicious Damage Act, 1861, in order to prevent the destruction of property in salmon rivers by the serious act of poisoning the water. Therefore section 13 of the Act of 1873 must be read as if the words “in lieu of the words ‘private rights of fishery’” were omitted, inasmuch as the manifest intention of the statute would be absolutely defeated if section 32 of the Act of 1861 were altered in the strict way which the amending section directs. *Rex v. Vasey*, 75 L. J. K.B. 19; [1905] 2 K.B. 748; 93 L. T. 671; 54 W. R. 218; 69 J. P. 455; 21 Cox C.C. 49; 22 T. L. R. 1—C.C.R.

Exclusion of Class.—Where a statute excludes in plain language from its operation a class of persons to whom its provisions do not appear to be applicable, such exclusion cannot be held to apply to another class of persons not expressly named. *Smyth v. Reg.*, 67 L. J. P.C. 129; [1898] A.C. 782; 79 L. T. 199—P.C.

Extension by Inference to Cases not Originally Contemplated.—The rule that statutes extend by inference to cases not originally contemplated depends upon shewing that the statute deals with a genus within which the new species is brought; but if the statute shews plainly that the word is not used as describing the whole genus put forward as the one applicable to the case, but only some particular species thereof, the rule has no application. *Birmingham Corporation v. Birmingham Canal Navigations*, 3 L. G. R. 1287; 21 T. L. R. 548—Farwell, J.

Protection of Certain Persons—Lunatic—Powers of Committee.—The insertion in an Act of Parliament of words protecting certain specified persons does not by implication exclude others from such protection. Accordingly, persons acting under the instructions of the committee of a lunatic who in good faith and with proper care convey the lunatic to an asylum are not liable to an action, although they are not enumerated in the persons protected by section 171 of the Lunacy Act (New South Wales), 1898. *McLaughlin v. Westgarth*, 75 L. J. P.C. 117; 94 L. T. 831; 22 T. L. R. 594—P.C.

Exemption—Interference with Treatment or Utilisation of Sewage—Woolcombing Effluent—Penalties—Named Persons Exempted—Successors.—Section 45 of the Bradford Tramways

and Improvement Act, 1897, prohibits the discharge of certain refuse into the city sewers subject to two exceptions, the first in favour of "the persons named in the first part of the schedule to this Act," and the second in favour of "the persons referred to in the second part of the schedule to this Act or the successors of any such person."—*Held*, on an originating summons taken out by a company to whom had been assigned the business, goodwill, and property of several of the persons named in the first part of the schedule, and who were carrying on the same business, on the same premises, and under the same names, as those persons, that the company were not entitled to the exemption in favour of the persons named in the first part of the schedule, as it was not expressed to extend to the successors of the named persons. *Woolcombers, Lim. v. Bradford Corporation*, 4 L. G. R. 1038; 70 J. P. 434—Swinfen Eady, J.

"Week"—Advertisement of Notice in Newspaper "for two successive weeks."—A statute requiring publication of certain notices in a newspaper "for two successive weeks" is complied with by the insertion of a notice in a newspaper on Friday in one week, and on Wednesday in the following week. *Aberdeen Corporation v. Watt*, 3 F. 787—Ct. of Sess.

"Person"—Corporation.]—The word "person," when used in a statute, does not include corporation where the statute contains expressions that are repugnant to that construction. Thus, under a statute providing that the persons present at a meeting may vote, but that a proxy shall not be admitted, a corporation, though a person in law, is debarred from voting. *Wills v. Tozer*, 53 W. R. 74; 20 T. L. R. 700—Farwell, J.

— Limited Company.]—A limited company is a "person" within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, which provides that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser" under a penalty. *Pearks v. Ward*, 71 L. J. K.B. 656; [1902] 2 K.B. 1; 87 L. T. 51; 66 J. P. 774; 20 Cox C.O. 279—D.

Proviso—"Expressio unius est exclusio alterius."—A proviso attached to an enacting or exegetical section of a statute is not necessarily to be construed on the principle of *Expressio unius est exclusio alterius*. *Stevenson v. Hunter*, 5 F. 761—Ct. of Sess.

Inclosure Act—Contemporanea Expositio.]—In construing an Inclosure Act it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject. *Att.-Gen. v. Lumsdale Rural Council*, 86 L. T. 822—Farwell, J.

Taxing Act—Effect of Continuous User.]—No amount of subsequent user will control the plain meaning of an Act of Parliament; but, where the meaning is not plain, a continuous user, extending over many years, may be called in aid to shew what the true meaning is. *Dublin Corporation v. Trinity College*, 88 L. T. 305—H.L. (Ir.)

— Courts of Co-ordinate Jurisdiction.]—In

the construction of a taxing statute applicable to the United Kingdom the Court of one country ought not to differ from the construction already given to the statute in another country by a Court of co-ordinate authority. *Studdert, In re*, [1900] 2 Ir. R. 400—C.A.

Transfer to Public Body—Common-law Obligation of Class.]—In construing an Act of Parliament which transfers to a public body the common-law obligations of the inhabitants at large to repair highways, there is a *prima facie* presumption that the Legislature did not by such a transfer intend to impose any greater obligation on the public body than that which existed on the inhabitants at large before such transfer. *Maquire v. Liverpool Corporation*, 74 L. J. K.B. 369; [1905] 1 K.B. 767; 92 L. T. 374; 53 W. R. 449; 69 J. P. 158; 3 L. G. R. 485; 21 T. L. R. 278—C.A.

Variation between Enacting Clause and Schedule.]—Where the language used in the schedule to an Act of Parliament varies from that of the enacting clause to which it relates, the language of the enacting clause prevails. *Jacobs v. Hart*, 2 F. (Just. Cas.) 33—Ct. of Justy.

"Daily."—See GAS COMPANY.

Reference to Repealed and Re-enacted Provision.]—See *Stevens v. General Steam Navigation Co.*, 72 L. J. K.B. 417, *ante*, MASTER AND SERVANT.

Saving by Later Act of Rights Accrued under Earlier Act.]—See *London and North-Western Railway v. Walker*, 72 L. J. K.B. 578, *ante*, RAILWAY.

4. WHEN RETROSPECTIVE.

Intention.]—Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. *Midland Railway v. Pye* (10 C. B. (N.S.) 191) approved. *Young v. Adams*, 67 L. J. P.C. 75; [1898] A.C. 469; 78 L. T. 506—P.C.

The Preferential Payments in Bankruptcy Act, 1897, is not retrospective in its operation. *Waverley Typewriter, Lim., In re; D'Esterre v. Waverley Typewriter, Lim.*, 67 L. J. Ch. 360; [1898] 1 Ch. 699; 78 L. T. 593; 46 W. R. 685; 5 Manson, 269—Wright, J.

"It is declared."—The use of the words "It is declared" in a statute does not necessarily import that the statute is merely declaratory of existing law, and therefore retrospective. *Harding v. Queensland Commissioners of Stamps*, 67 L. J. P.C. 144; [1898] A.C. 769; 79 L. T. 42—P.C.

Code of Civil Procedure.]—The principle that legislation is presumed not to be retroactive cannot, in the case of an alteration in the general law, be extended to all the consequences of the original enactment. Thus it does not operate to preserve the privileges of the grantor of a lease in respect of the judicial abandonment of property by a trader where those privileges have been curtailed by legislation subsequent to the date of the lease. *Ross v. Beaudry*, 74 L. J. P.C. 106; [1905] A.C. 570; 93 L. T. 315; 21 T. L. R. 735—P.C.

Criminal Procedure.]—Section 27 of the Pre-
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vention of Cruelty to Children Act, 1904, which substitutes a limit of six months for the three months mentioned in the second proviso of section 5 of the Criminal Law Amendment Act, 1885, deals with "procedure only. Therefore, after the Act of 1904 comes into operation a prisoner who previously committed an offence under section 5, sub-section 1 of the Criminal Law Amendment Act, 1885, may, within the limit of six months from the commission of the offence imposed by section 27 of the Act of 1904, be prosecuted for the offence, although he committed it more than three months previously to the commencement of the prosecution, so that the limitation of time for commencing the prosecution imposed by section 5 of the Act of 1885 is exceeded. *Rea v. Dharma*, 74 L. J. K.B. 450; [1905] 2 K.B. 335; 92 L. T. 700; 53 W. R. 431; 69 J. P. 198—C.C.R.

Limitation of Actions—Right of Action Accrued before Statute Passed.]—The Public Authorities Protection Act, 1893, applies to an action in respect of a right of action accrued before the Act was passed. *The Ydun*, 68 L. J. P. 101; [1899] P. 236; 81 L. T. 10; 8 Asp. M.C. 551—C.A.

By the Ribble Navigation and Preston Dock Act, 1883 (46 & 47 Vict. c. cxv.), the defendants, the mayor, aldermen, and burgesses of the borough of Preston, are constituted the port and harbour authority for the port and harbour of Preston. By the Public Authorities Protection Act, which was passed on December 5, 1893, and came into force on January 1, 1894, an action against any person, in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority, must be commenced within six months next after the act, neglect, or default complained of. The plaintiffs, owners of a barque, issued a writ, on November 14, 1898, in an Admiralty action, against the defendants, for damages sustained by the grounding of their vessel on September 13, 1893, in the river Ribble within the port and harbour of Preston, through the alleged negligence of the defendants in inviting the vessel to come up when there was not sufficient water in the channel leading to the docks:—*Held*, that the defendants were acting in pursuance of their public duties, so that section 1 of the Public Authorities Protection Act, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of. *Ib.*

Agricultural Holdings.]—The Agricultural Holdings Act, 1900, gives tenants right to compensation, *inter alia*, for "laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy":—*Held*, that a tenant, whose tenancy terminated less than two years from the date of the Act, was entitled to compensation under this enactment. *Hamilton Ogilvy v. Elliot*, 7 F. 1115—Ct. of Sess.

Right of Appeal—Legislation Taking Away such Right.]—A right of appeal to a higher tribunal is a matter of substance, and not of procedure, and such a right, unless expressly or by necessary intendment retrospectively

abolished, is not taken away by subsequent legislation. Thus the right of appeal to the King in Council, which was taken away by the Australian Commonwealth Judiciary Act, 1903, but is not retrospective, still subsists in a suit pending when the Act was passed. *Colonial Sugar Refining Co. v. Irving*, 74 L. J. P.C. 77; [1905] A.C. 369; 92 L. T. 738; 21 T. L. R. 513—P.C.

Declaratory Act is Retrospective.]—See *Lovell and Collard's Contract, In re*, 76 L. J. Ch. 246, *ante*, REVENUE.

Vested Interests—Act Dealing with, is not Retrospective.]—See *The Langdale*, 76 L. J. P. 154, *ante*, SHIPPING.

5. STATUTORY POWERS.

Local Authority Created by Statute—Purchase of Tramways—Running of Omnibuses—Ultra Vires.]—Where a corporation is the creation of statute its powers are confined to such as are expressly, or by necessary implication, conferred by the statute. Thus the London County Council, constituted by the Local Government Act, 1888, and having thereunder and in virtue of other statutes the power of acquiring and working tramways, is not entitled to run a service of omnibuses, such service not being a necessary incident of the business of a tramway company. *London County Council v. Att.-Gen.* 71 L. J. Ch. 268; [1902] A.C. 165; 86 L. T. 161; 50 W. R. 497; 66 J. P. 340—H.L. (E.)

Trespass—Mandatory Injunction.]—A public body invested with statutory powers must take care not to exceed or abuse those powers, and must act in good faith within the limits of its authority. *Westminster Corporation v. London and North-Western Railway*, 74 L. J. Ch. 629; [1905] A.C. 426; 93 L. T. 143; 54 W. R. 129; 69 J. P. 425; 3 L. G. R. 1120; 21 T. L. R. 686—H.L. (E.)

Public Body with Statutory Powers—Dedication of Highway on Land Acquired for Statutory Purposes.]—If land is vested by an Act of Parliament in a statutory body so that they are thereby bound to use it for some special purpose incompatible with its public use as a highway, such a body is unable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then such a body have the power. A public body is incapable of dedicating a right of way over the embankment of a reservoir where it is proved that the user by the public must ultimately lead to the destruction of the embankment unless great expense is incurred by the company for the purpose of preventing such a result. *Lancashire and Yorkshire Railway v. Davenport*, 4 L. G. R. 425; 70 J. P. 129—C.A.

Land Acquired for Statutory Purposes—Railway Company—Power to Dedicate to the Public.]—A statutory body, such as a railway company, cannot alienate its rights in land (other than superfluous land) acquired for a statutory purpose, if such alienation may in the future prove incompatible with the use of the land for carrying out the company's statutory objects. *Taff Vale Railway v. Pontypridd*

Urban Council, 93 L. T. 126; 69 J. P. 351; 3 L. G. R. 1339—Buckley, J.

A railway company built and maintained a private accommodation bridge over its lines to connect the properties of a landowner that had been severed by the railway. The bridge in course of time came to be much used by the public, and the acts done in connection with it by the railway company would, if they had been the acts of a private owner, have constituted a dedication of the roadway to the public. Gas pipes were laid by the local authority in the roadway of the bridge on the footing that the bridge was a public road, and in exercise of the powers conferred by section 6 of the Gas Works Clauses Act, 1847. The railway company wished to alter the bridge, in order to lay down more lines on land acquired for that purpose, and adjacent to their existing lines at the bridge, and requested the local authority to remove the gas pipes:—*Held*, that the bridge in question was not a public road so as to enable the local authority to exercise therein the powers conferred by the above-mentioned section. *Att.-Gen. v. London and South-Western Railway* (21 T. L. R. 220) explained. *Held*, also, that this decision in the absence of the Attorney-General did not bind the Public. *Ib.*

A mandatory injunction compelling the local authority to remove their gas pipes was refused on the ground that the local authority might be entitled to retain them by virtue of section 7 of the Gas Works Clauses Act, 1847. *Ib.*

Land Acquired by Agreement for Purposes of Special Order — Proposed User of Part for Another Purpose — Refuse Destructor — Refuse as Fuel for Generating Station — Combined Scheme.]—It is *ultra vires* for a local authority, having acquired land for particular purposes under the powers of a special Act, to use the land so acquired, or any part of it, for another purpose, although such purpose may be within powers given to them under some other Act. *Att.-Gen. v. Pontypridd Urban Council*, 75 L. J. Ch. 578; [1906] 2 Ch. 257; 95 L. T. 224; 70 J. P. 394; 4 L. G. R. 791; 22 T. L. R. 576—C.A.

The defendant council had acquired land by agreement for the purposes of their special order under the Electric Lighting Acts, and were proposing to use a small part of such land as a site for a refuse destructor connected in such a way with their generating station that the refuse could be used as fuel for the purpose of generating electrical energy:—*Held*, that the land, having been acquired under the powers of the Electric Lighting Acts, and not under the powers of the Public Health Act, 1875, could only be used for the purpose of supplying electricity, and for such acts and things as might be necessary and incidental to such supply; that the refuse destructor was not a subsidiary part of or thing incidental to the supply of electricity, but was an independent work intended to enable the defendants to dispose of their refuse in compliance with their statutory obligations under the Public Health Act, 1875, and that the proposed user of the piece of land for this purpose was therefore *ultra vires*. *Ib.*

Use of Land—Injury to Adjoining Land—Imperative or Permissive Rights—Compensation.]—Wherever the Legislature has authorised a proprietor to make a particular use of his land, and the authority is permissive and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common-law rights of others. *Canadian Pacific Railway v. Parke*, 68 L. J. P.C. 89; [1899] A.C. 535; 81 L. T. 127; 48 W. R. 118—P.C.

The owner of land exercising statutory rights, for the purpose of irrigating his own land, to divert under prescribed conditions unrecorded and unappropriated water from the natural channel of any stream, lake, or river adjacent to or passing through such land, is not entitled, where the language of the statute is permissive and not imperative, to use his water supply so as to damage adjacent lands, and is liable to adjoining proprietors, even in the absence of negligence on his part, for injury done to their land in the course of such irrigation. *Ib.*

Dedication — Whether Compatible with User of Railway.]—A railway company can dedicate a footway in the nature of a level crossing, so long as the user of such path is not inconsistent with the obligations of the company. Where, therefore, a railway company had dedicated such a footway across its line and there was no danger involved thereby to the user of the railway or to the safety of the public using the trains, the company were restrained from closing the footpath. *Att.-Gen. v. London and South-Western Railway*, 69 J. P. 110; 3 L. G. R. 1327; 21 T. L. R. 220—Farwell, J.

Interference with Tunnel under River Thames — Dredging Operations likely to Endanger Tunnel — Injunction.]—An injunction granted restraining the defendants from carrying out dredging operations likely to cause danger to the tunnel belonging to the plaintiffs, which was constructed under statutory authority. *East London Railway v. Thames Conservators*, 68 J. P. 302—Farwell, J.

Unreasonable Exercise of Statutory Powers.]—The defendants were authorised by statute to carry out certain works in connection with their undertaking, and were in the habit of carrying on work on the site of a proposed station by night as well as by day. The plaintiff, who occupied a house close to this site, brought an action to restrain the defendants from working at night, alleging that such work rendered his house uninhabitable, and was a vexatious and unreasonable abuse by the defendants of their statutory powers. He also claimed damages:—*Held*, that, upon the assumption that working at night was unreasonable and rendered the plaintiff's house uninhabitable, a good cause of action was disclosed. The fact that compensation could be obtained under section 63 of the Lands Clauses Consolidation Act, 1845, did not exclude the regulating and restraining jurisdiction of the Court. *Roberts v. Charing Cross, Euston, and Hampstead Railway*, 87 L. T. 732—Farwell, J.

Damage Caused in Carrying out Statutory Powers — Absence of Negligence.]—Where a company or corporation is empowered by statute to do a certain thing, it is not liable

for damage caused in carrying out its statutory powers, in the absence of negligence. *Canadian-Pacific Railway v. Roy*, 71 L. J. P.C. 51; [1902] A.C. 220; 85 L. T. 127; 50 W. R. 415—P.C.

Injury to Individual—Remedy.]—Where a public body, acting in the execution of their public duties for the public benefit, do an act which they are authorised by law to do, and the act, though done in a proper manner, causes special injury to a particular person, that person has no remedy unless one is given by statute. The appellants corporation, acting in pursuance of statutory powers, altered the gradient of a street in the town, and thereby seriously interfered with the access to the respondent's house. The Act under which the appellants acted made no provision for compensation in respect of consequential injury:—*Held*, that the respondent could not maintain an action against the corporation in respect of such injury. *East Fremantle Corporation v. Annois*, 71 L. J. P.C. 39; [1902] A.C. 213; 85 L. T. 732; 67 J. P. 103—P.C.

Exceeding—Injury.]—A shopkeeper sued a local authority for damages caused by loss of business at his shop through the road which gave access to the shop being unnecessarily and negligently obstructed by them. Under an Act of Parliament the defendants were empowered to obstruct the road temporarily while making a new street:—*Held*, that there being no evidence of any damage to the plaintiff arising out of any excess by the defendants of their statutory powers, the defendants were entitled to judgment. *Quare*, whether assuming a loss of business through such an excess, the injury to the plaintiff would have been actionable. *Martin v. London County Council*, 80 L. T. 866—C.A.

Where a private person is injured owing to works carried out by a public authority under statutory powers, even if such works are unnecessarily or unreasonably delayed, an action for damages will not lie unless the person aggrieved can shew he has been injured specially, directly, and substantially. S.C. 79 L. T. 170—*per* KENNEDY, J.

— **Exercise of Statutory Powers—Injury Caused by such Exercise.]**—When powers are given by statute to a person or corporation which necessarily imply that damage may be caused to others in their exercise, an action for damage at the instance of any one injuriously affected thereby is excluded; such powers, however, must not be exercised arbitrarily, carelessly, or oppressively. *Southwark and Vauxhall Water Co. v. Wandsworth District Board*, 62 J. P. 519—*Kekewich, J.* Affirmed, C.A., 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79 L. T. 132; 62 J. P. 756; 47 W. R. 107. See col. 1656.

Nuisance.]—Where a nuisance is caused by a company in its execution of works under statutory powers, the company will not be restrained by injunction or made liable in damages if it is acting “reasonably” in the execution of the works. *Ash v. Great Northern, Piccadilly, and Brompton Railway*, 67 J. P. 417—*Kekewich, J.*

Construction of Electrical Tramway—Roadway and Pavement—Nuisance.]—A corporation, purporting to act in the exercise of their powers under their special Tramways Act, which incorporated the Tramways Act, 1870, and authorised the construction of an electric tramway, erected a pole and a fuse-box in the footpath close to the principal entrance of the plaintiffs' premises:—*Held*, that the defendants' statutory powers authorised them to use the pavement for the purpose of doing that which was necessary for making their tramway an electrical tramway; that the nuisance which the defendants were authorised to commit could not be interfered with unless the plaintiffs could prove that the powers conferred upon the defendants had been abused, which the plaintiffs had failed to do; and that therefore the action could not be maintained. *Goldberg v. Liverpool Pool Corporation*, 82 L. T. 362—C.A.

Electric Lighting Order—“Nothing in this Order shall exonerate the undertakers from any indictment action or other proceeding for nuisance in the event of any nuisance being caused by them” —Leakage of Electricity—Explosion—Damage to Property in Adjoining Premises—Liability of Undertakers.]—The defendants, a municipal corporation, were the undertakers for the supply of electricity to their district under the provisions of an Order made under the Electric Lighting Acts, 1882 and 1888, and confirmed by Parliament. By the Regulations of the Board of Trade made under the Acts and Order the defendants were required to constantly maintain a supply of electricity in their mains at the pressure fixed by the Order. The Order contained a clause that “nothing in this Order shall exonerate the undertakers from any indictment action or other proceeding for nuisance in the event of any nuisance being caused by them.” A leakage of electricity from one of the defendants' mains caused the bitumen in which the wire was encased to be fused, whereby a gas was generated which, escaping into the premises of the plaintiffs adjoining the street in which the main was laid, exploded there and damaged the plaintiffs' property:—*Held*, in an action by the plaintiffs for damages, that, apart from any question of negligence, the defendants had caused a “nuisance” within the meaning of the clause in their Order, and consequently that, the statutory authority conferred upon them under their Order being qualified by the condition contained in the Order, they were not thereby protected from liability to the plaintiffs for the damages sustained by them. *Shelfer v. City of London Electric Lighting Co.* (64 L. J. Ch. 216; [1895] 1 Ch. 287) followed. *Midwood v. Manchester Corporation*, 74 L. J. K.B. 884; [1905] 2 K.B. 597; 93 L. T. 525; 54 W. R. 37; 69 J. P. 348; 3 L. G. R. 1136; 21 T. L. R. 667—C.A.

Conflict.]—See WATER.

Damage Sustained — Compensation — Negligence.]—See TELEGRAPH, col. 2512.

Railway—Omnibus Business.]—See RAILWAY, col. 2053.

Tramway—Carrier.]—See CORPORATION, cols. 557–8.

6. STATUTORY DUTY.

Proceedings to Enforce.—Where powers are given to a statutory company for the supply of a commodity, the Act providing that in certain specified events the price is to be reduced, and the municipality is authorised to audit the company's annual statement and verify their accounts, an aggrieved consumer, in the absence of any pecuniary penalty for default or for the reservation of any right of action to individuals, has no right of action against the company for non-compliance with the provisions of the Act. To the corporation only in such a case is the duty confided of seeing that the Act is obeyed. *Johnston v. Toronto Gas Consumers Co.*, 67 L. J. P.O. 33; [1898] A.C. 447; 78 L. T. 270—P.C.

Breach of Statutory Provision—Remedy.—*See* INJUNCTION, col. 1015.

7. CONFIRMATORY STATUTES.

Toll — Franchise — Confirmation of Customary Title by Statute—Substitution of Statutory for Customary Title—Extinction of Customary Title.—Where an Act of Parliament, according to its true construction, has embraced and confirmed a right which previously existed by custom or prescription, such right becomes thenceforth a statutory right, and the lower right by custom and prescription is merged in and extinguished by the higher title of the Act of Parliament. *New Windsor Corporation v. Taylor*, 68 L. J. Q.B. 87; [1899] A.C. 41; 79 L. T. 450; 68 J. P. 164—H.L. (E.)

Contract — Confirmation of — Vagueness — Remoteness.—Where an agreement between parties is confirmed by Act of Parliament, every clause in it has statutory validity, and no objection can be taken to any provision in it on the ground that it is void for remoteness or uncertainty. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 486; 49 W. R. 418—C.A.

— **Illegal—Statutory Confirmation of.**—*See* CONTRACT, col. 522.

8. CONSOLIDATING STATUTES.

Ambiguity — Previous Legislation.—Where the wording of a consolidating Act of Parliament is ambiguous, the Court is entitled to look at previous Acts of Parliament passed *in pari materia* and see how the matter was there dealt with. *Rea v. Abrahams*, 73 L. J. K.B. 972; [1904] 2 K.B. 859; 91 L. T. 493; 68 J. P. 546; 20 T. L. R. 684—Lord Alverstone, C.J.

9. STATUTORY REMEDY.

Market—Statutory Regulation—Disturbance—Common Law Action—Injunction.—Where an ancient market is regulated by an Act of Parliament, an action at law will lie for disturbance of the market, notwithstanding provisions giving a summary remedy before a special tribunal. *Stevens v. Chown*, 70 L. J. Ch. 571; [1901] 1 Ch. 894; 84 L. T. 796; 49 W. R. 460; 65 J. P. 470—Farwell, J.

But the remedy formerly administered by the Court of Chancery by injunction was more extensive than any common law remedy, and may be invoked to prevent an invasion of proprietary rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right. *Id.*

Different Remedies — Limitation of Time — Lex Fori.—If in an Act of Parliament power is conferred to take remedy in divers Courts, as a general rule that remedy will, in each Court, be subject to the *lex fori* of that Court, including the limitation of actions. *Blackburn Corporation v. Sanderson*, 71 L. J. K.B. 590; [1902] 1 K.B. 794; 86 L. T. 304; 66 J. P. 452—C.A.

Remedy by Summary Jurisdiction—Jurisdiction of High Court.—Where by an Act of Parliament a claim thereunder is made enforceable by a Court of summary jurisdiction, it is not competent to enforce such claim by means other than those prescribed by the statute, or to have recourse to the High Court in order to determine the right. *Barraclough v. Brown*, 66 L. J. Q.B. 672; [1897] A.C. 615; 76 L. T. 797; 62 J. P. 275; 8 Asp. M.C. 290—H.L. (E.) *See also Grand Junction Waterworks Co. v. Hampton Urban Council* (No. 1), 67 L. J. Ch. 608.

Statutory Remedy not Exclusive.—*See* GAS.

10. STATUTORY PENALTY.

Prohibitory Statute — Illegal Contract.—Where by a statute a penalty is imposed—not solely for protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal. *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. 678; [1905] 2 Ch. 624; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742—Buckley, J. S.P., *Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740; 94 L. T. 656; 22 T. L. R. 399—C.A.

Special Agreement for Supply of Energy—Breach of Contract by Failure to Supply—Penalty Clause—Action for Damages.—By their private Act the defendants were bound to supply electrical energy to certain classes of persons. They were also empowered to supply other persons under special agreements. By clause 62 of their Act it was provided that "Whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this part of this Act they shall be liable in respect of each default to a penalty. . . ." A special agreement was made between the plaintiffs (who were not persons to whom the defendants were bound to give a supply) and the defendants for a supply of energy by the latter. The defendants, as the plaintiffs alleged, made default in the supply of energy, whereby the plaintiffs suffered damage, and thereupon the plaintiffs sued to recover damages for such default:—*Held*, that the action was maintainable, as the penalty section only applied in the case of

consumers to whom the defendants were bound to make a supply. *Morris & Bastert v. Loughborough Corporation*, 77 L. J. K.B. 91; [1908] 1 K.B. 205; 71 J. P. 521; 6 L. G. R. 55—C.A. Reversing, 5 L. G. R. 269—Bigham, J.

11. LOCAL AND PRIVATE STATUTES.

Private Act — Special Obligations — General Act.]—Private Acts conferring special rights and imposing special obligations for special purposes are not overruled by general legislation, the application of which might interfere with the rights granted and the obligations imposed by the private Acts. *Esquimalt Waterworks Co. v. City of Victoria Corporation*, 76 L. J. P.C. 75; [1907] A.C. 499; 97 L. T. 492; 23 T. L. R. 762—P.C.

“Local or private Act of Parliament.”]—A railway company’s special Act is a “local or private Act” within section 13 of the Public Health Act, 1875, although in the special Act itself it is provided that “this Act shall be a public Act.” *London and North-Western Railway v. Runcorn Rural Council*, 67 L. J. Ch. 324; [1898] 1 Ch. 561; 78 L. T. 343; 46 W. R. 484; 62 J. P. 643—C.A.

Effect of Public Act on Private Act.]—See *Uckfield Rural Council v. Crowborough Water Co.*, ante, col. 1396.

Implied Repeal of Local Act by Subsequent Local Act.]—See METROPOLIS (RATES).

12. SPECIAL STATUTES.

Special Act — Construction.]—The effect of descriptions in special Acts of Parliament affecting interests in land considered. *Locke-King v. Woking Urban Council*, 77 L. T. 790; 62 J. P. 167—Kekewich, J.

Effect of General on Special Act.]—See *Ash-ton-under-Lyne Corporation v. Pugh*, ante, col. 1406.

13. REPEAL OF STATUTES.

Repeal by Implication—Earlier by Later Act.]—An Act of Parliament enacted that no lands in a city should be liable to contribute to any rate made by or in accordance with the precept of any board, authority, or person other than the corporation:—*Held*, that this enactment, though *prima facie* capable of exempting the lands in question from a rate made by the Commissioners of Sewers, had not that effect. *Bristol Corporation v. Canning*, 95 L. T. 183; 70 J. P. 528—Buckley, J.

Procedure Section—Procedure—Offence under Sale of Food and Drugs Act, 1879—Power of Amendment.]—Where an Act creating an offence is kept in force, and the section providing procedure only is repealed, and other procedure is provided by the repealing Act, although an offence is committed while the repealed section is in force, if proceedings are not taken until after the repeal takes effect, they are governed by the requirements of the repealing Act. In

such a case the old form of procedure is not kept alive by section 38, sub-section 2 of the Interpretation Act, 1889, as to offences committed under the earlier Act. *Batt v. Mattinson*, 82 L. T. 800; 64 J. P. 615; 19 Cox C.C. 532—D.

Effect of Saving Clause—Jurisdiction.]—Although by virtue of section 340 of the Lunacy Act, 1890, the Lords Justices have no power to make a vesting order of the trust property under that Act in the case of a criminal lunatic who is a trustee, there is jurisdiction to make such an order under section 5 of the Trustee Act, 1850. The powers of the Lords Justices under the Trustee Act, 1850, are, notwithstanding the repeal of section 5 by section 342 of the Lunacy Act, 1890, preserved, as regards criminal lunatic trustees, by the saving clause in the same section. *R. In re*, 75 L. J. Ch. 421; [1906] 1 Ch. 730; 94 L. T. 494; 54 W. R. 578—C.A.

Repeal of Earlier by Later Act.]—See *Coster v. Headland*, ante, POOR LAW, col. 1865.

14. OTHER MATTERS.

Effect of Statute on Contract.]—See *Bradford Tramways Co.*, *In re*, 68 J. P. 362, ante, COMPANY.

Whether Crown Bound by Statute.]—See CROWN.

STOCK EXCHANGE.

Employment of Broker—Rules.]—Where a broker is employed to do business on a Stock Exchange, he must, in the absence of any evidence to the contrary, be taken to be employed on the terms of such Stock Exchange. *Forget v. Baater*, 69 L. J. P.C. 101; [1900] A.C. 467; 82 L. T. 510—P.C.

Rules—Defaulting Broker—Collection of Assets—Money paid into Court in Action by Official Assignee in Name of Defaulter—Charging Order Subsequently Obtained by General Creditor of Defaulter—Assignment—Priorities.]—The official assignee of the Stock Exchange, in collecting, under the rules of the Stock Exchange, the assets of a defaulting broker, brought an action in the name of the defaulter against one of his clients, and succeeded in obtaining the payment into Court of part of the amount claimed. Subsequently, one of the defaulter’s creditors, whose claim did not arise out of any transaction on the Stock Exchange, recovered judgment against the defaulter and obtained a charging order *nisi* on the money paid into Court in the previous action. No proceedings had been taken to have the defaulting broker adjudicated bankrupt:—*Held*, that the charging order *nisi* must be discharged, as, under the rules of the Stock Exchange, there had been a valid assignment to the official assignee, which, being prior in date to the judgment creditor’s rights, took priority over them. *Lomas v. Graves*, 73 L. J. K.B. 803; [1904] 2 K.B. 557; 91 L. T. 616; 20 T. L. R. 657—C.A.

— Construction of—“Assets” of Defaulting

Member—Meaning of "Assets" in Rule 176.]—The words "the assets" in rule 176 of the Stock Exchange Rules, which provides that the official "assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible," mean the whole of the assets of a defaulting member. *Richardson v. Stormont, Todd & Co.*, 69 L. J. Q.B. 369; [1900] 1 Q.B. 701; 82 L. T. 316; 48 W. R. 451; 5 Com. Cas. 134—C.A.

Right of Official Assignee to Sue.]—The official assignee has such a right or interest in the assets of a defaulter as entitles him to sue in his own name to recover the same. *Tomkins v. Saffery* (47 L. J. Bk. 11; 3 App. Cas. 213) considered. *Ib.*

Loan on Shares by Jobber to Broker—Outside Principal—Default of Broker—Default of Principal—Rules.]—The rules of the Stock Exchange, whereby in the case of the failure of a member of the Stock Exchange, all members having transactions open with the defaulter are compelled to close them by buying or selling, as the case may be, the securities concerned at an official price, are rules affecting the relations of the members of the Stock Exchange only *inter se*. They will not apply to an outside principal, even though the failure which has caused the rules to become applicable was due to the default of the principal. *Ponsolle v. Webber*, 77 L. J. Ch. 253; [1908] 1 Ch. 254—Neville, J.

A broker obtained on behalf of an undisclosed principal a loan from a jobber until the following settling day, on the security of shares sold for that settling day to another broker acting for the same undisclosed principal. The purchasing and borrowing brokers both made default in respect of the transaction, owing to the failure of the undisclosed principal to put either of them in funds to meet their obligations in respect of the transaction:—*Held*, that, although by the rules of the Stock Exchange the lender was compelled as a result of the failures to take over the shares at an official price from the borrowing broker in part payment of his loan, he could not claim as against the principal to retain the shares for his own benefit, but, having subsequently sold the shares at an enhanced price, was bound to account to the principal for the proceeds of sale, after deducting his principal, interest, and costs. *Ib.*

Carrying over—Death of Client.]—See PRINCIPAL AND AGENT, col. 1976.

"Carrying over"—Date of Completion—Death of Vendor.]—See *Schwabacher, In re; Stern v. Schwabacher*, 98 L. T. 127—Parker, J.

Contract—Breach of—Measure of Damages.]—See CONTRACT, col. 536.

Default—Right of Creditor to Present Petition.]—See *Mendelssohn, In re, ante*, BANKRUPTCY, col. 86.

Rights and Liabilities Arising from Contract.]—See PRINCIPAL AND AGENT, col. 1974.

Sale by Custom of.]—See PRINCIPAL AND AGENT, col. 1977.

Title of Trustee in Bankruptcy as against Official Assignee.]—See BANKRUPTCY, col. 106.

STOCKS AND SHARES.

See COMPANY, col. 366.

SUCCESSION DUTY.

See ESTATE DUTY.

SUGAR.

Statute.]—3 Edw. 7 c. 21 is the *Sugar Convention Act*, 1903.

SUMMONS, WRIT OF.

See PRACTICE AND PLEADING, col. 1902.

SUNDAY.

Observance—Shopkeeper not Present in Shop.]—On an information under the Lord's Day Observance Act, 1676, it was proved that at 1.20 p.m. on Sunday, May 13, 1906, several persons went to the appellant's shop and purchased oranges, sweets, and eggs. At 1.30 p.m. a child purchased some currants and a youth tobacco. A police constable who was watching went into the shop and saw a young man, who was in charge of the shop, and the latter made a communication to him about the appellant. The young man was a railway clerk, and was seventeen years of age. The shop remained open until 10 p.m. He saw the appellant on May 14, 1906, on the subject, and he replied that he was doing nothing wrong so long as he himself kept away from the shop. In cross-examination the witness said that the appellant, in addition to the shop where he carries on business as a grocer and general dealer, was a beer retailer at Barnsley. He was also a cycle repairer. The Justices convicted the appellant:—*Held*, that the conviction was good. *Connor v. Quest*, 96 L. T. 28; 71 J. P. 62; 21 Cox C.C. 345—D.

Exercising Ordinary Calling—Chipped-potato Dealer—"Cook's shop . . . for such as otherwise cannot be provided."]—A tradesman in the course of his business cut up and cooked or fried potatoes, sometimes alone and sometimes with fish, which he sold hot on his premises to the poorer classes. He was charged with exercising his ordinary calling by doing this on a Sunday:—*Held*, that his premises came within the exception in section 3 of the Sunday Observance Act, 1677, as being a "cook's shop" for such as otherwise could not be provided, and that he was therefore not liable to the penalty imposed by section 1 of the Act. *Bullen v. Ward*, 74 L. J. K.B. 916; 93 L. T. 439; 54 W. R. 411; 69 J. P. 422; 21 Cox C.C. 28; 21 T. L. R. 753—D.

— **Hairdresser—"Tradesman."]**—A hair-

dresser is not within section 1 of the Sunday Observance Act, 1677, which provides that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day." *Palmer v. Snow*, 69 L. J. Q.B. 356; [1900] 1 Q.B. 725; 82 L. T. 199; 48 W. R. 351; 64 J. P. 342; 19 Cox C.C. 475—D.

Institution of Prosecution—Consent in Writing—Bread Act.—The provision of section 1 of the Sunday Observance Prosecution Act, 1871, that no prosecution or other proceeding shall be instituted for any offence committed under 29 Car. 2, c. 7 (the Sunday Observance Act, 1677), except by or with the consent in writing of the chief officer of police of the district or with the consent in writing of two Justices of the peace or a stipendiary magistrate, has no application to prosecutions under section 16 of the Bread Act, 1822, for selling or exposing for sale bread on the Lord's Day. *Re v. Mead*, 71 L. J. K.B. 871; [1902] 2 K.B. 212; 87 L. T. 136; 50 W. R. 589; 66 J. P. 676; 20 Cox C.C. 337—D.

Whether Included in Word "Daily."—See GAS COMPANY, col. 910.

SUPPLY.

See REVENUE.

SUPPORT, RIGHT OF.

See EASEMENT, col. 726.

TAPESTRY.

See FIXTURES, col. 869.

TAXATION OF COSTS.

Between Solicitor and Client.]—See SOLICITOR.

In other Cases.]—See COSTS, col. 579.

TAXES.

See REVENUE.

TELEGRAPH AND TELEPHONE.

STATUTES.

Money.—61 & 62 Vict. c. 33 is the *Telegraph (Money) Act*, 1898.

—4 Edw. 7 c. 3 is the *Telegraph (Money) Act*, 1904; and 4 Edw. 7 c. 24 is the *Wireless Telegraphy Act*, 1904.

—7 Edw. 7 c. 6 is the *Telegraph (Money) Act*, 1907.

Pacific Cable.—1 Edw. 7 c. 31 is the *Pacific Cable Act*, 1901.

—2 Edw. 7 c. 26 is the *Pacific Cable Amendment Act*, 1902.

Telegraph.—62 & 63 Vict. c. 38 is the *Telegraph Act*, 1899.

Telephone Company—Power to Take up Streets—Licence of Postmaster-General—Consent of Person Liable for the Repair of Road—Tramway Company.—The Postmaster-General and his licensees have power to lay telegraph or telephone wires in that part of a public street or road which a tramway company is liable to repair, without obtaining the consent of the tramway company, under section 13 of the *Telegraph Act*, 1863. *Bristol Tramways and Carriage Co. v. National Telephone Co.*, 68 L. J. Ch. 566; [1899] 2 Ch. 282; 80 L. T. 836—North, J.

Telephone Wires—Ownership of "Solum" by Road Authority.—The powers conferred on the Postmaster-General by the *Telegraph Acts*, 1863 and 1878, are powers of construction, and a licence granted by him to the *National Telephone Co.* to use lines when constructed is not a licence to exercise powers conferred on the Postmaster-General by the *Telegraph Acts* of 1863 or 1878; and, consequently, in such a case, section 5 of the *Telegraph Act*, 1892, has no application. *Postmaster-General v. Edinburgh Corporation*, 10 Ry. & Can. Traff. Cas. 247—Ry. Com.

Section 13 of the *Telegraph Act*, 1863, only requires the consent of the landowner (to the laying of telegraph wires) in addition to the consent of the body having control of the street, where such landowner is liable, *qua* landowner, for the repair of the street, and where the landowner and the body having such control are separate persons. *Ib.*

The fact of a corporation having the ownership of the *solum* through which the wires are to be laid affords no reason for annexing pecuniary terms to their consent, inasmuch as the corporation is a public body, and the Postmaster-General must be held to be acting in the public interest. *Ib.*

—Conditional Consent of Road Authority—Public Interest—Pecuniary Terms.—The Corporation of Glasgow refused their consent to the laying of wires by the Postmaster-General except on the condition "that such consent was not to be made applicable to the purposes of any private company or individual, whose application if made direct to the corporation could be refused by the corporation without right of appeal." The Postmaster-General admitted that the wires when laid would be used by the *National Telephone Co.* as junction lines with the Post-Office trunk lines, and stated that this would be done in pursuance of a Treasury minute which had been laid before Parliament:—*Held*, that the Postmaster-General was carrying out a definite policy sanctioned by the Legislature, and must be assumed to be acting in the public interest in providing facilities for the telephone company; and that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorised by the law. *Postmaster-*

General v. Glasgow Corporation, 10 Ry. & Can. Traff. Cas. 238—Ry. Com.

Held, further, that the Commissioners under section 3 of the Telegraph Act, 1878, as "the authority by whom the difference is to be determined, may . . . give their consent either unconditionally or subject to such pecuniary or other terms, conditions and stipulations as they may think just," and therefore may fix pecuniary terms where such terms are no part of the original difference. *Ib.*

The Corporation of Glasgow appealed to the Court of Session under section 17 of the Railway and Canal Traffic Act, 1888, on the ground that the words in the judgment "that the corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorised by the law," were founded upon an erroneous view of the law, and that this had prevented the Commissioners from considering the reasonableness of the conditions which the corporation sought to have attached to their consent:—*Held* (by the COURT OF SESSION), that these words did not decide any question of legal right, but merely expressed the view of the Court that the condition was an unreasonable one; and, there being no question of law, that the appeal was incompetent. *Ib.*—Ct. of Sess.

— **Conditional Consent of Road Authority—Objections they may Take.**—The Corporation of London (as successors of the Commissioners of Sewers of the City of London), on being applied to by the Postmaster-General under section 3 of the Telegraph Act, 1878, for their consent to the placing and maintaining of a line or lines of underground telegraphs under certain streets in the City of London, refused their consent, except on condition that the said line or lines of telegraphs should not be "laid for the use of the National Telephone company, unless the telephone company were prepared to provide an improved service at a reduced cost." This difference, after having been referred to the Judge of the City of London Court, was, in accordance with section 4 of the Telegraph Act, 1878, brought before the Railway Commissioners:—*Held*, that the following words in section 5 of the Telegraph Act, 1863—"any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) as the person or body giving consent thinks fit"—only entitled street authorities in withholding such consent to raise objections of a kind which concerned them as a street authority; and that the objection raised by the corporation was an unreasonable one, inasmuch as it did not apply to the public at large and did not affect the corporation's interests as a street authority at all. *Postmaster-General v. London Corporation*, 10 Ry. and Can. Traff. Cas. 234—Ry. Com.

Underground Wires—Road Authority—Power of, to Impose Conditions on Postmaster-General.—Section 9 of the Telegraph Act, 1863, provides that the company, which by a later Act includes the Postmaster-General, shall not place any telegraph under any street except with the consent of the bodies having the control of the streets; and section 5, sub-section 3, provides that any consent may be given "on such pecu-

niary or other terms or conditions as the person or body giving consent thinks fit":—*Held*, that the objections which the road authority are entitled to raise under section 5, sub-section 3, are objections as to matters only which concern them as a road authority, and that they cannot raise objections as to the modes or conditions of carrying on the service or the reasonableness of the charges for such service; and that they cannot therefore, when giving consent to the Postmaster-General to lay an underground telephone wire, impose the condition that the wire should not be laid for the use of a particular telephone company unless such company were prepared to provide an improved service at a reduced cost, as such condition would be not only outside the scope of their duties as a road authority, but also unreasonable. *Postmaster-General v. London Corporation*, 78 L. T. 120; 62 J. P. 380—Ry. Com. And see *National Telephone Co. v. Tunbridge Wells Corporation*, ante, LOCAL GOVERNMENT, col. 1414.

Exercise of Statutory Powers—Damage—Claim for Compensation—Condition Precedent—Proof of Absence of Negligence.—In order that a person may maintain a claim for compensation under section 7 of the Telegraph Act, 1863, for damage done by reason of the exercise of the powers of the Act as distinct from an action at law, it is not incumbent upon him to shew that the undertakers in doing the damage did not act negligently. *St. James and Pall Mall Electric Light Co. v. Regem*, 73 L. J. K.B. 518; 90 L. T. 344; 68 J. P. 288—Farwell, J.

Licence to Provide Telephonic Communication in Exchange Area—New Licence to Local Authority in Respect of same Area—Continuance of Powers to lay down Underground Wires required by Company by Agreement with Local Authority.—Section 3, sub-section 1 of the Telegraph Act, 1899—which provides, under certain circumstances, for the continuance of powers acquired by an existing company by agreement with the local authority before the passing of the Act to lay down underground wires in an exchange area, in the event of a new licence being granted to the local authority or to another company in respect of the same exchange area—applies only to the case where the powers of the company are in existence at the date of the grant of the new licence. Accordingly, where the local authority by virtue of a clause contained in the agreement conferring the powers has duly determined those powers before the date of the grant of the new licence, the section does not operate to continue them. *National Telephone Co. v. Kingston-upon-Hull Corporation*, 89 L. T. 291; 51 W. R. 617; 1 L. G. R. 777; 68 J. P. 62—Buckley, J.

The words in the section, "those powers shall continue for the period specified in the new licence for the duration thereof," refer to the duration of the powers, and not to the duration of the new licence. Assuming, therefore, that the powers of the company are in existence at the date of the grant of the new licence, they will be continued, not during the duration of the new licence, but during the period (if any) which the new licence specifies for their continuance. *Ib.*

Postmaster-General's Exclusive Privilege—Exceptions—Maintained "for private use"—Wires between Separate Establishments.]—External communications between two or more separate establishments, although made by special telegraph or telephone wire owned or rented by one of the parties exclusively, are not, by section 5 of the Telegraph Act, 1869, excepted from the exclusive privilege of transmitting telegrams conferred on the Postmaster-General by that Act. *Postmaster-General v. National Telephone Co.*, 76 L. J. Ch. 353; [1907] 1 Ch. 621; 96 L. T. 632; 71 J. P. 221; 23 T. L. R. 401—Swinfen Eady, J.

Contract—Telegraphic Code—Mistake—Action on Contract—Onus probandi.]—Where parties have corresponded by means of a telegraphic code, it is for the plaintiff, in an action for breach of contract, to show that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe. *Falck v. Williams*, 69 L. J. P.C. 17; [1900] A.C. 176—P.C.

Liability of Postmaster-General to Actions.]—See POST OFFICE, col. 1867.

Removal of Telephone Wires—Obstruction of Public Place.]—See LOCAL GOVERNMENT, col. 1415.

Rent of Telephone—Bankruptcy of Lessee—Preferential Claim of Postmaster-General.]—The bankrupt had rented a telephone service wire from the Postmaster-General under an agreement dated June 2, 1905, which contained a provision that if he should become bankrupt the Postmaster-General might terminate the agreement by notice in writing, and that on doing so the Postmaster-General should be entitled to recover forthwith, as liquidated damages, and not by way of penalty, a sum equal to the whole subscription, which would become payable between such termination and the expiration of the agreement. The adjudication took place on October 15, 1906, and notice of the termination of the agreement was served on November 14, 1906:—*Held*, that the Postmaster-General was entitled, as a preferential Crown debt, to the amount he claimed as liquidated damages in respect of the rent of the telephone up to June 18, 1908, the date at which the agreement would expire by efflux of time. *Niblock, In re*, [1907] 2 Ir. R. 559—K.B. D.

Rent in Advance—Disconnection of Telephone—Right to Full Rent.]—G. agreed to pay to the National Telephone Co. rent in advance for the use of a telephone. The company was to have the right to disconnect G., without prejudice to the other conditions of the contract, if he failed to observe the company's rules, or if any sum of money payable by him under the contract was in arrear. Further, the contract was terminable by the company in the event of any sum payable under it being in arrear. G. paid the first year's rent in advance, but upon the second falling due he declined to pay in advance for the future. Thereupon the company disconnected G., and claimed to be entitled to recover the full rent payable on the first day of the second year, although he had in fact enjoyed the use of the telephone during forty

days of the second year, and no more:—*Held*, that the company were entitled to recover the second year's rent in full. *National Telephone Co. v. Griffen*, [1906] 2 Ir. R. 115—K.B. D.

Rival Systems—Right to Intercommunication.]—Defendants were licensees whose licence had been extended in respect of an exchange area under the provisions of section 3 of the Telegraph Act, 1899, and they were requested by the plaintiffs, who were subsequent licensees for the same exchange area, to provide intercommunication with their system:—The Court, after considering the report of a special scientific referee, who had by their order held a local investigation, made a declaration as to the facilities for intercommunication to be given by the defendants to the plaintiffs. Order of BUCKLEY, J. (74 L. J. Ch. 449), varied. *Swansea Corporation v. National Telephone Co.*, 75 L. J. Ch. 407; 94 L. T. 565; 70 J. P. 366; 4 L. G. R. 809; 22 T. L. R. 471—C.A.

Protection of Submarine Telegraph Cables—Sacrifice of Anchor Fouling Cable—Compensation in Accordance with Submarine Telegraphs Convention—Measure of Damages.]—Where an anchor of a steamship fouled a submarine cable and was sacrificed by the captain on the faith of a public notice stating that the owner of the cable would compensate owners of vessels for loss of material by adhering to the Submarine Telegraph Act, 1885, Schedule, Art. VII.—which provides that shipowners who can prove that they sacrificed an anchor, &c., in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable—the liability of such owner under the terms of the notice is to make compensation for the sacrifice of the anchor, but not further to pay the damages resulting from such sacrifice. *Agin-court Steamship Co. v. Eastern Extension Telegraph Co.*, 76 L. J. K.B. 884; [1907] 2 K.B. 305; 97 L. T. 410; 12 Com. Cas. 302; 23 T. L. R. 490—C.A.

TENANT FOR LIFE AND REMAINDERMAN.

(And see cols. 795, 2274.)

Unauthorised Securities—Income—Enjoyment in Specie—Power to Retain Investments.]—A testator gave 100,000l. upon trust to invest in trustees' securities and to pay the income to his wife for life, after whose death the said sum and the investments thereof were to fall into residue. He gave his residue upon trust to invest in like manner and to pay the income to his niece for life with a gift over of the said residue and investments after her death. He gave the trustees absolute power to retain existing securities, whether authorised or not, and to apportion any part to meet the 100,000l., the legatee to be entitled to any increase and liable to any decrease after apportionment:—*Held*, that the wife was entitled to the whole income of unauthorised investments apportioned to the 100,000l., and the niece to the whole income of other unauthorised investments retained under the power. *Wilson, In re*; *Moore v. Wilson*, 76 L. J. Ch. 210; [1907] 1 Ch. 394; 96 L. T. 455—Swinfen Eady, J.

Sheldon, In re; Nixon v. Sheldon (58 L. J. Ch. 25; 39 Ch. D. 50), and *Bates, In re; Hodson v. Bates* (76 L. J. Ch. 29; [1907] 1 Ch. 22), followed. *Chaytor, In re; Chaytor v. Horn* (74 L. J. Ch. 106; [1905] 1 Ch. 233), distinguished. *Ib.*

Misappropriation by Trustee—Restoration of Capital with Interest at 5 per Cent—Capital and Income—Claim of Capital to Excess of Interest beyond Amount Obtainable from Authorised Investments.]—The sole trustee of a marriage settlement realised a sum of Consols which had fallen into possession and formed part of the settled funds, and in breach of trust applied the proceeds in paying off a private debt which bore interest at 5 per cent. Subsequently he restored the capital in full to the trust estate, and it was assumed that he had paid interest thereon at the rate of 5 per cent. to the tenant for life under the settlement, who made no claim against him:—*Held*, that the persons entitled under the settlement to the fund in remainder were not entitled, as against the tenant for life, to attribute to capital the excess of interest over the amount which would have been produced if the fund had been invested in authorised securities, and that the trustee had completely discharged himself. *Slade v. Chaine*, [1908] 1 Ch. 522—C.A.

General Power to Retain Investments—Wasting or Hazardous Security—Enjoyment in Specie.]—A testator bequeathed his personal estate upon trusts to correspond with those declared as to his real estate—namely, to his wife for her life with remainders in strict settlement—and by a codicil declared that his trustees might retain any investments belonging to him at the time of his death for such period as to them might seem proper. His personal estate consisted of shares in a prosperous colliery company, the objects of which included wide trading powers. The trustees decided to retain the shares as authorised by the testator:—*Held*, that the testator having said that the trustees were not bound to convert, this discretionary direction added to the list of authorised securities, and that the security in question being not a wasting security but a hazardous security which the trustees could retain under the general power, the tenant for life was therefore entitled to the whole of the dividends so long as the trustees thought fit to retain the investment. The rule of *Howe v. Dartmouth (Earl)* (7 Ves. 137) held not to apply. *Sheldon In re; Nixon v. Sheldon* (58 L. J. Ch. 25; 39 Ch. D. 50), discussed. *Bates, In re; Hodson v. Bates*, 76 L. J. Ch. 29; [1907] 1 Ch. 22; 95 L. T. 753; 23 T. L. R. 15—Kekewich, J.

Trust for Sale—Real Estate—Postponement of Sale—Mining Royalties—Interim Profits—Enjoyment in Specie.]—Where a testator directs sale and conversion of his real estate without power to postpone, and directs that the proceeds be held on trust for one for life and then for others, but gives no direction as to the income until sale, and where the sale is without any impropriety postponed, sums paid by a lessee under a lease granted by the testator in respect of areas of chalk-bearing land from time to time taken and quarried under a power in the lease belong absolutely to the person

entitled to the income of the real estate after conversion. *Brown v. Gellatly* (L. R. 2 Ch. 751) distinguished. *Searle's Settlement Trusts, In re* (69 L. J. Ch. 712; [1900] 2 Ch. 829), followed. *Darnley (Earl), In re; Clifton v. Darnley*, 76 L. J. Ch. 58; [1907] 1 Ch. 159; 95 L. T. 706; 23 T. L. R. 93—Kekewich, J.

Annuity Given by Bond—Property Settled by Will—Tenant for Life and Remainderman—Income and Corpus—Apportionment.]—A testator gave his property in moieties in trust for his son and daughter at twenty-five for life, with remainders over. Before his death in 1888 he had covenanted to pay a life annuity to a person who was still alive in 1907, when the daughter, who was the elder, attained twenty-five. The annuity had till then been paid out of the general income:—*Held*, that, as to the half of the annuity chargeable against the daughter's moiety, the rule in *Allhusen v. Whittell* (36 L. J. Ch. 929; L. R. 4 Eq. 295) should be applied by dealing with each future instalment as it accrued, ascertaining what sum set aside at 3 per cent. on the daughter attaining twenty-five would have met the particular payment, and attributing that part of the payment to capital and the remaining part to income. *Dawson, In re; Arathoon v. Dawson* (75 L. J. Ch. 604; [1906] 2 Ch. 211), *infra*, and *Henry, In re; Gordon v. Gordon* (76 L. J. Ch. 74; [1907] 1 Ch. 30), not followed. *Perkins, In re; Brown v. Perkins*, 77 L. J. Ch. 16; [1907] 2 Ch. 596; 97 L. T. 706—Swinfen Eady, J.

Annuity—Residuary Personalty—Testator's Covenant to Pay Annuities—Capital and Income—Apportionment.]—As between a tenant for life and remainderman, the periodical payments of an annuity covenanted to be paid by a testator ought to be borne by the tenant for life and remainderman proportionately, according to the values of their respective interests in the residue of the testator's estate as at the date of his death. *Yates v. Yates* (29 L. J. Ch. 872; 28 Beav. 687) followed. *Allhusen v. Whittell* (36 L. J. Ch. 929; L. R. 4 Eq. 295) applied. *Dawson, In re; Arathoon v. Dawson*, 75 L. J. Ch. 604; [1906] 2 Ch. 211; 94 L. T. 817; 54 W. R. 556—Swinfen Eady, J.

Construction—Property “not actually producing income”—Mortgage—Interest—Payment Postponed—Capital or Income—Tenant for Life and Remainderman.]—By a mortgage which recited that the mortgagor was indebted to the mortgagee and it had been agreed that payment of the debt should be postponed, the mortgagor covenanted to pay on his (the mortgagor's) death the amount of the debt with simple interest, and, if the aggregate amount of such sum and interest should not then be paid, the mortgagor should pay to the mortgagee interest for such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after the mortgagor's death. The mortgagee died, having made a will under which his widow was entitled to the income of his estate, which was to be converted, for her life, with remainders over. The will contained a power to postpone conversion, and a provision that the income of unconverted estate should be applied as if it arose from converted estate, and it was also provided that no property not actually producing income should be treated as

producing income or as entitling any person to the receipt of income. The mortgagor having subsequently died in the lifetime of the widow, —*Held*, that the interest on the mortgage debt attributable to the period between the mortgagee's death and the mortgagor's death belonged to the mortgagee's widow and not to his remaindermen. *Hubbuck, In re; Hart v. Stone* 65 L. J. Ch. 271; [1896] 1 Ch. 754, considered and applied. *Lewis, In re; Davies v. Harrison*, 76 L. J. Ch. 539; [1907] 2 Ch. 296; 97 L. T. 636 —Warrington, J.

Incidence of Costs—Expense of Compelling Tenants to Repair.—The expenses incurred by trustees in compelling tenants of the settled property to fulfil their obligations to repair (such as costs of survey and of serving notices on the tenants) must be borne in fair proportion by the tenant for life and remaindermen, and that can be effected by raising the amount on a mortgage of the property. The principle laid down in *Hotchkys, In re; Freke v. Calmady* (55 L. J. Ch. 546; 32 Ch. D. 408), applied. *McClure's Trusts, In re; Carr v. Commercial Union Insurance Co.*, 76 L. J. Ch. 52; 95 L. T. 704; 23 T. L. R. 42—Kekewich, J.

"Outgoings."—Such expenses are not "outgoings." *Ib.*

Bonus Paid by Company out of Reserve Fund—Capital or Income.—When a testator directs or permits part of his estate to remain as shares or stocks in a company which has the power either to distribute its profits as dividends or convert them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested through the testator in the shares, and consequently what is paid by the company as dividend goes to the life-renter, and what is paid by the company to the shareholders as capital or appropriated as an increase to the capital stock of the concern enures to the benefit of all who are interested in the capital. *Byth's Trustees v. Milne*, 7 F. 799—Ct. of Sess.

Copyholds—Fines and Fees—Admission of New Trustees—Apportionment.—The fines and fees payable in respect of the admission of new trustees to copyhold estates devised to trustees in trust for a tenant for life, with remainders over to other persons, must be borne by the tenant for life and remaindermen in proportion to the value of their respective interests. *Bullock's Settled Estates, In re; Lofthouse v. Haggard*, 91 L. T. 651—Swinfen Eady, J.

Railway Bonds—Cumulative Interest—Payment out of Net Earnings of any Year Remaining Available—Deficiency of Earnings—Arrears of Interest—Sale of Bonds—Apportionment of Proceeds as between Capital and Income.—Bonds of a company were settled on trust for one for life, with remainders over. They contained a proviso for payment of interest "accumulative" at a rate per cent. twice in each year "as and when earned out of any net earnings of any year remaining after" certain other payments, "and if in any year the net earnings so remaining available . . . shall not be sufficient to pay such interest in full . . . any deficiency shall . . . be paid . . . out of the net earnings of any subsequent year or

years as and when there shall be any net earnings available for such purpose." Coupons attached stated interest to be payable "only as and when earned out of any net earnings available." There were never sufficient earnings to pay the interest in full. The bonds were sold in the lifetime of the tenant for life for a sum not sufficient to pay both principal and arrears of interest:—*Held*, as between tenant for life and remainderman, that the sum was not apportionable between capital and income, but must be treated wholly as capital. *Taylor, In re; Matheson v. Taylor*, 74 L. J. Ch. 419; [1905] 1 Ch. 734; 92 L. T. 558; 53 W. R. 441—Buckley, J.

Commutation of Annuity for Fixed Sum—Capital and Income—Apportionment.—*See ANNUITY*, col. 16.

Mortgage—Insufficient Security.—*See MORTGAGE*, col. 1700.

Paving Expenses—Charge on Premises.—*See LOCAL GOVERNMENT*.

Powers of Tenant for Life.—*See SETTLED LAND*, col. 2230.

Public-house—Compensation Fund—Deduction from Rent—Incidence.—*See Smith, In re; Smith v. Dodsworth, post, WILL*.

Remuneration of Trustees.—*See Francis, In re; Barrett v. Fisher*, 74 L. J. Ch. 198, *post, TRUST*.

Return of Capital of Company—Capital or Income.—*See COMPANY (CAPITAL)*, col. 842.

Settled Estates.—*See SETTLED LAND and SETTLEMENT*, cols. 795, 2274.

Tenant for Life Purchasing Mortgaged Property from Mortgagee—Constructive Trust.—*See TRUST and TRUSTEE*.

Trust for Conversion.—*See WILL*.

And see ESTATE, col. 795, and *SETTLEMENT*, col. 2274.

TENANTS IN COMMON.

New Lease—Fiduciary Relation.—When a lease held by tenants in common has expired, and the lessee's interest is determined, and no tenancy or interest continues or has sprung up in the former co-owners of the lease, there is no necessary incapacity which debars one of such tenants in common from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, and if the lessor has power to give and intends to give it to him to the exclusion of the former co-owners. But such a tenant in common cannot claim to hold a new lease for his own benefit if it is established—first, that a fiduciary relation had been created by agreement or conduct between the tenants in common with reference to the old lease, or to an essential part of the subject-matter of the lease, or secondly, that the lessee had obtained the new lease after representing to the lessor and causing him to believe and intend that the new lease was to be for the benefit of all the

co-owners; or thirdly, that the new lease was obtained by the use of a right or rights which a Court of equity would recognise as having been attached to the common property—for example, a licence and goodwill attached to licensed premises. *Hunter v. Allen*, [1907] 1 Ir. R. 212—Barton J. And see *ESTATE*, col. 799.

TENANTS IN TAIL.

Barring Entail.—See *ESTATE*, col. 798, and *Att.-Gen. v. Richmond (Duke)* (No. 1), 76 L. J. K.B. 1049; [1907] 2 K.B. 940; 23 T. L. R. 742—Bray, J.; ante, *REVENUE*, cols. 2060–2061.

TENDER.

Sale by Tender.—“Highest net money tender”—**Tender with Reference to other Possible Tender.**—The liquidator of the defendant company invited sealed tenders for the purchase of certain property of the company, and stated “the highest net money tender I receive, . . . that tender I will at once accept.” B. offered 81,100*l.*, and the plaintiffs offered “such a sum as will exceed by 200*l.* the amount to-day offered by the other proposing purchaser”:—*Held*, that the plaintiffs’ offer did not answer the description of “the highest net money tender.” *South Hetton Coal Co. v. Haswell, Shotton, and Easington Coal and Coke Co.*, 67 L. J. Ch. 238; [1898] 1 Ch. 465; 78 L. T. 366; 46 W. R. 355—C.A.

Authority of Solicitor to Accept Cheque instead of Cash.—See *Blumberg v. Life Interests and Reversionary Securities Corporation*, ante, col. 1715.

THAMES.

Pollution—“Wilfully suffering.”—Persons are not guilty of wilfully suffering offensive matter to pass into the Thames by an omission to do something which might have mitigated the evil. *High Wycombe Corporation v. Thames Conservators*, 78 L. T. 463—D.

Navigation of.—See *SHIPPING*, col. 2442.

Prevention of Floods.—See *METROPOLIS*, col. 1673.

Watermen and Lightermen—By-laws of.—See *Kennaird v. Cory*, 67 L. J. Q.B. 809; [1898] 2 Q.B. 578—D., col. 2444.

THEATRE.

Licence to Perform Stage Plays—Restrictions on Licence.—An application was made to the respondent authority for a licence to perform stage plays. The licensing authority heard the application, and took into consideration a rule made under section 9 of the Theatres Act, 1843, to the effect that “no spirituous liquors, wines, ale, porter, cider, perry, or tobacco shall be sold or disposed of in the building” for which a theatre licence is asked. A licence was granted

to the applicants on an undertaking by them that they would not apply for an Excise licence for the sale of intoxicating liquors:—*Held*, on a rule for a *mandamus* to the licensing authority to hear and determine the application without any restriction, that the matter had been heard and determined, and that the rule should therefore be discharged. *Reg. v. Sheerness Urban Council*, 62 J. P. 563—C.A.

Lease—Metropolis—Damage by Fall of Adjoining Wall—Dangerous Structure—Order of Magistrate for Structural Repairs—“Closed by order of superior authority”—Suspension of Rent.—A lease of a theatre in the metropolis contained a provision that if and whenever during the term the theatre should be “closed by order of any superior authority or be destroyed by fire or so damaged by fire that the same cannot be continued to be used as a theatre,” the rent was to be suspended and cease to be payable until the theatre was reopened. The wall of an adjoining railway station fell upon the theatre, and so damaged it that a dangerous structure order was made by a magistrate at the instance of the London County Council requiring the lessee to take down and secure certain walls thereof. At the time of the accident the theatre was being rebuilt, and there was no licence for it from the Lord Chamberlain in existence. The Lord Chamberlain, in answer to an enquiry, stated that he would not permit the theatre to be opened until it was passed as safe by the London County Council:—*Held*, that the theatre was, by virtue of the order of the magistrate, “closed by order of a superior authority,” and that therefore the rent was suspended. *Lennox v. Curzon*, 22 T. L. R. 611—C.A.

Music-hall—Stage Play—Agreement to Produce—Illegality—Liability to Damages.—The plaintiff agreed with the defendant company to produce at their music-hall a sketch called *The Fighting Parson* for a period of six weeks, and the agreement contained a clause that “if it should be found that the artist’s performance is contrary to law, or is objected to by any licensing or other public authority, this engagement may be cancelled by the company.” After the plaintiff had produced the sketch at the music-hall for five weeks the defendants, in consequence of the decision of a magistrate that a somewhat similar sketch was a stage play, and that it was therefore contrary to section 11 of the Theatres Act, 1843, to present it at a place not licensed as a theatre, gave notice to the plaintiff cancelling the engagement:—*Held*, that, as the sketch was a stage play, and as it could not be legally performed at a music-hall, the defendants were entitled under the agreement to cancel the engagement. *Gray v. The Oxford, Lim.*, 22 T. L. R. 684—C.A.

Licence for Sale of Liquors.—See *INTOXICATING LIQUORS*, col. 1113.

TIMBER.

See *SETTLED LAND*, col. 2244.

TIME.

How Computed—Compulsory Power to cease after Expiration of Three Years from Passing of Private Act—Service of Notice to Treat.]—By section 29 of the West Metropolitan Railway Act, 1899, the powers of a railway company for the compulsory purchase of lands for the purpose of the Act "shall cease after the expiration of three years from the passing of this Act." The Act received the Royal assent on August 9, 1899. On August 9, 1902, the defendants served on the plaintiffs a notice to treat for the purchase of part of the plaintiffs' land:—*Held*, that the notice to treat had been served in time, as the day on which the Act received the Royal assent must be excluded in the computation of time within which the powers of the defendants under the Act to compulsorily purchase land were to exist. *Goldsmiths Co. v. West Metropolitan Railway*, 72 L. J. K.B. 931; [1904] 1 K.B. 1; 89 L. T. 428; 52 W. R. 21; 68 J. P. 41; 20 T. L. R. 7—C.A.

Greenwich Mean—Sunset—Vehicles—Lights on Bicycles.]—The expression "sunset" in section 85 of the Local Government Act, 1888, is not an expression of time within the Statutes (Definition of Time) Act, 1880, and a bicyclist is not compelled under section 85 to light his lamp an hour after sunset according to Greenwich mean time, but according to the time of sunset as it varies at different places in England. *Gordon v. Cann*, 68 L. J. Q.B. 434; 80 L. T. 20; 47 W. R. 269; 63 J. P. 324—D.

Month—Lunar Month—Commercial Documents—Contract to Extend Time Implied from Contract.]—In legal documents the primary meaning of month is lunar month. There is no general exception making it mean calendar month in commercial documents. It can only bear that meaning in cases where, according to the ordinary rules of construction of documents, a secondary meaning can be admitted. The belief or subsequent conduct of the parties cannot affect the construction, but an agreement to extend the time may be inferred from conduct which would make it inequitable to insist on the limit to lunar months. *Bruner v. Moore*, 73 L. J. Ch. 377; [1904] 1 Ch. 305; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125—Farwell, J.

Voyage Policy—Insurance of Ship for Period after Arrival—Duration of Risk—"Until she be there moored in good safety and for thirty days in port after arrival"—"Days," how Reckoned.]—Where in a policy of insurance on ship in the ordinary Lloyd's form the risk is defined as being for a voyage to a port named in the policy "until she hath here moored at anchor in good safety" and "for 30 days in port after arrival however employed," the thirty days are to be reckoned as thirty successive periods of twenty-four hours each, the first of which commences to run as soon as the ship is moored at anchor in good safety in her port of destination. *Cornfoot v. Royal Exchange Assurance Corporation*, 73 L. J. K.B. 22; [1904] 1 K.B. 40; 89 L. T. 490; 52 W. R. 49; 9 Com. Cas. 80; 9 Asp. M.C. 489—C.A.

"Daily."—See *London County Council v.*

South Metropolitan Gas Co., ante, GAS COMPANY, col. 910.

Fractions of a Day.]—See *Yeoman v. Regem, ante*, SHIPPING, col. 2334.

Return of Summons—Computation of Time.]—See *McQueen v. Jackson*, 72 L. J. K.B. 606, *ante*, LOCAL GOVERNMENT, col. 1355.

TITHES.

* See ECCLESIASTICAL LAW.

TOLLS.

Bridge—"Sledge, drag or such like carriage"

—Bicycle.]—By a private Act for building a bridge over the river Severn, near Cressage, in Shropshire, which recited that the passage over the river at the place by a ferry was inconvenient and not suited to the accommodation of passengers, and that it "would be a great convenience to the public" if a communication were made across the river by a bridge and commodious roads were made to and from the same, it was provided that the trustees of the bridge to be erected might demand and take "before any passage shall be permitted through or over the same" the several sums following: "For every coach, chariot . . . or other such like carriage drawn by six horses, mares, geldings or mules, the sum of 2s. and drawn by four horses &c. 1s. 6d. and drawn by two horses &c. 1s. and drawn by one horse &c. 6d." "For every sledge, drag or such like carriage the sum of 6d." "And for every foot passenger 1d." :—*Held*, that a bicycle was not a sledge, drag, or other such like carriage within the enactment so as to be liable to a toll of 6d. *Smith v. Kynnersley*, 72 L. J. K.B. 357; [1903] 1 K.B. 788; 88 L. T. 449; 51 W. R. 548; 67 J. P. 125; 1 L. G. R. 393—C.A.

—User of—Carriage with Less than Four Wheels—Bicycles and Tricycles.]—A private Act (7 Geo. 3, c. lxiii.) authorised the following bridge tolls to be taken: "For every coach, chariot, berlin, hearse, chair, calash, waggon, wain, dray, cart, car, or other carriage whatsoever with four wheels the sum of 4d., and with less than four wheels the sum of 2d." :—*Held*, that a bicycle or tricycle is a "carriage" within the meaning of the Act, and, as such, liable to the toll imposed upon a carriage with less than four wheels. *Cannan v. Abingdon (Earl)*, 69 L. J. Q.B. 517; [1900] 2 Q.B. 66; 82 L. T. 382; 48 W. R. 470; 64 J. P. 504—D.

"Carriage"—Bicycle.]—A local Act authorised the following tolls to be taken: "For every coach, chariot, hearse, chaise, berlin, landau, and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse, or other beast of draught drawing the same, the sum of twopence" :—*Held*, that a bicycle is not a "carriage" within the meaning of the Act. The definition of a "carriage" formulated by PHILLMORE, J., in *Cannan v. Abingdon (Earl)* (69 L. J. Q.B. 517; [1900] 2 Q.B. 66) questioned. *Simpson v. Teignmouth and Shaldon Bridge Co.*, 72 L. J.

K.B. 204; [1903] 1 K.B. 405; 88 L. T. 117; 51 W. R. 545; 67 J. P. 65; 1 L. G. R. 235—C.A.

— **Bicycle.**—By a local Act tolls were imposed on "every coach, chariot, hearse," &c., and "every other carriage hung on springs the sum of 6d. for each wheel, and for each horse or other beast of draught drawing the same 2d."; and "for every waggon," &c., "or other such like carriage, with or without springs, the sum of 6d. per wheel, and for each horse or other beast of draught drawing the same the sum of 2d."—*Held*, without deciding whether or no it was a "carriage hung on springs," that a bicycle was not a carriage within this section, as it only referred to carriages drawn by horses or other beasts of draught. *Simpson v. Teignmouth Bridge Co.*, 85 L. T. 726—Wright, J.

"Sledge, drag, or such like carriage"—**Bicycle.**—A bicycle does not come within the words "sledge, drag, or such like carriage," occurring in a statute imposing a toll upon such vehicles. *Smith v. Kynnersley*, 66 J. P. 679—Wright, J.

Turnpike Road—Exemption—Carriage "Employed" in Her Majesty's Military Service—Private Carriage of Officer Used by Him on Duty.—The private carriage of an officer of her Majesty's regular forces, used by him in the discharge of his official duties, he not being in receipt of or entitled to any Government allowance for such a carriage nor entitled to hire such a carriage at the cost of the Government, is not "employed" in her Majesty's military service within the meaning of section 143 of the Army Act, 1881, and consequently, in passing along a turnpike road, is not exempted by that section from payment of a statutory toll payable on such road. *Craig v. Nicholas*, 69 L. J. Q.B. 608; [1900] 2 Q.B. 444; 82 L. T. 765; 49 W. R. 48; 64 J. P. 569; 19 Cox C.C. 526—D.

Private Line of Railway—Colliery Companies—Adjacent Owners—Wayleave.—The appellants and respondents were owners of adjacent collieries, and their respective predecessors in title had obtained a private Act of Parliament authorising them to construct and maintain a private line of railway for the use of their respective collieries. The Act provided that the railway should be open to the public upon payment of a toll to the two companies. The appellants subsequently acquired another colliery adjacent to their original holding, and brought coals from it over the joint line:—*Held*, that they were not liable to pay tolls to the respondents in respect of such coals. *Caledonian Coal Co. v. Seaham Colliery Co.*, 70 L. J. P.C. 105; [1901] A.C. 554; 84 L. T. 785—P.C.

Confirmation of Customary Title by Statute—Substitution of Statutory for Customary Title—Extinction of Customary Title.—A franchise to take tolls becomes extinguished where a private Act dealing with such tolls does not operate as a mere recognition of the customary title to take such tolls, but gives a statutory title with different incidents to take tolls of the same amount. *Taylor v. New Windsor Corporation*, 67 L. J. Q.B. 96; [1898] Q.B. 186; 77 L. T.

585; 62 J. P. 5—C.A. Affirmed in H.L., 68 L. J. Q.B. 87; 79 L. T. 450.

Dock and Harbour Dues.—See SHIPPING, col. 2425.

Exemption—Post-Office Officials.—See POST OFFICE, col. 1367.

Market Tolls.—See MARKET, col. 1452.

River—Navigation—Repair of Locks.—See WATER.

TORT.

Wrong Committed Abroad—Right of Action in England—Act of British Naval Officer under Authority of Foreign State—Foreign Territorial Waters.—In order to found an action in this country for a wrong committed abroad two conditions are necessary. First, the act complained of must be of such a character as to be actionable if committed in this country; and secondly, it must be without justification by the law of the place where it was committed. *Carr v. Francis, Times & Co.*, 71 L. J. K.B. 361; [1902] A.C. 176; 85 L. T. 144; 50 W. R. 257—H.L. (E.).

The seizure by a British naval officer of British goods on a British ship in the territorial waters of a foreign sovereign, effected under the authority and by the direction of that sovereign, cannot be made the subject of legal proceedings in this country. *Ib.*

Action by Purchaser of Interest in Land.—See VENDOR AND PURCHASER.

Assignability of Claim for Damages.—See ASSIGNMENT, col. 53.

Interference with Contractual Rights—Cause of Action.—See CONTRACT.

Waiver of.—See *Manchester Ship Canal v. Rochdale Canal*, 81 L. T. 472, post, WATER; and *Rice v. Reed*, post, TROVER, cols. 2572-3.

TRADE INJURIES.

1. *Passing off Goods as Another's*, 2524.
2. *Trade Libel*, 2527.
3. *Combination to Injure*, 2528.

1. PASSING OFF GOODS AS ANOTHER'S.

Evidence.—To entitle a plaintiff to succeed in a passing-off case, he need not prove fraud in the defendant, or give evidence that any single person was deceived. *London General Omnibus Co. v. Lavell* (70 L. J. Ch. 17; [1901] 1 Ch. 133) observed upon. *Bourne v. Swan and Edgar*, 72 L. J. Ch. 168; [1903] 1 Ch. 211; 87 L. T. 589; 51 W. R. 213—Farwell, J.

Advertisement by Trader—Imitation.—No trader is justified in taking the peculiar symbol, device, or mark by which another trader distinguishes his goods on the market, and so attracting custom to himself from his rival. *Weingarten v. Bayer*, 92 L. T. 511; 21 T. L. R. 418—H.L. (E.).

The appellants sold their goods in boxes, with the name of the article printed in a particular manner on a "scroll." The respondents sold precisely similar goods under the same name, also printed on a similar scroll, with the addition of their initials "C.B." There was no evidence that any customers were in fact deceived, and after the commencement of the action the respondents discontinued the use of the scroll:—*Held* (Lord Robertson dissenting), that the appellants were entitled to an injunction to restrain the respondents from using the scroll in connection with their goods, and to an account of profits derived by the respondents from the sale of goods in boxes distinguished by the scroll. *Ib.*

Apollinaris Salts.]—The plaintiffs had the sole right to sell in the United Kingdom water the product of a German spring. The defendants, who were chemists in England, sold preparations which they described in their catalogue as "salts for the production of natural mineral waters, prepared according to the most reliable analysis of the respective waters." Then followed a list of waters, headed by "Apollinaris per lb., 2s. 6d." The plaintiffs did not sell salts obtained from Apollinaris water. The defendants in fulfilling orders for their salts described them as "Apollinaris salts," and gave directions for dissolving the salts in a certain quantity of water. In an action to restrain the defendants from selling salts not obtained from such water or as capable of being made up into such water without distinguishing such salts from salts obtained from Apollinaris water,—*Held*, that the defendants did not pass off their salts as and for salts obtained from Apollinaris water, but merely represented that their salts would produce waters having the constituents of that water; nor did the defendants by what they had done cause or enable the purchasers of the salts to do that which they were not entitled to do. *Apollinaris Co. v. Duckworth*, 22 T. L. R. 744—C.A.

Use by Plaintiff of the Word "Trade mark" —No Registered Trade Mark—Title to Relief—Injunction.]—In an action to restrain the passing off of goods as those of the plaintiff, where the defendant has so imitated the general get-up adopted by the plaintiff as to be likely to deceive an unwary purchaser into the belief that the goods he is buying are the goods of the plaintiff's manufacture, the mere fact that the plaintiff has employed on packages of his goods the word "Trade mark," when in fact he has no registered trade mark, but is only entitled to a trade mark by user, is not sufficient to disentitle him to relief by way of an interlocutory injunction; for the use of the word does not necessarily imply that the person using it has a registered trade mark. *Sen Sen Co. v. Brittens*, 68 L. J. Ch. 250; [1899] 1 Ch. 692; 80 L. T. 278; 47 W. R. 358—Stirling, J.

To disentitle a plaintiff to relief in such a case there must be other circumstances, besides the use of the word "Trade mark," to imply, contrary to the fact, that he has a registered trade mark. *Lewis's v. Goodbody* (67 L. T. 194) distinguished. *Ib.*

Distinctive Words on Trade Mark.]—The

plaintiffs, a firm of distillers and wine and spirit merchants, had used a label with a cat and barrel depicted thereon since 1849. In 1879 they registered their mark in class 43 for fermented liquors and spirits as an old mark. There are two other cat and barrel marks on the register in the same class: one scarcely used in England by traders who sold in bulk or used a label without a cat and barrel; the other was a barrel and three cats, and no user in this country was proved. The plaintiffs' goods were well known as the "Cat and Barrel Brand," or the "Cat Brand." The defendant in 1899 commenced to sell sloe gin under a label whereon part of a cat and part of a barrel was depicted with the words "Cat Brand" underneath. The plaintiffs did not manufacture sloe gin at the date of the registration of their mark:—*Held*, that the plaintiffs were entitled to—first, an injunction to restrain the defendant, his agents and servants, from infringing the plaintiffs' registered trade mark; and secondly, an injunction to restrain the defendant, his agents and servants, from selling or passing off sloe gin not of the plaintiffs' manufacture as and for the goods of the plaintiffs in any way whatsoever, and in particular by using the words "Cat Brand" in connection with the representation of a cat and a barrel, or any words, signs, figures, or devices which were calculated to enable the defendant's sloe gin or other liqueurs or goods of the defendant to be passed off as and for the goods of the plaintiffs. *Boord v. Huddart*, 89 L. T. 718; 20 T. L. R. 142—Swinfen Eady, J.

No Deception Probable — Injunction.]—A brought an action to restrain B from passing off his soap as A's soap by using wrappers which were alleged to have been copied in many respects from A's wrappers, and to be calculated to deceive, but no actual deception was proved. The Court came to the conclusion that the draughtsman who designed B's wrapper had used A's wrapper when doing so, but that there was no probability of deception in the ordinary course of business:—*Held*, that, notwithstanding the copying of A's wrapper, he was not entitled to an injunction as B's wrapper was not calculated to deceive. Judgment of Lord Macnaghten in *Reddaway v. Banham*, [1896] A.C. 219 distinguished. *Lever Brothers v. Bedingfield*, 80 L. T. 100—C.A.

Fraud—Appropriation of Testimonials Given to Rival.]—An interlocutory injunction refused to the inventor of a system of medical treatment (not protected by letters patent) against a rival inventor of a competing system who had appropriated the testimonials given to the former inventor, and by alterations in the text made them apparently applicable to the latter system, damage not being shewn, nor necessarily flowing from the act. *Batty v. Hill* (1 H. & M. 264) followed. *Franks v. Weaver* (10 Beav. 297) distinguished. *Tallerman v. Dowling Radiant Heat Co.*, 68 L. J. Ch. 618; [1900] 1 Ch. 1; 48 W. R. 146—Stirling, J. See s.c. in C.A., 69 L. J. Ch. 46—C.A.

Infringement—Personal Name.]—In 1904 two brothers, Robert and J. F. Dunlop, who had since 1898 been in partnership in a cycle and motor repairing business in Kilmarnock under the name of R. and J. F. Dunlop, transferred

the motor branch of their business to the Dunlop Motor Co., Lim., a company which had been formed with a capital of 500L., held by the two Dunlops and some of their friends. By the memorandum of association that company had power, *inter alia*, to deal in and make motor cars and motoring "accessories." In 1905 the Dunlop Pneumatic Tyre Co., Lim., a company registered in England, who were the makers of a well-known tyre for cycles and motors called the "Dunlop" tyre, the patent for which had recently expired, and who also manufactured cycling and motoring "accessories," took proceedings to have the Dunlop Motor Co., Lim., interdicted from carrying on their business under any name containing the name "Dunlop." The Dunlop Pneumatic Tyre Co., like the Dunlop Motor Co., had power to make motor cars, but neither company had ever, in fact, made any motor cars. The Court refused to grant interdict, holding that the respondents had not adopted the name Dunlop Motor Co., Lim., for the purpose of passing off their goods as the goods of the Dunlop Pneumatic Tyre Co., Lim., and that the name Dunlop Motor Co., Lim., was not calculated to deceive the public into purchasing their goods in the belief that they were the goods of the other company. *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.*, 8 F. 1146—Ct. of Sess.

On appeal, —*Held*, on the evidence, that the appellant company were not entitled to the exclusive use of the name "Dunlop," and had failed to prove that any one had been misled into the belief that the respondents' business was identical or connected with that of the appellants. *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.*, 76 L. J. P.C. 102; [1907] A.C. 430; 97 L. T. 259; 23 T. L. R. 717—H.L. (Sc.)

2. TRADE LIBEL.

Disparagement of Goods—Imputation of Misconduct.—In an action of libel the statement of claim alleged that the defendants, who were manufacturers of typesetting machines, published of the plaintiffs, who were rival manufacturers, the following written words: "The Empire Typesetter in America. The *Union Printer and American Craftsman*, the most wide-awake and spirited of American trade journals, has recently contained several references to the Empire" (the plaintiffs') "composing machines, which were installed in the office of the *New York Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of February last, the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Company" (the plaintiffs) "is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." There was no allegation of special damage:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that these words, besides being a disparagement of the plaintiffs' machines, which would not be actionable without proof

of special damage, were also, when taken in their natural and ordinary meaning, capable of being understood by men of ordinary intelligence as conveying an imputation upon the plaintiffs in the way of the trade, and the question of libel or no libel was therefore rightly left to the jury. *Empire Typesetting Machine Co. v. New York v. Linotype Co.*, 79 L. T. 8—C.A.

— Malicious Statement — Special Damage.]

—A statement by a trader that goods of his manufacture are superior to those manufactured by another rival trader, although untrue and made maliciously, is not actionable as a defamatory libel, nor does such a statement afford ground for an action for disparagement of goods, even if the plaintiff is damaged by it, and avers special damage. *Hubbuck v. Wilkinson, Heywood & Clark*, 68 L. J. Q.B. 34; [1899] 1 Q.B. 86; 79 L. T. 429—C.A.

3. COMBINATION TO INJURE.

Malice—Motive—Association to Induce Persons not to Deal with Traders.—By their statement of claim the plaintiffs alleged that the defendants combined with others to prevent them carrying on their trade, by inducing third persons not to deal with them:—*Held* (PHILLIMORE, J., *dissentiente*), that this did not violate any right of the plaintiffs, and therefore the statement of claim disclosed no cause of action. *Held*, per BIGHAM, J., that intention is immaterial if the acts themselves are not wrongful; per PHILLIMORE, J., that, given a combination, the motive and purpose make all the difference. *Boots v. Grundy*, 82 L. T. 769; 48 W. R. 638—D. And see CONTRACT, col. 537.

Contracts in Restraint of Trade.—See CONTRACT, col. 525.

TRADE MARK.

1. Statute, 2528.
2. Registration, 2528.
3. What may be Registered, 2529.
4. Trade Label, 2535.
5. Similarity, 2536.
6. Disclaimer, 2538.
7. Old Mark, 2538.
8. Rectification of Register, 2540.
9. False Trade Description, 2541.
10. Merchandise Marks Acts, 2541.
11. Certificate under Trade Marks Acts, 2545.

1. STATUTE.

5 Edw. 7 c. 15 is the *Trade Marks Act*, 1905.

2. REGISTRATION.

Essential Particulars—General Description—
"Combination of devices"—Subject-matter—
Whole Trade Mark not Visible at once.—In the case of the registration of a label, a general description, such as a "combination of devices," leaving parties to ascertain from the register what the mark is, is a sufficient description of the "essential particulars" required by section 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by section 10 of

the Act of 1888. *Crompton & Co.'s Trade Mark, In re*, 71 L. J. Ch. 497; [1902] 1 Ch. 758; 86 L. T. 657; 50 W. R. 426—Swinfen Eady, J.

Two labels, *already separately registered, and a third label containing no distinctive features may be registered as a "combination of devices" to be used together as one trade mark. *Id.*

Where a trade mark consists of a combination of devices it is not necessary that each device should be visible at once. *Id.*

Registration in a Class—Partial User—Remedy of Party Aggrieved.—Where a trade mark has been registered in a class and the party registering deals in some only of the goods mentioned in that class, a party aggrieved by the registration may apply to have the register rectified by limiting the trade mark to the goods actually dealt in, but he cannot have the trade mark struck off the register. *Id.*

Registration for Entire Class—User for Many Years in Respect of Some Goods in Class—Alleged Intention to Use in respect of other Goods—Non-user—Exclusion of other Goods from Class.—Where a mark was in 1880 registered under the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), in respect of the whole of class 42—that is, "substances used in food or ingredients used in food"—and the mark had since that time been continuously used for some goods in that class, but never for condensed milk, which had always been dealt with in connection with other marks, the register was on the application of another dealer in condensed milk rectified by the exclusion of condensed milk from the class of goods in respect of which the mark was registered, on the ground that there never was at the time of registration any such intention to use the mark in connection with condensed milk as to bring the case within the principle requiring *de facto* user or immediate intention to use. *Edwards v. Dennis; Edwards's Trade Mark, In re* (55 L. J. Ch. 125; 30 Ch. D. 454), applied. *Hart's Trade Mark, In re*, 71 L. J. Ch. 869; [1902] 2 Ch. 621; 87 L. T. 426; 51 W. R. 107—Byrne, J.

3. WHAT MAY BE REGISTERED.

Intention to Use—Rectification.—No one can properly register or retain on the register a trade mark for goods in which he does not deal and has not, at the time of registration, some definite intention to deal. *Batt v. Dunnett*, 68 L. J. Ch. 557; [1899] A.C. 428; 81 L. T. 94—H.L. (E.)

Section 75 of the Patents &c. Act, 1883, as altered by section 17 of the Act of 1888, substitutes application for registration for previous user and reputation gained thereby; it does not mean that continued registration is equivalent to continued user. *S.O. in C.A.*, 67 L. J. Ch. 576; [1898] 2 Ch. 432; 79 L. T. 206.

Natural Products of the Earth.—A trade mark may be registered in connection with vegetables and other natural products of the earth. *Major v. Franklin*, [1908] 1 K.B. 712—Jelf, J.

Design—Position of Trade Mark.—A device

is capable of being registered as a trade mark, under the Trade Marks Act, 1905, notwithstanding the fact that it is also capable of being registered as a design under the Patents, Designs, and Trade Marks Act, 1883. *United States Playing-card Co.'s Application, In re*, 77 L. J. Ch. 204; [1903] 1 Ch. 197—Swinfen Eady, J.

Fancy Word—Descriptive Name—Patented Article.—In 1881 an instrument for duplicating copies of manuscripts was invented and patented. Inked rollers and a special kind of paper were used in connection with it. The instrument consisted of a pen carrying a toothed wheel. The name "Cyclostyle," derived from κύκλος (circle) and στίλος (pen), was invented and applied to the instrument which became known by that name. In 1884 the word "Cyclostyle" alone was registered as a trade mark by a firm of stationers for stationery and apparatus for producing copies of manuscripts:—*Held*, that the word "Cyclostyle," being descriptive, had been wrongly registered under the Patents, Designs, and Trade Marks Act, 1883, s. 64, and could not now be registered under the Trade Marks Act, 1905, s. 9, as, though originally an invented word, and, as such, registrable even though descriptive, it had become the name of a particular article, and must therefore be removed from the register. *Gestetner's Trade Mark, In re*, 77 L. J. Ch. 299; [1908] 1 Ch. 513; 98 L. T. 121—C.A.

The name of a patented article is not a trade mark within section 3 of the Trade Marks Act, 1905, as it cannot be distinctive of the trade of a particular individual. *Id.*

The meaning of section 36 of the Trade Marks Act, 1905, is that no trade mark which has been registered under the earlier Acts shall be removed from the register on the ground that it was not properly registrable under those Acts if it would on such removal be registrable again under the Act of 1905. It does not mean that no trade mark which has been registered under the earlier Acts shall be removed from the register if it would have been properly registrable at the date of its original registration, supposing that the Act of 1905 had then been in force. *Id.*

The Court may, under section 35 of the Trade Marks Act, 1905, in an application by an aggrieved party to strike off the register, make an order varying the entry upon the application of the registered proprietor. *Id.*

"Invented word"—"Absorbine."—The word "Absorbine" used in connection with a veterinary preparation, which professed to absorb and remove certain equine ailments, is not an "invented word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 10, and therefore is not properly registered as a trade mark, and should be expunged from the register. *Christy v. Tipper* 74 L. J. Ch. 55; [1905] 1 Ch. 1; 91 L. T. 712; 53 W. R. 147; 21 T. L. R. 53—C.A.

"Hæmatogen"—Descriptive Word.—*"Hæmatogen"* as applied to a preparation of a drug called hæmoglobin *held* not to be an

"invented word" within the meaning of section 64, sub-section 1 (d) of the Patents &c. Act, 1883, as amended by the Patents &c. Act, 1888, s. 10, sub-s. 1, and therefore not capable of registration as a trade mark. *Hommel v. Bauer*, 20 T. L. R. 585—Warrington, J.

— "Solio"—"Word . . . having no reference to the character or quality of the goods."—The word "Solio," which the appellants applied to register as a trade mark in connection with photographic materials, is an "invented" word within the meaning of the Act of 1888, s. 10, and therefore capable of registration. Sub-section 1 (d) and (e) of section 10, by the former of which an "invented word or words" may be registered, and by the latter "a word or words having no reference to the character or quality of the goods," are not to be read together, and if the word is "invented" it is no objection to its registration that it is descriptive of the goods to which it is applied. *Farbenfabriken Application, In re* (63 L. T. Ch. 257; [1894] 1 Ch. 645), overruled. *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade Marks*, 67 L. J. Ch. 628; [1898] A.C. 571; 79 L. T. 195; 47 W. R. 152—H.L. (E.).

— "Tachytype."—The word "Tachytype" is an "invented word" within the meaning of the Patents &c. Acts, 1883 and 1888, and as such is capable of registration as a trade mark. Under these Acts it is not essential that the applicant for registration should be the first and true inventor of the word, nor that there should have been no prior publication of the word within the jurisdiction. *Linotype Co.'s Trade Mark, In re*, 69 L. J. Ch. 625; [1900] 2 Ch. 285; 82 L. T. 794—Cozens-Hardy, J.

— Misspelling—"Word having no reference to character or quality."—A word such as "Uneeda," which merely consists of a misspelling of three common words put into one, is not "an invented word" within section 64, sub-section 1 (d) of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888. If such a word or phrase suggests that the purchaser of goods will find them comforting or advantageous, it cannot be registered under sub-section 1 (e) of that section as "having no reference to the character or quality of the goods." *National Biscuit Co.'s Application, In re; Uneeda Trade Mark*, 71 L. J. Ch. 353; [1902] 1 Ch. 783; 86 L. T. 439; 50 W. R. 467—C.A.

— Secondary Meaning—Word Acquiring.]—Warrington, J., having held—first, that the word "hæmatogen" as applied to a preparation of a drug called hæmoglobin was not an "invented word" within the meaning of section 64, sub-section 1 (d) of the Patents &c. Act, 1883, as amended by the Patents &c. Act, 1888, s. 10, sub-s. 1, and was therefore not capable of registration as a trade mark; and secondly, that the word had not acquired a secondary meaning exclusively denoting the plaintiff's goods, the Court of Appeal held (there being no appeal upon the first point) that the decision of Warrington, J., upon the second point was right. *Hommel v. Bauer*, 21 T. L. R. 80—C.A.

— Similar Sound.]—Where a particular word

cannot be registered as a trade mark, another word sounding exactly like it, but spelt differently, cannot be registered. *Ripley's Trade Mark, In re*, 78 L. T. 367—C.A.

— Word Representing Sound of Letters.]—The applicants were owners of an old trade mark consisting of the letters "V Z." An application by them for the registration of the word "Vezet" was granted. Whether a word which is merely a combination of the sounds of letters can be registered as a new mark, *quære*. *Verschure & Zoon's Trade Mark, In re*, 74 L. J. Ch. 684—Warrington, J.

Geographical Word.]—Motion for the rectification of the register of trade marks by removal therefrom of the words "Saint Raphael" or "St. Raphael" in respect of wine, or an entry thereon of a disclaimer of the words:—*Held*, that the words were not geographical. *Clement & Co.'s Trade Mark, In re*, 80 L. T. 230; 47 W. R. 407—Kekewich, J. See s.c. in C.A., *supra*.

— "Distinctive mark"—Word Distinguishing Goods as well as the Proprietor—Geographical Name—Undertaking to the Court.]—The clause of section 9 of the Trade Marks Act, 1905, which defines a "distinctive" trade mark for the purposes of registration under sub-section 5 of that section, refers to the distinction between the goods of one proprietor and those of another, and not to a distinction between the goods themselves; but if a trade mark does so distinguish the goods of a proprietor, it is immaterial that it also distinguishes the goods themselves. *Apollinaris Trade Mark, In re*, 76 L. J. Ch. 437; [1907] 2 Ch. 178; 96 L. T. 877; 23 T. L. R. 515—Kekewich, J.

The German Apollinaris Co., owning the well-known natural mineral-water spring in Rhenish Prussia, originally called the Apollinaris Spring, after the name of a saint, and situate near a hill called Apollinarisberg,—*Held*, entitled to registration of the word "Apollinaris" as a distinctive trade mark within the meaning of section 9, sub-section 5 of the Trade Marks Act, 1905, upon giving an undertaking not to use the mark except in respect of water from that particular spring and its neighbourhood. *Id.*

Descriptive Word—"Calculated to deceive or otherwise."—Under the Patents &c. Act, 1883, a trade mark for jams was registered by the plaintiffs consisting of a copy of a written signature with the word "Silverpan" added. The plaintiffs did not claim under the registration the exclusive use of the word "Silverpan." On motion by the defendants to rectify the register by removing the trade mark, or by adding a disclaimer of any right by the plaintiffs to the exclusive use of the word "Silverpan,"—*Held*, that the word "Silverpan" was not a "distinctive word" within the meaning of section 74 of the Patents &c. Act, 1883, and was "not calculated to deceive or otherwise" within the meaning of section 73 of the Act, and that the motion must be refused. *Faulder's Trade Mark, In re*, 83 L. T. 726—Kekewich, J.

— "Naptha"—Fels-Naptha Soap—Lady-

bird Naptha Soap.—The word "Naptha" as applied to soap, being a descriptive word, has not acquired in the market a secondary meaning denoting the plaintiff's goods, to the exclusion of the goods of all other manufacturers of soap. *Fels v. Hedley*, 20 T. L. R. 69—C.A.

— **Secondary Meaning.**—The term "Cellular," as applied to cloth and other like materials, is descriptive of the character and texture of the goods, and has not acquired a secondary meaning in association with the goods of particular manufacturers. *Reddaway v. Banham* (65 L. J. Q.B. 381; [1896] A.C. 199) distinguished. *Cellular Clothing Co. v. Maxton*, 68 L. J. P.C. 72; [1899] A.C. 326; 80 L. T. 809—H.L. (Sc.)

— **"Tabloid."**—In 1884 the word "Tabloid" was registered as a trade mark under the Patents, Designs, and Trade Marks Act, 1883, in respect of substances used in medicine and pharmacy. On a motion to expunge the trade mark from the register, —*Held*, that the word "Tabloid" was in 1884 "a distinctive fancy word not in common use," and was properly registered under section 64, sub-section 1 (c) of the Act, and should not be removed from the register. *Burroughs, Wellcome & Co.'s Trade Marks, In re*, 73 L. J. Ch. 474; [1904] 1 Ch. 736; 91 L. T. 58; 52 W. R. 581; 20 T. L. R. 415—C.A.

— **Disclaimer—Disentitled to Protection.**—A "distinctive" word in sub-section 1 (b) of section 74 of the Patents &c. Act, 1883, means something at the time of registration apparently chosen by the applicant for registration for the purpose of distinguishing his goods from the goods of others, and *prima facie* suitable for that purpose when used. *Burland v. Broxburn Oil Co.* (58 L. J. Ch. 816; 42 Ch. D. 274) approved. *Faulder & Co.'s Trade Mark, In re*, 71 L. J. Ch. 124; [1902] 1 Ch. 125; 86 L. T. 66—C.A.

In 1886 a firm of jam manufacturers registered in respect of preserves a mark consisting of the signature of the firm and the word "Silverpan" above it:—*Held*, that "Silverpan" was an "addition" to the trade mark within section 64 of the Act of 1883, and not part of it, and was a "distinctive word" within section 74, sub-section 1 (b), and a disclaimer of any right to the exclusive use of the word ought to have been entered. The mark was ordered to be removed from the register, the registered proprietors preferring that to the entry of a disclaimer. *Smokeless Powder Co.'s Trade Mark, In re* (61 L. J. Ch. 391; [1892] 1 Ch. 590), and *Clement & Co.'s Trade Mark, In re* (69 L. J. Ch. 52; [1900] 1 Ch. 114), distinguished. *Ib.*

Per COZENS-HARDY, L.J.—*Quare*, whether, after the registration of a trade mark has been completed, the Court can order a disclaimer to be entered *nunc pro tunc*. *Ib.*

"Distinctive device"—Mark in Common Use in the Trade—Bona Fide Intention to Use.—A trade mark consisting of the head and shoulders of the picture known as Gainsborough's "Duchess of Devonshire" was registered by the plaintiffs in January, 1892, in class 38, for

"hats, bonnets, and similar head coverings." It was alleged that the defendant, who also carried on a millinery business, had infringed the plaintiffs' trade mark by affixing to his premises, while in the course of erection, a board upon which there was a painted reproduction of the duchess; that he had also exhibited the same mark upon posters and advertisements in connection with his business, and that he used boxes for delivering millinery, &c., and notepaper containing reproductions of the plaintiffs' trade mark. The defendant alleged that he had for seven years past or thereabouts used representations of the duchess in various ways in connection with his business as a milliner. It was proved that the picture in question had from the year 1876 been in common use in the hat and millinery trade as an ornamentation upon various papers, circulars, &c., used by milliners in their business. The plaintiffs had never used the trade mark on the actual goods supplied by them, but they had often used it on labels affixed to the boxes in which the goods were delivered to customers, as well as on bills, receipts, &c. The defendant had used the mark which constituted the alleged infringement in a similar manner:—*Held*, that, in 1892, when the trade mark was registered, it was not "distinctive" or capable of distinguishing the goods of the plaintiff as his manufacture or selection from the goods of all other persons; that it was not therefore capable of registration, and that it must be expunged from the register. *Semble*, that, in order to justify the removal of a trade mark from the register on the ground of non-user, it must be shewn either (a) that at the date of registration there was no *bona fide* intention to use it, and that it has never in fact been used; or (b), if there was a *bona fide* intention to use and actual user for a short time, there has been actual abandonment over a long period of time. *Louise & Co. v. Gainsborough*, 87 L. T. 591—Farwell, J.

Word used before August 13, 1875—"Special and distinctive word."—To entitle a person to register a word used as a trade mark before August 13, 1875, as a trade mark, it is essential to shew, first, that it was "special and distinctive" of his goods; and secondly, that it was used as a trade mark. *Wood's Trade Mark, In re*; *Wood v. Lambert* (55 L. J. Ch. 377; 32 Ch. D. 247), followed. *Bourne v. Swan & Edgar*; *Bourne's Trade Mark, In re*, 72 L. J. Ch. 168; [1903] 1 Ch. 211; 87 L. T. 589; 51 W. R. 213—Farwell, J.

— **Delay.**—A delay of nearly five years from the time when the applicant first had notice that a mark was registered held not fatal to the application to rectify the register, the respondent failing to shew that he had been prejudiced by the delay. *Ib.*

— **Costs—Proportional Apportionment.**—As the apportionment of costs according to strict rights was impracticable, THE COURT directed the plaintiff to pay to the defendant a proportion of the aggregate amount of the costs of the motion to rectify and of the action. *Pollard, In re*; *Pollard v. Pollard* (W. N. (1902), 49), followed. *Ib.*

Intention to Use—Mark as Applicable to

certain Goods—Mark Common to the Trade—Subsequent Application of Mark to other Goods—Rectification of Register.]—The plaintiffs registered a trade mark in 1878 in respect of substances used as food or as ingredients in food, except condensed milk, coffee and milk, chocolate and milk, and essence of coffee. The mark consisted of "a representation of a Swiss milkmaid holding a pail in one hand and with the other hand supporting another pail on her head"; above the figure were the words "Milkmaid Brand." At the time the mark was registered the plaintiffs had no real intention to use the mark for butter. In 1901 they commenced to sell butter and registered a trade mark with a similar representation of a milkmaid with the words "Milkmaid Brand." Such a device or representation was common and open to the trade in connection with butter at and prior to the registration of 1901:—*Held*, that the registration of the mark of 1901 must be restricted so as to exclude butter from the goods in respect of which it was registered, and that the mark of 1878 must either be struck off the register or be restricted by excluding butter. *Anglo-Swiss Condensed Milk Co. v. Pearkes, Gunston & Tee*, 20 T. L. R. 238—C.A.

Old Mark—Disclaimer.]—Section 64, sub-section 3 (ii.) of the Patents &c. Act, 1883, enables only those old marks, which do not contain any of the essential particulars defined in the previous clauses of the section, to be registered without any disclaimer. Therefore, where the old mark sought to be registered is a label consisting of a distinctive device and words or letters, it is registrable under section 64, sub-section 2, and the words or letters must be disclaimed, notwithstanding the circumstance that if the words or letters were used alone they could be registered as an old mark under section 64, sub-section 3 (ii.). *Wright, Crossley & Co.'s Trade Mark, In re*, 69 L. J. Ch. 589; [1900] 2 Ch. 218; 83 L. T. 150—Byrne, J.

An application by a firm for the registration of a mark used by it before August 13, 1875, need not contain a statement of the names of the firm for the time being since the first alleged user, or even the words "and their predecessors in business, members of the firm for the time being." *Ib.* And see *infra*, OLD MARK.

4. TRADE LABEL.

Distinctive Label—Words Forming Part of Label—Added Words—Disclaimer.]—A word or words, though not capable of being registered as a trade mark as a "fancy word or words not in common use" under section 64, sub-section (c) of the Patents, Designs, and Trade Marks Act, 1883, may form part of a distinctive label properly registered as a trade mark under the same sub-section, and in that case need not be disclaimed as an addition to the trade mark under section 74. *Smokeless Powder Co.'s Trade Mark* (61 L. J. Ch. 391; [1892] 1 Ch. 590) followed. *Clement & Co.'s Trade Mark, In re*, 69 L. J. Ch. 52; [1900] 1 Ch. 114; 81 L. T. 400; 48 W. R. 67—C.A.

Colourable Imitation—Calculated to Deceive—

Evidence—Question for the Court.]—Where an action is brought to restrain a colourable imitation of the make-up of goods, it must be proved beyond question that the goods are so got up as to be calculated to deceive. No general rule can be laid down, and each case must be judged by its own circumstances. *Payton v. Snelling, Lampard & Co.*, 70 L. J. Ch. 644; [1901] A.C. 308; 85 L. T. 287—H.L. (E.)

Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the Court (and not for the witness) to decide, after inspection of the exhibits and paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods. It is not sufficient to shew that by a trick or device a retail trader might be able to pass off the goods of one for those of another. *Ib.*

"Calculated to deceive"—Words "Trade mark" on Label.]—Putting the words "trade mark" on a label which constitutes a trade mark is not in itself "calculated to deceive"; and it will not be taken, as a general rule, that the words were intended to designate the particular part only of the label on which they are placed. They may apply to that part only, but, even so, the label is not necessarily "calculated to deceive"—that is, reasonably calculated to injure somebody. In each case it must be seen whether the natural inference would be that the rest of the label, or the label as a whole, was not a trade mark; and the Court will not order the mark to be removed from the register unless it is shewn that it is reasonably likely to injure some one. *Bass, Ratcliff & Gretton's Trade Mark, In re*, 71 L. J. Ch. 779; [1902] 2 Ch. 579; 87 L. T. 408; 51 W. R. 86—C.A.

The decision in *Apollinaris Co.'s Trade Marks, In re* (61 L. J. Ch. 625, 644; [1891] 2 Ch. 186, 233), on this point was a decision upon a question of fact, not of law, and is not binding except in a case where the facts are the same. *Ib.*

5. SIMILARITY.

"Cottolene"—"Cocosoline."]—The plaintiffs, who were the registered owners of two trade marks, each of which consisted of the word "Cottolene," which was used to denote a butter substitute made from cotton-seed oil, sought an injunction to restrain the defendant from selling or advertising for sale any butter substitute under the name of "Cocosoline":—*Held*, that as the defendant had taken the word "Cocosoline" innocently, and without any intention of injuring the plaintiffs' business, and as no instance of anyone being deceived was proved, the action must be dismissed. *N. K. Fairbank Co. v. Cocos Butter Manufacturing Co.*, 20 T. L. R. 53—Swinfen Eady, J.

"Motorine" already on Register—Application to Register "Motricine."]—The applicants, who carried on a large trade in petrol spirit under the name of "Motricine" abroad, and had registered the word there as a trade

mark, applied to register the word in England for light mineral oils for driving motor cars and oil engines. The application was opposed and refused. They then applied to register the word as a spirit for motor-power purposes derived from petroleum. The application was again opposed and refused. The opponents were a firm who had registered the word "Motorine" as a trade mark for lubricating oil suitable for motor cars, disclaiming any right to the exclusive use of the word "motor." The applicants appealed against the refusal to register "Motricine." The evidence shewed that "Motorine" had come to be known as the lubricating oil manufactured by the opponents; that both the petrol spirit (which was highly explosive) and the lubricating oil were derived from petroleum, and were sold by, and to, the same classes of persons; and that there was, in fact, danger of confusion in use between the two.—*Held*, that the applicants, not having shewn that the trade mark which they proposed to register was not calculated to deceive, were, under section 11 of the Trade Marks Act, 1905, not entitled to register it. Principle of *Eno v. Dunn* (15 App. Cas. 252) applied. *Compagnie Industrielle des Pétroles' Application, In re*, 76 L. J. Ch. 646; [1907] 2 Ch. 435; 97 L. T. 235; 23 T. L. R. 672—Warrington, J.

Held, also, that "Motorine" was a word which had no direct reference to the quality or character of the goods in respect of which it was registered, and was therefore, under section 9, sub-section 4 of the Trade Marks Act, 1905, capable of being registered. *Ib.*

Sections 19 and 21 of the Trade Marks Act, 1905, apply to cases where the objection to a proposed trade mark is simply the existence on the register of another mark of another trader, and cannot be called in aid of a case falling within section 11. *Ib.*

Identical Mark for Different Goods — Same Proprietor — "Closely resembling" — Associated Marks — Assignability — Discretion — Costs.]—The Birmingham Small Arms Co., who were entered on the register of trade marks as proprietors of the trade mark "B.S.A." for small arms, applied for the registration of the same trade mark for goods in a different class—namely, cycles and automobiles. The Registrar of Trade Marks refused the application, unless the applicants agreed that the two marks should be "associated" in accordance with section 24 of the Trade Marks Act, 1905.—*Held*, on appeal, that section 24 had no application to cases of an identical mark of the same proprietor for such different goods as small arms and cycles, but applied only to cases where registration was sought for a mark "so closely resembling" a trade mark of an applicant already registered for the same goods or description of goods as to be calculated, in the case of an application by a stranger, to deceive or cause confusion. The Registrar was accordingly directed to proceed with the registration without "association." The discretion vested in the Registrar under sub-section 2 of section 12 of the Act must be exercised subject to the provisions of section 24. *Birmingham Small Arms Co.'s Application, In re*, 76 L. J. Ch. 571; [1907] 2 Ch. 397; 97 L. T. 330; 23 T. L. R. 650—Kekewich, J.

6. DISCLAIMER.

"Added matter."—On the registration, under the Patents, Designs, and Trade Marks Act, 1888, a disclaimer of any right to the exclusive use of such portion of a label as constitutes "added matter" must be made. *Royal Baking-Powder Co.'s Trade Mark, In re*, 50 W. R. 454—Farwell, J.

Double Registration—Time for Disclaimer.]—When a disclaimer is required under the Patents, Designs, and Trade Marks Acts, 1883–1888, it must be made in the application for registration, and cannot be made afterwards. *Player & Sons' Trade Mark, In re*, 70 L. J. Ch. 359; [1901] 1 Ch. 382; 84 L. T. 190—Cozens-Hardy, J.

When a trade mark has been registered with words the exclusive use of which is not claimed, and which are not essential to the trade mark, a second registration of the same mark will not be allowed with different words and other non-essential particulars. *Ib.* And see cols. 2533, 2535.

7. OLD MARK.

Application to Remove.]—Where a word has been registered under section 10 of the Trade Marks Registration Act, 1875, as being a "special and distinctive word . . . used as a trade mark before the passing of this Act," and an application is made to remove it, as having been improperly placed on the register, the burden of proof is on the applicants to shew that it should not have been registered, and not on the owners of the trade mark to defend the registration. *Leonard & Ellis's Trade Mark, In re* (53 L. J. Ch. 603; 26 Ch. D. 288), followed. *Pearson's Application, In re; Cheesebrough Manufacturing Co.'s Trade Mark "Vaseline," In re*, 71 L. J. Ch. 427; [1902] 2 Ch. 1; 86 L. T. 665—C.A.

Patented Article—"Special and distinctive word."]—In 1872 an inventor took out a patent in the United States for the manufacture of a substance which he stated to be "named by me 'vaseline'"; in 1874 he took out a patent in England for improvements in the manufacture of the substance which he said "I term 'vaseline.'" In 1877 he registered the word "vaseline" under the Trade Marks Registration Act, 1875, as an old trade mark. On an application to remove the mark from the register,—*Held* (*dissentiente* COZENS-HARDY, L.J.), that the language of the patents was ambiguous, as the meaning might either be that the name "vaseline" was given to the substance manufactured by the inventor and his successors, or that it designated the substance made according to the process described; that the burden was on the applicants to shew that it had the latter meaning; and that as, according to the evidence, they had not discharged this burden, the mark should not be removed. *Linolium Manufacturing Co. v. Nairn* (47 L. J. Ch. 430; 7 Ch. D. 834) distinguished. *Ib.*

Held, by COZENS-HARDY, L.J., that the word "vaseline" was an invented word to describe an invented thing, and that, as any one was at

liberty to manufacture it when not protected by the patent and to call it by that name, it could not be treated as a "special and distinctive word" within section 10 of the Trade Marks Registration Act, 1875, and properly registered as an old mark. *Per COZENS-HARDY, L.J.*—The principle applied by *Fry, J.*, in *Lino-leum Manufacturing Co. v. Nairn (supra)* to the case of a patented article after the expiration of the patent cannot be limited to that case. *Ib.*

—**Proof.**—When a trade mark is impeached after it has been for a long time on the register, and has been openly and largely made use of, the presumption is in its favour, and the onus of proof that it was improperly registered is on the persons who seek to have it removed. *Cheesebrough Manufacturing Co.'s Trade Mark "Vaseline," In re* (71 L. J. Ch. 427; [1902] 2 Ch. 1), followed. *Burroughs, Wellcome & Co.'s Trade Mark, In re*, 73 L. J. Ch. 474; [1904] 1 Ch. 736—C.A.

Mark Registered under Patents Act—Order to Expunge Simply—Not Subject to Application to Amend.—*Semble*, leave should not now be given to amend a bad trade mark which was originally registered under the Act of 1883. The Court rejected the owner's contention that an order to expunge his mark, which had been registered under the Act of 1883, should only be made subject to an application to amend being made by him within a reasonable time, but made an order to expunge the mark absolutely. *Wills's Trade Mark* (62 L. J. Ch. 545; [1893] 2 Ch. 262) not followed. *Day v. Riley*, 48 W. R. 556—Buckley, J.

Non-User of Mark—Non-Appearance of Proprietor—Removal from Register—Service Abroad of Notice of Motion.—A word was registered as a trade mark in 1891 upon the instructions and in the name of an American, giving Chicago as his address, with the name and address of an English firm of patent agents as his address for service. In 1899 an American company applied for the registration of the same word as their trade mark, they having used it for a long time in America and also more recently in England. This application was objected to by the comptroller in view of the previous registration. Thereupon enquiries were instituted by the company, with the result that the registered proprietor could not be found to have ever used the mark or done any business either in America or in England; that he could not be traced in Chicago or elsewhere; that letters addressed to him at Chicago were returned through the Dead-Letter Office; and that the patent agents named as the address for service could give no information with respect to him. The company then gave notice of motion to rectify the register by expunging the mark, and left a copy of this notice at the address for service, and sent another copy of it in a registered packet to Chicago by a letter as directed in *Compagnie Générale d'Eaux Minérales et de Bains de Mer, In re* (60 L. J. Ch. 728; [1891] 3 Ch. 451). On proof of these facts, and the registered proprietor not appearing, though more than twenty-eight days had elapsed since the despatch of the packet and letter to Chicago,—*Held*, that the mark should

be expunged. *Ashton's Trade Mark, In re*, 48 W. R. 339—Stirling, J.

8. RECTIFICATION OF REGISTER.

Person Aggrieved—"Sufficient cause."—The words in section 90, "entry made without sufficient cause," do not only mean "made without sufficient cause at the time of registration," but apply to an entry which is at any time on the register without sufficient cause, and such an entry may therefore be expunged by the Court under that section. *Batt v. Dunnett*, 67 L. J. Ch. 575; [1897] 2 Ch. 432; 79 L. T. 206.

Competency of Rectification after Five Years.—*Boord & Son*, who had been for five years the registered proprietors of a trade mark, raised an action for infringement against *Thom & Cameron*, who defended the action, and raised a counter-action against *Boord & Son*, concluding, *inter alia*, for declarator that the trade mark was incapable of registration and should be expunged from the register in respect that it was common property before its registration by *Boord & Son*:—*Held*, that the lapse of five years was no bar to the removal of the entry, and that the question of *Boord & Son's* right to be on the register had been competently raised. *Boord v. Thom & Cameron*, [1907] S.C. 1326—Ct. of Sess.

In an action for infringement of a trade mark that has been on the register for five years, if the defender desires to plead as a defence either that the mark should not be on the register as being common property, or that he himself is entitled also to be put on the register as the owner of the same mark, he must take steps to have the register rectified by the expunging of the mark or the insertion of his own name as the case may be. *Ib.*

Where, in an action for infringement of a registered trade mark the defence of common property is put forward, the onus on the defender of proving common property is increased by the length of time the mark has been on the register; and he cannot discharge that onus by proof of a few isolated sales under the mark by persons other than the pursuer, but can only discharge it by proof that such a quantity of goods had been sold by such persons under the mark that the mark had come, in a certain market, to be associated with their goods. *Ib.*

Resemblance—Effect of Long Association of Complainers' Goods with a Certain Device.—A firm of spirit merchants, who had a registered trade mark consisting of a cat standing on a barrel, proved, in an action at their instance for infringement of this mark, that their goods had been so long associated with the mark that they had come to be known as the "Cat and Barrel" brand:—*Held*, that in considering whether certain labels amounted to infringement of the complainers' trade mark the effect of this long association must be taken into account; and that labels which shewed a cat and a barrel placed differently from those on the complainers' trade mark, and which did not bear a close resemblance to it, amounted to a practical infringement of the complainers' trade mark. *Ib.*

9. FALSE TRADE DESCRIPTION.

Watch—Parts Imported from Abroad—Finished in England—“English lever.”—The appellants sold a watch for 2*l.* 5*s.* to which they applied the description “English lever.” Certain parts were imported into this country from abroad in a more or less unfinished state. The value of these parts in their rough condition, including the mainspring, hairspring, and certain screws, was 8*d.* The price of these parts when finished in England was estimated to be 4*s.* 5*d.* All these parts were dealt with in this country to enable them to go into a watch, and the watch was put together here. The magistrate held that the imported parts were of foreign origin, and of such importance that a description which failed to indicate them was a false description in a material respect, and that the finishing operations in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made and produced. He accordingly convicted the appellants of applying a false trade description to the watch:—*Held*, on remitting the case to the magistrate, that if he had come to the conclusion as one of fact on the evidence, and had simply stated the case to determine whether there was anything in point of law to prevent him coming to such conclusion, the Court would not disturb his decision; but that if he decided upon the view that the inclusion of certain parts partly manufactured abroad compelled him as a matter of law to hold that “English” was a false description, then his decision could not be supported. *Williamson v. Tierney*, 88 L. T. 592; 65 J. P. 70—D.

Misrepresentation—False Statement Made in Advertisements.—The plaintiffs by means of extensive advertising established a large business for the sale of certain pills of an oviform shape, called “Bile Beans for Biliousness.” Many of the advertisements contained a story to the effect that Bile Beans were compounded of ingredients which included a vegetable substance, of wonderful curative properties, which was found in Australia, but had only been recently discovered after thorough investigation by Charles Forde, an eminent scientist. The labels on the boxes described the Bile Beans as “Charles Forde’s,” but did not contain any specific reference to Forde’s discovery of the Australian vegetable substance. The plaintiffs claimed an interdict restraining the defendant from selling as “Bile Beans” pills which were not of the plaintiffs’ manufacture. It was proved that there was no such person as Charles Forde, and that the plaintiffs’ Bile Beans did not contain any ingredient which was peculiar to Australia:—*Held*, that the repute of “Bile Beans” had been established by fraudulent misrepresentations on the part of the plaintiffs, and therefore that they were not entitled to interdict. *Bile Bean Manufacturing Co. v. Davidson*, 8 F. 1181—Ct. of Sess.

Semble—“Bile Beans” is a descriptive name and not a fancy name of the plaintiffs’ invention. *Ib.*

10. MERCHANDISE MARKS ACTS.

Description Purely Verbal—Description Added to Invoice.—The Merchandise Marks Act, 1887,

does not apply to trade descriptions purely verbal. *Coppen v. Moore*, 67 L. J. Q.B. 689; [1898] 2 Q.B. 300, 306; 78 L. T. 520; 46 W. R. 620; 62 J. P. 453; 19 Cox C.C. 45—D.

The addition in writing of a word to the invoice sent with goods sold which induces the purchaser to believe they are what he asked for, is a false trade description within the Act. *Ib.*

Criminal Liability of Vendor or Principal for Acts of Servants or Agents.—The Merchandise Marks Act, 1887, renders the master or principal criminally liable for the acts of his servants and agents in all cases within section 2, sub-sections 1 and 2, where the conduct constituting the offence is pursued by such servants or agents within the scope or in the course of their employment. The master or principal can only be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. *Ib.*

Forged Mark Applied to China Sold by Auction—Suspicion of Forgery Entertained by Auctioneers and Suggested to Bidders—Absence of Mens Rea—“Acted innocently.”—To obtain a conviction under the Merchandise Marks Act, 1887, the case must be one in which *mens rea* in fact exists; but although the burden of proof is shifted and the prosecution have not to prove *mens rea*, yet if the defendant can prove absence of *mens rea*, he is to be acquitted. *Mens rea* must be applied to the particular offence, and there may be an innocence of intention to infringe the Act, although there may be suspicion of the genuineness of the trade mark. *Christie v. Cooper*, 69 L. J. Q.B. 708; [1900] 2 Q.B. 522; 83 L. T. 54; 49 W. R. 46; 64 J. P. 692—D.

Thus, auctioneers who have a suspicion that Dresden china, sent to them as genuine and put up for sale at their rooms, is not genuine, but bears a forged trade mark, and who tell the assembled bidders that they sell the lot “for what it is,” thereby suggesting suspicion in the minds of the bidders as to its genuineness, act innocently within the meaning of sub-section 2 (c) of section 2 of the Merchandise Marks Act, 1887. *Ib.*

“Applied” to Goods—Implied Representation.—The appellant asked for two half-pounds of tea at the respondents’ shop. The respondents’ salesman took two packets off the counter, wrapped them in paper, and handed them to the appellant, who paid for them. The appellant afterwards found that though each packet, including its paper wrapper, weighed more than half a pound, the tea in each packet weighed less than half a pound. On each packet was a printed statement that its weight including the wrapper was half a pound:—*Held*, that the handing over of the packets by the salesman to the appellant, who had asked for a greater weight of tea than the packets contained, did not amount to the application of a false trade description to the goods by the respondents so as to bring them within the provisions of section 2, sub-section 2 of the Merchandise Marks Act, 1887, which makes it an offence to

sell goods to which such a description is applied. *Langley v. Bombay Tea Co.*, 69 L. J. Q.B. 752; [1900] 2 Q.B. 460; 83 L. T. 175; 49 W. R. 27; 19 Cox C.C. 551—D.

False Trade Description—New Zealand Mutton—Letters Written upon Invoice.—The appellant went to the shop of the respondent, who carried on business as a butcher, and asked him for a leg of New Zealand mutton. The respondent having produced and weighed a leg of mutton, the appellant asked for an invoice, which was handed to him. The appellant asked the respondent to put a mark upon the invoice shewing that the mutton was New Zealand meat, and the respondent then wrote upon it the letters "N. M." The mutton was not in fact New Zealand mutton. Upon an information against the respondent under section 2, sub-section 2 of the Merchandise Marks Act, 1887, the Justices held that the letters "N. M." did not constitute a "trade description" within the definition contained in section 3 of the Act, on the ground that it was not established that "according to the custom of the trade" such letters were "commonly taken to be an indication of" the country in which the goods were produced:—*Held*, that the Justices were wrong, and that upon the facts as found the respondent ought to be convicted. *Cameron v. Wiggins*, 70 L. J. K.B. 15; [1901] 1 K.B. 1; 83 L. T. 428; 49 W. R. 237; 19 Cox C.C. 580—D.

False Trade Description—Invoice—Kilderkin.—G. having ordered one kilderkin of mild ale, received a cask of ale together with an invoice which stated: "Bought of North-Eastern Breweries Limited. Oct. 21, 1903. Kils. 1. Mild Ale B.M. Per Brl. 48s.—17." The cask held seventeen gallons one quart and one pint, and a kilderkin is a cask holding eighteen gallons. It was found as a fact that the appellants knew that the process of cooping casks had the effect of diminishing their holding capacity:—*Held*, that the appellants were rightly convicted of applying a false trade description within section 2, sub-section 1 (d) of the Merchandise Marks Act, 1887. *North-Eastern Breweries v. Gibson*, 91 L. T. 78; 68 J. P. 356; 20 Cox C.C. 706; 20 T. L. R. 496—D.

Cigarettes—Label on Packet—Guaranteed "Hand-made."—The defendants sold machine-made cigarettes in a packet labelled "guaranteed hand-made by experienced workmen." The price was 2½d. a packet. The price of packets of cigarettes of the same quality made by hand was 2½d. The quality of tobacco, paper, starch, &c., used for the manufacture of the machine-made cigarettes was the same as in the case of hand-made cigarettes, and their construction was as proper:—*Held*, that the label was a false trade description in a material respect within section 3, sub-section 1 of the Merchandise Marks Act, 1887, and that the doctrine of equivalents—that the article sold under the false description was as good as that asked for by the customer—was inapplicable. *Kirshenboim v. Salmon*, 67 L. J. Q.B. 691; [1898] 2 Q.B. 19; 73 L. T. 658; 46 W. R. 573; 62 J. P. 439; 19 Cox C.C. 127—D.

Mineral-water Bottles—Trade Mark Embossed—Seller's Labels Affixed—No Actual Fraud or Deception Proved—"Innocently."—

The plaintiffs were manufacturers of mineral waters in D., which they sold to the trade in bottles embossed with their name, registered as a trade mark. The defendants, who were manufacturers of mineral waters in L., received in the course of trade from their customers a large number of the plaintiffs' bottles so embossed, which they filled with mineral waters of their own manufacture and sold to retailers, but with labels affixed bearing their own name and address as manufacturers, and stating the contents of the bottles. The defendants had not tried to pass off their mineral waters as the manufacture of the plaintiffs, nor was it proved that fraud was intended, or that any person had been deceived:—*Held*, that the defendants, by filling bottles bearing the plaintiffs' trade mark with mineral waters of their own manufacture, committed an offence against section 2 of the Merchandise Marks Act, 1887, and that placing labels bearing the defendants' own name on the bottles did not exonerate them. *Thwaites v. M'Evilly*, [1904] 1 Ir. R. 310—C.A.

"Soda crystals"—Mixture of Crystallised Carbonate of Soda and Crystallised Sulphate of Soda.—The appellant sold in the ordinary way of his trade a quantity of soda which was described in the invoice as "soda crystals." Upon analysis the soda was found to contain crystallised carbonate of soda mixed with crystallised sulphate of soda. The quantity of the latter substance varied in the different samples from 18 to 64 per cent. An information having been preferred against the appellant under section 2, sub-section 2 of the Merchandise Marks Acts, 1887, charging him with having sold goods to which a false trade description was applied, the Justices held that "soda crystals" meant ordinary washing soda, which upon the evidence consisted of crystallised carbonate of soda containing not more than 2 per cent. of sulphate of soda, and that it was a false trade description when applied to the mixture sold by the appellant. They accordingly convicted him:—*Held* (DARLING, J., dissenting), that the description "soda crystals" was a "false trade description" within the meaning of section 3 of the Act, and that the appellant was properly convicted. *Fowler v. Cripps*, 75 L. J. K.B. 72; [1906] 1 K.B. 16; 93 L. T. 808; 54 W. R. 299; 70 J. P. 21; 21 Cox C.C. 52; 4 L. G. R. 9; 22 T. L. R. 73—D.

"Natural mineral water"—Water Subjected to Process—Water Identical.—The description "natural mineral water" applied to water, which has been subjected to a process for making it fit for sale and consumption, which when offered for sale is in all essentials identical with the water as it exists in the spring from which it comes, is not a false trade description. *Davenport v. Apollinaris Co.*, 89 L. T. 19; 67 J. P. 323; 20 Cox C.C. 502—D.

Tea Weighed with Paper—Gross Weight.—The respondent, having asked for a quarter of a pound of tea, was handed by an assistant of the appellants a packet already folded and tied with string. A ticket was inserted under the string, on one side of which was "Star Tea Company Limited. Quarter pound 2s. 8d. tea ticket . . ." and on the other a notice that every purchaser of a quarter of a pound and

upwards was given some useful article. The tea was wrapped in a piece of lead paper, on which was printed, "Quarter pound gross weight." The tea by itself was short by $\frac{1}{4}$ oz. of a quarter of a pound, but with the paper was slightly in excess:—*Held*, that the appellants were rightly convicted under section 1, sub-section 2 of the Merchandise Marks Act, 1887, of applying a false trade description to the tea by means of the ticket. *Star Tea Co. v. Whitworth*, 91 L. T. 87; 68 J. P. 443; 2 L. G. R. 1000; 20 Cox C.C. 658; 20 T. L. R. 539—D.

Label—Tarragona Port.—The respondents sold to the appellant at the usual retail price of 1s. an imperial quart bottle of wine bearing the following label: "Stower's Tarragona Port (Blended with wine produced from finest foreign grapes)." Tarragona Port is a wine made in Spain, in the province of Tarragona, from fresh grapes grown there; it is a wine having a distinct taste, bouquet, and smell. One-third (in bulk) of the contents of the bottle sold to the appellant consisted of a special kind of high-priced Tarragona port called "Mistella," which is a very heavy wine not fit for drinking by itself, and imported for the purpose of being blended with other wines. The remaining two-thirds of the bottle consisted of a light wine made from "grape must." "Grape must" is made in Greece; it consists of the concentrated juice of fresh grapes grown in Greece. It is exported from Greece in concentrated form and converted in England into wine by adding a ferment and water. So produced the wine is red in colour, and is not of a high quality. An information was laid against the respondents under the Merchandise Marks Act, 1887, for selling the wine to which a false trade description was applied by the label on the bottle. The magistrate having dismissed the information, —*Held*, that it was impossible to say that the magistrate had come to a wrong determination. *Hooper v. Riddle*, 95 L. T. 424; 21 Cox C.C. 277; 70 J. P. 417—D.

Absence of "intent to defraud"—Acting "innocently."—An aerated-water manufacturer and bottler was charged with selling beer in a bottle to which a false trade description was applied, in contravention of section 2, sub-section 2 of the Merchandise Marks Acts, 1887. The sheriff held that the accused had committed the offence knowingly, and convicted him, but found that he had acted "without intent to defraud." The accused appealed, on the ground that the finding that he had acted "without intent to defraud" was tantamount to a finding that he had acted "innocently":—*Held*, that, inasmuch as the appellant had acted "knowingly" he had not acted "innocently" in the sense of section 2, sub-section 2 of the Act, and that the conviction was right. *Haddow v. Neilson*, 2 F. (Just. Cas.) 19—Ct. of Justy.

11. CERTIFICATE UNDER TRADE MARKS ACT.

Certificate—Discretion.—The granting of a certificate, under section 77A of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, that the right to a trade mark has come in question, is discretionary. *Bourne v. Swan & Edgar*, 72 L. J. Ch. 168; [1903] 1 Ch. 211; 87 L. T. 589; 51 W. R. 213—Farwell, J.

Action for Infringement and Motion to Expunge Heard Together—Certificate that Right to Exclusive Use of Trade Mark Came in Question in Action.—When an action for infringement of a registered trade mark and a motion to expunge the trade mark from the register are heard together on the same evidence, the Court may certify that "the right to the exclusive use of the trade mark came in question in an action for infringement of a registered trade mark," under section 18 of the Patents, Designs, and Trade Marks Act, 1888—and this although the trade mark has been on the register for more than five years. *Field v. Wagel Syndicate*, 69 L. J. Ch. 365; [1900] 1 Ch. 651; 82 L. T. 231; 48 W. R. 390—Buckley, J.

TRADE NAME.

1. *Generally*, 2546.
2. *Similarity*, 2548.
3. *Sale of Business*, 2552.

1. GENERALLY.

Appropriate Words of Description—Exclusive Right to Use such Name.—In the absence of any such secondary meaning of appropriate words of ordinary description as has created a general association of the name of the product with the plaintiff, and of evidence of confusion between the goods of the plaintiff, the first user, and those of the defendant, caused by identity of name, no injunction can be granted to restrain the defendant's employment of such name to designate his own goods. *Parsons v. Gillespie*, 67 L. J. P.C. 21; [1895] A.C. 289—P.C.

Name of Locality — Natural Product.—Where goods are not manufactured, but are the natural product of a particular locality, the name of which necessarily forms part of any real description of the goods, the first user has no exclusive right to call his goods by the name of the place. *Montgomery v. Thompson* (60 L. J. Ch. 757; [1891] A.C. 217) distinguished. *Grand Hotel Co. of Caledonia Springs, Lim. v. Wilson*, 73 L. J. P.C. 1; [1904] A.C. 103; 89 L. T. 456; 52 W. R. 286; 20 T. L. R. 19—P.C.

The appellants were the owners of land on which there were natural springs, the water of which they sold for table and medicinal purposes. The respondents acquired adjacent land, from which by borings and pipes they obtained similar water:—*Held*, that the respondents were entitled to use the name of the place as part of the description of the water which they sold. *Ib.*

Name of Repute—Fraudulent Adoption—User—Absolute Injunction.—A name or surname adopted with the view of partially appropriating the general business reputation of another firm, though only in connection with a special class of goods not dealt in or likely to be dealt in by that firm, can never ripen by user and repute into a real name as against that firm *quoad* its actual business, and should the adopter after any length of time enter into a similar business likely to compete with that of the firm he may be absolutely restrained from the use of the name in connection therewith. *Pinet et Cie. v. Maison Louis Pinet*, 67 L. J. Ch. 41; [1898] 1 Ch. 179; 77 L. T. 613; 46 W. R. 506—North, J.

Unauthorized Use of—Holding out as Partner—Misrepresentation—Reasonable Probability of Risk and Liability.]—A dealer in cycles having advertised his goods in a manner which satisfied the Court that he intended the public to believe that the proprietors of the *Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with the sale of "Times" cycles,—*Held*, on the authority of *Routh v. Webster* (10 Beav. 561), that as the plaintiffs, the proprietors of the *Times*, were exposed to some risk and liability by the unauthorized use of the name of their newspaper by the defendant, and that as there was a reasonable probability of the *Times* being exposed to litigation, and possibly being made responsible, had the plaintiffs not taken steps to disconnect the name of their newspaper from the advertisement and circulars issued by the defendant, an interim injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were in fact offered for sale by the plaintiffs, or that he was carrying on business as a department of the *Times*, or in any way holding out the *Times* to be the owners of or connected with his business. Principles on which injunctions are granted in cases of this nature discussed. *Walter v. Ashton*, 71 L. J. Ch. 839; [1902] 2 Ch. 232; 87 L. T. 196; 51 W. R. 131—Byrne, J.

Concurrent User—Discontinuance by One Party—Exclusive Right of Other Party.]—Where two firms have used the same trade name for similar goods concurrently for some time, but one firm has discontinued the user, and the name has come to be known in the trade as denoting goods made by the other, the firm which has discontinued the user will be restrained from resuming it. *Daniel v. Whitehouse*, 67 L. J. Ch. 262; [1898] 1 Ch. 685—Gorell Barnes, J.

Exclusive Right to Trade Mark—Colourable Imitation of Trade Mark—Firm Name.]—The firm of J. H. & Co., the sole partner of which was J. H., having been made bankrupt, the trustee sold the goodwill of the business, with the right to use the firm's name, to another firm. After his discharge, J. H., having intimated his intention of carrying on business again and using therein the firm name of J. H. & Co. and the trade marks, labels, &c., of that firm,—*Held*, that he must be restrained from using the firm name of J. H. & Co., or the trade marks or labels in any form of that firm. *Melrose-Drover v. Heddle*, 4 F. 1120—Ct. of Sess.

"Incorporated accountant"—Right to Use—Incorporated Society.]—The plaintiff society was incorporated in 1885 under the Companies Acts with the object of forming a body of accountants and enabling its members to acquire by means of examinations and other tests a certain *status* in the profession; and it recommended its members to adopt the professional designation of "incorporated accountant." By the time when the defendant society was established, in 1905, the term "incorporated accountant" had come to mean, in the minds of persons dealing with accountants, a member of the plaintiff society. The defendant society was established under the Companies Acts with an object similar to that of the plaintiff society.

It also recommended its members to use the professional designation of "incorporated accountant":—*Held*, that the title "incorporated accountant" was not a descriptive but a fancy term; and that the plaintiff society was entitled to an injunction to restrain a member of the defendant society from using the designation "incorporated accountant" in such a way as to lead to the belief that he was a member of the plaintiff society, and to restrain the defendant society from holding out that its members were entitled to use the designation in such a way as to represent that they were members of the plaintiff society. *Society of Accountants in Edinburgh v. Corporation of Accountants* (20 Ct. Sess. Cas. (4th Ser.), p. 750) followed. *Accountants and Auditors Society v. Goodway*, 76 L. J. Ch. 384; [1907] 1 Ch. 489; 96 L. T. 326; 23 T. L. R. 286—Warrington, J.

Limited Company—Corporate Name—Inadvertent Omission to Publish—Penalty—Right to Injunction.]—The inadvertent omission of a limited company, carrying on a business under a trade name, to publish at the same time its corporate name in compliance with the provisions of section 41 of the Companies Act, 1862, will not prejudice the company's right to have the use of its trade name protected by injunction, and it makes no difference whether the company itself created and established such trade name, or acquired it by purchase. The principle of *Wright v. Horton* (56 L. J. Ch. 873; 12 App. Cas. 371) applied. *Pearks v. Thompson* (18 Rep. Pat. Cas. 185; 17 Times L. R. 250) followed. *Randall, Lim. v. British and American Shoe Co.*, 71 L. J. Ch. 683; [1902] 2 Ch. 354; 87 L. T. 442; 50 W. R. 697; 10 Manson, 109—Swinfen Eady, J.

2. SIMILARITY.

True Personal Name—Tendency to Deceive—Injunction.]—The plaintiffs were the proprietors and manufacturers of a preparation of meat juice, which for many years had been advertised and sold under a name whereof "Valentine" formed part. The defendant company was promoted by the defendant C. R. Valentine, who was appointed managing director, for the purpose of manufacturing and selling extract of meat in the shape of globules in a protecting cover, according to his patented invention. The globules were at first packed in boxes bearing labels describing them as "Valentine's Valtine Meat Globules," the word "Valtine" being a registered trade mark which was acquired by the defendant company, on its formation, from the defendant C. R. Valentine. Previously there was no preparation of meat juice or extract on the market connected with the name of "Valentine" other than that manufactured and sold by the plaintiffs. Accordingly they brought an action for an injunction to restrain the defendant company from carrying on business as manufacturers or vendors of any preparation of extract of meat or meat juice under any name or title of which the name "Valentine" or "Valentine's" formed part; and to restrain the defendant C. R. Valentine from carrying on any such business under any such name or title without clearly distinguishing that business from the business of the plaintiffs. Since the commencement of the action the description

on the labels issued by the defendant company had been altered to "Valtine Meat Globules." The plaintiffs did not complain that the defendant company had got up their goods so as to resemble the plaintiffs', but only that they had made use of the name "Valentine" in such a way as to deceive the public into the belief that the goods sold by them were manufactured by the plaintiffs:—*Held*, that there was, in principle, no distinction between a case in which the name, of the use of which the complaint was made, was the name of the person who was carrying on the business and a case in which it was not; that in both cases the principle of *Reddaway v. Banham* ([1896] A.C. 199) applied; that the term "Valentine Extract" could not be used in connection with meat juice without representing the goods to be those of the plaintiffs; and that, therefore, they were entitled to the relief which they asked, and under the circumstances the injunction must extend to the use of the word "Valtine." *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. 259—C.A.

Per COLLINS, L.J.—It is immaterial whether the deception arises from the use of a name which is, as it happens, the name of the defendant, or whether it arises from the use of any other description which in a sense may be accurate of that which he sells. For if the article which he sells has come to be known in the market as meaning something made by somebody other than himself, it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers. *Ib.*

Two Firms of Same Surname—Name Identified with Manufacture of one—Right to Exclusive Use of—User without Qualifying Words—Tendency to Deceive.—Injunction granted restraining the defendants (who had acquired a distillery which had been carried on under the name first of William Jameson, then of Jameson & Robertson, and finally of William Jameson & Co.) from selling their whiskey under the name of "Jameson's Whiskey" without the prefix "William" or some other distinctive indication, such as they had previously employed, that the whiskey was not that manufactured by the plaintiffs, the Court being of opinion on the evidence that the name "Jameson's Whiskey" had become so identified with the plaintiffs' whiskey that the use of it by the defendants, without qualifying words, was likely to mislead purchasers into the belief that it was the plaintiffs' manufacture. *Jameson v. Dublin Distillers' Co.*, [1900] 1 Ir. R. 43—V.C.

Same Name—Goods of Same Class—Misleading the Public.—A person cannot be absolutely restrained from carrying on business in his own name; he can only be restrained from carrying on business in his own name without taking reasonable precautions to prevent his business or goods being confounded with those of another person. *Cash, Lim. v. Cash*, 86 L. T. 211; 50 W. R. 289—C.A.

Imitation—Descriptive Name—Fanciful Name—Calculated to Mislead.—The plaintiffs, who were manufacturers of corsets in the United States, in May, 1900, adopted as a new distinctive designation for their corsets the term

"Erect Form," and in March, 1901, introduced these corsets into the United Kingdom. These corsets were designated in the advertisements relating to them, upon the boxes in which they were sold, and generally, as "W. B. Erect Form Corsets," the words "Erect Form Corsets" being printed in special fancy type in the manner of a scroll. The letters "W. B." were the initials of the plaintiffs' firm, but having been warned that these initials had been for some time used by another firm, they abandoned them, and substituted the words "America's Leading," printed in ordinary type. About the month of October, 1901, when the plaintiffs had effected sales of their corsets to a substantial amount in the United Kingdom, and such corsets had acquired some reputation therein, the defendant company resolved to apply the title "Erect Form Corsets," together with the scroll, to goods of their own manufacture, and they proceeded to sell corsets of their own make, some being of a style imitated from those of the plaintiffs, but many others totally different, in boxes practically of the same size and shape, which had upon the lid the words "Erect Form Corsets," printed as a scroll, and placing the company's trade mark, the letters "C. B.," sometimes before and sometimes both before and after the scroll. The defendant company had previously advertised in the trade journals stating what they proposed to do:—*Held* (ROMER, L.J. dissenting), that the plaintiffs were not entitled to any relief, what the defendants had done not being intended to deceive, nor calculated so to do. *Weingarten v. Bayer*, 89 L. T. 56—C.A.

Company—Similarity of Names—Injunction.]

—A company or trading concern is not entitled to adopt a name which incorporates the whole of the name of a pre-existing concern carrying on a like business. *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, 68 L. J. Ch. 74; [1899] A.C. 83; 79 L. T. 645—H.L. (E.). See s.c. in C.A., *infra*.

The Manchester Brewery Co., Lim., was carrying on business at Manchester, and the North Cheshire Brewery Co., Lim., was carrying on business at Macclesfield, but the districts served by the two companies to some extent overlapped. A new company was formed to take over the business of the North Cheshire Co., called the "North Cheshire and Manchester Brewery Co., Lim."—*Held*, that the name of the new company would suggest to any one who knew the two old companies that they had been amalgamated, and so nearly resembled the name of the plaintiff company as to be calculated to deceive; and an injunction should be granted to restrain the use of it. *Manchester Brewery Co. v. North Cheshire and Manchester Brewery Co.*, 67 L. J. Ch. 351; [1898] 1 Ch. 539; 78 L. T. 537; 46 W. R. 515—C.A.

— "Calculated to deceive."—A company, which is registered under a name which represents a word in common use at the date of registration, and which represents an article of commerce, cannot claim a monopoly of that name so as to prevent another company taking the word as part of its name, unless it is obvious that persons will be in fact deceived as to the identity of the two companies. *North Cheshire and Manchester Brewery Co. v. Manchester*

Brewery Co. (68 L. J. Ch. 74; [1899] A.C. 83) distinguished. *Aerators, Lim.* v. *Tollit*, 71 L. J. Ch. 727; [1902] 2 Ch. 319; 86 L. T. 651; 50 W. R. 584; 10 *Manson*, 95—*Farwell, J.*

— **Rival Company—Deception—Injunction.**—

The principles applicable in the determination of the question whether the name of a company is likely to deceive, having regard to the existence or use of another name, are closely analogous to those applicable in cases of the passing off of goods, when the Court has to determine whether a trade name or description or a description of a particular class of goods is likely to deceive, though it is possible that for certain purposes the application of the principles may vary. In determining whether words forming part of the names of two companies, and descriptive of the goods in which both deal, have acquired in the mind of the public a secondary or subsidiary meaning as denoting the goods of one of the companies, no great inference can be founded on the fact that there has been a connotation of the goods as being the goods of that company while it had a monopoly at law or in fact. If a company incorporates into its name words descriptive of the article in which it deals, it cannot claim a monopoly of the use of them, and runs the risk of having the articles similarly described in the trade name of rival traders. It is because no such monopoly can be secured that a descriptive name may be registered. *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, 76 L. J. Ch. 511; [1907] 2 Ch. 312; 97 L. T. 201; 14 *Manson*, 231; 23 T. L. R. 587—*Parker, J.*

The plaintiff company was incorporated in 1903 to acquire and work an invention, patented in 1901, for the cleaning of carpets and other articles by suction caused by the creation of a vacuum. The defendant company was incorporated in 1906 to work another and later invention for the same purpose, but differing in material particulars:—*Held*, on the evidence, that “vacuum cleaner” and “vacuum cleaning process” had not acquired a secondary or subsidiary meaning as denoting the machine or process used by the plaintiff company; that the name of the defendant company was not likely to deceive; and that the word “new” sufficiently distinguished the defendant company from the plaintiff company. *Aerators, Lim.* v. *Tollit* (71 L. J. Ch. 727; [1902] 2 Ch. 319) followed. *Dictum* of LORD DAVEY in *Cellular Clothing Co. v. Mauston* (68 L. J. P.C. 72; [1899] A.C. 326) applied. *Ib.*

— **Individual Transfer of Name to Company—No Goodwill Transferred—Possible Confusion.**—

A new company with a title of which a personal name forms part has not the natural right of an individual born with that name to trade under that name where there is a possibility of confusion with an old company. *Fine Cotton Spinners and Doublers Association v. Harwood Cash & Co., Lim.*, 76 L. J. Ch. 670; [1907] 2 Ch. 184; 97 L. T. 45; 23 T. L. R. 537; 14 *Manson*, 235—*Joyce, J.*

An individual, not transferring a business and goodwill, cannot confer upon a company a title to use his name as against persons liable to be damaged thereby. *Trussard v. Trussard* (59 L. J. Ch. 631; 44 Ch. D. 678) followed. *Ib.*

— **Carrying on Business under Misleading Name—Descriptive Word with Special Trade Meaning—Monopoly of Ordinary Word of the Language.**—A company was formed and registered in 1902 as the *Electromobile Company, Lim.* It dealt in electrically propelled carriages. At its formation and subsequently the word “*Electromobile*” was part of the language used in this country, and meant motor cars driven by electricity. The motor cars of this company became known in the trade as “*Electromobiles*.” In April, 1907, a company was formed and registered as the *British Electromobile Company, Lim.* It proposed to carry on the same kind of business as that of the former company. There was no evidence beyond that mentioned above that if the latter company carried on business in its name people would be induced to believe that its business was the same as that of the former company:—*Held*, that, in the absence of such evidence, the latter company would not be restrained from carrying on business in its present name. *Electromobile Co. v. British Electromobile Co.*, 97 L. T. 196; 23 T. L. R. 631—*Warrington, J.* Cp. cases, *sub tit.* **TRADE.**

— **Similarity—Fraud—Form of Injunction—Order to Change Name of Company.**—It appearing that the words “*Panhard et Levassor*,” or “*Panhard*,” in connection with the manufacture and sale of motors and motor-cars designated the goods of the plaintiffs, and that the individual defendants had subscribed the memorandum of association, and had caused the defendant company, in which they were the only shareholders and directors, to be registered with a view to annex the benefit of the trade and name of the plaintiff company, THE COURT granted the following injunctions—first, an injunction to restrain the defendants and their agents or servants from using the names of *Panhard and Levassor*, or either of them, or any title or description including those names, or either of them, or otherwise colourably resembling the names of the plaintiffs in connection with the manufacture, use or sale of, or other dealing in, motor-cars or parts thereof; secondly, an injunction to restrain the seven defendant signatories from allowing the defendant company to remain registered under its present title, or any such title or description as aforesaid. *Panhard et Levassor (Société Anonyme Anciens Etablissements) v. Panhard Levassor Motor Co., Lim.*, 70 L. J. Ch. 738; [1901] 2 Ch. 513; 85 L. T. 20; 50 W. R. 74—*Farwell, J.*

3. SALE OF BUSINESS.

— **Adoption of New Name—Use of Original Name by Another—Injunction.**—Where the assets and goodwill of a company in liquidation have been sold to purchasers who register the concern so purchased under a fresh name, no injunction can be granted against the use of the original company's name by a person who does not represent himself as the successor of such company, and whose use of the name has been acquiesced in by the liquidator of the old company and the purchasers of his goodwill. *Montreal Lithographing Co. v. Sabiston*, 68 L. J. P.C. 121; [1899] A.C. 610; 81 L. T. 135—P.C.

Purchaser's Right to Retain Old Name.]—Prior to a date in 1901 the trade reputation of the plaintiffs was so connected with the words "The Goupil Gallery" that a rival trader might have been restrained from calling his premises "The Goupil Gallery." The defendant having on that date purchased from the plaintiffs the premises known as "The Goupil Gallery," but not the goodwill of the business, and having agreed with the plaintiffs that he was to be their sole agent for the sale of the plaintiffs' pictures for five years, and also to be at liberty to trade there in pictures on his own account,—*Held*, in the absence of stipulation respecting the use of the words "The Goupil Gallery," that in 1907 the trade reputation of the defendant was so connected with the words "The Goupil Gallery" that he could not be restrained from so calling his premises after his agency had ceased; and, on the principles applied in passing-off cases, that the plaintiffs were not at liberty to call new premises, used for the same trade purposes as the defendant's premises, "The Goupil Gallery." *Boussod v. Marchant*, 97 L. T. 301; 23 T. L. R. 681.—Parker, J.

Goodwill and Exclusive Right to Use of Name.]—The defendant, who claimed to have been descended from an ancestor of the name of Pomeroy, and who carried on business under the name of Mrs. Pomeroy, assigned the business to a company with the goodwill and exclusive right to use the name of Mrs. Pomeroy as part of the name of the company, and to represent the company as carrying on the business in continuation of the firm of Mrs. Pomeroy:—*Held*, that the defendant must be restrained from carrying on a similar business under the name of Pomeroy or Mrs. Pomeroy or any other style of which the name Pomeroy formed part. *Pomeroy v. Scale*, 23 T. L. R. 170.—Parker, J.

TRADE SECRET.

Joint Owners of Trade Secret—Inspection—Secret Recipe.]—Where A and B, each claiming under assignments from C, had been held at the trial of an action between A and B to be joint owners of a secret remedy, and each entitled to make and sell the remedy, but the paper upon which the secret recipe was written had been destroyed,—*Held*, that A, to whom the recipe had never been communicated, was not entitled upon an application made under the liberty to apply given at the trial to demand from B either a copy or inspection of the secret recipe. *Poisson v. Robertson*, 86 L. T. 302; 50 W. R. 260—C.A.

Fraud—Appropriation of Testimonials Given to Rival.]—An interlocutory injunction refused to the inventor of a system of medical treatment (not protected by letters patent) against a rival inventor of a competing system who had appropriated the testimonials given to the former inventor, and by alterations in the text made them apparently applicable to the latter system, damage not being shewn, nor necessarily flowing from the act. *Batty v. Hill* (1 H. & M. 264) followed. *Franks v. Weaver*, (10 Beav. 297) distinguished. *Tallerman v. Dowling Radiant Heat Co.*, 68 L. J. Ch. 618;

[1900] 1 Ch. 1; 48 W. R. 146—Stirling, J. See s.c. in C.A., 69 L. J. Ch. 46.

TRADE UNION.

1. *Statute*, 2554.
2. *Registration*, 2554.
3. *Illegality*, 2554.
4. *Funds*, 2555.
5. *Alteration of Rules*, 2557.
6. *Expulsion of Member*, 2557.
7. *Inducing Breach of Contract*, 2557.
8. *Picketing*, 2558.
9. *Libel*, 2558.
10. *Preventing Workman Obtaining Employment*, 2559.
11. *Action Against*, 2559.
12. *Dissolution*, 2559.

1. STATUTE.

6 Edw. 7 c. 47 is the *Trade Unions Act*, 1906.

2. REGISTRATION.

Registration under Companies Acts—Title to Sue.]—The Edinburgh and District Aerated-Water Manufacturers' Defence Association, Lim., was registered under the Companies Acts, 1862 to 1890, for the object, as set forth in the memorandum of association, of protecting the bottles and boxes of members from being dealt with by persons not having lawful authority. By its articles and by-laws prohibitions were imposed on members with regard to the purchase and exchange of bottles, and to the employment of travellers formerly in the employment of other members, and provision was made for fines for breach of the rules or by-laws. The association, described as "incorporated under the Companies Acts, 1862 to 1890," sued one of its members to recover a fine for breach of a rule:—*Held*, that the association was a trade union within the meaning of the Trade Union Act Amendment Act, 1876, that consequently its registration under the Companies Acts was void, and that as an unincorporated company it had no title to sue. *Edinburgh and District Aerated-Water Manufacturers' Defence Association v. Jenkinson*, 5 F. 1159—Ct. of Sess.

3. ILLEGALITY.

Action by Member—Rules—Restraint of Trade—Illegal Society.]—Under the rules of the Amalgamated Society of Tailors it was provided by rule xxxiv., "Trade Regulations," that during slack seasons a fair equitable division of trade shall be compulsory in all shops. That a fair equitable division of trade shall be understood to mean that each man shall get trade to the same value as his fellow-man, or as near it as possible. In no shop shall the dual system of piece work and day wage be allowed to exist. No member of this society shall in future be allowed to leave a workshop for the purpose of working outdoors or at home, except by the express permission of his branch committee,

such permission only to be granted in case of physical inability to remain in the workshop, and to be in all cases indorsed by a general meeting of the members of the branch. Any member breaking the rules and allowing himself to run out of society and still work for a society shop, the branch shall have full power to deal with the matter as they deem best, subject to rules xxxii. and xxxiii. That a working week shall not exceed fifty-four hours, each district or town to regulate its own time of starting in the morning and leaving off in the evening, and that no overtime be worked except in cases of necessity. Time lost on one day cannot be made up on the following or any subsequent day. Members infringing this rule shall be dealt with as the branch directs, subject to rules xxxii. and xxxiii. By rule xxxii., if a member acted contrary to the interests of the society or its rules, he was to be fined or expelled:—*Held*, that the society was an illegal one, and that an action would not lie against it at the suit of one of its members. *Cullen v. Elwin*, 88 L. T. 686—D.

4. FUNDS.

Diversion of—Injunction to Restrain—Funds to Unauthorised Purposes—Action by Individual Member—Competency of Action.—An action by a member of a trade union to restrain the union from dealing with its funds in a manner contrary to its rules is not an action “instituted with the object of directly enforcing . . . an agreement for the application of the funds . . . (a) to provide benefits to members, or (b) to furnish contributions,” within the meaning of the Trade Union Act, 1871, s. 4, sub-s. 3. Observations upon *Rigby v. Connol* (49 L. J. Ch. 328; 14 Ch. D. 482). *Yorkshire Miners' Association v. Howden*, 74 L. J. K.B. 511; [1905] A.C. 256; 92 L. T. 701; 53 W. R. 667; 21 T. L. R. 431—H.L. (E.)

Unlawful Objects—Directly Enforcing Agreement—Infliction of Fine on Members—Jurisdiction of Court.—Where the executive committee of a registered trade union have passed a resolution inflicting fines upon members who have acted in a manner prejudicial to the welfare of the society by working in the same shop with a non-member, the society will not be restrained at the instance of the members on whom such fines have been stated to have been imposed from levying them, even on the assumption that the rules gave no direct power of fining. To prohibit the defendants from levying such fines at the instance of parties who still wish to retain the benefit of membership of the society with its attendant advantages would be entertaining legal proceedings instituted with a view to directly enforcing an agreement within section 4 of the Trade Union Act, 1871. *Rigby v. Connol* (49 L. J. Ch. 328; 14 Ch. D. 482) and *Chamberlain's Wharf v. Smith* (69 L. J. Ch. 783; [1900] 2 Ch. 605) followed. *Howden v. Yorkshire Miners' Association* (72 L. J. K.B. 176; [1903] 1 K.B. 309) (overruled: see preceding case) distinguished. *Mullett v. United French Polishers' Society*, 91 L. T. 133; 20 T. L. R. 595—Kekewich, J.

Application of Funds to provide Benefits to Members—Principal Object of Society—Division. II.

bility of Objects—Rules in Restraint of Trade—Illegal Society—Action by Member to Enforce Benefit Rules.—A society registered under the Trade Union Acts was governed by rules, some of which made provision for benefits to members, and the others were illegal as being in restraint of trade. A member brought an action against the officers of the society to enforce a rule of the society under which he claimed to be entitled to a superannuation allowance:—*Held*, upon the consideration of all the rules of the society, that the main object of the society was illegal at common law as being in restraint of trade, and that those rules which made provision for benefits to members were merely ancillary to that main object, and could not be separated from it. *Held*, therefore, that under section 4 of the Trade Union Act, 1871, the action must fail. *Cullen v. Elwin*, 90 L. T. 840; 20 T. L. R. 490—C.A.

Levy of Funds to Maintain Representative in Parliament—Ultra Vires—Irregularity of Levy—Internal Management of Union—Jurisdiction of Court.—The defendants, a trade union, of which the plaintiff was a member, provided by their rules that funds might be raised by entrance fees, contributions, levies, donations, and fines for, among other objects therein set out, paying the expenses of returning and maintaining representatives to Parliament and other public bodies. No rule provided how or by whom such levy was to be made. A majority of the members and all the governing bodies of the union agreed to make a levy, and a levy was made, paid by the plaintiff, and applied to the above purpose. The plaintiff sought an injunction to restrain the defendants from misapplying the funds of the union by such application, and also from continuing to make the said levy:—*Held*, that section 16 of the Trade Union Act Amendment Act, 1876, does not exhaustively define the powers and objects of trade unions, and that if the above purpose was not within that section it was not consequently *ultra vires*:—*Held* (by DARLING, J.), that it was within section 16. *Steele v. South Wales Miners' Federation*, 76 L. J. K.B. 333; [1907] 1 K.B. 361; 96 L. T. 260; 23 T. L. R. 228—D.

Held, also, that the fact that no machinery for making the above levy was provided by the rules did not entitle the Court to interfere in the internal management of the federation, the above object being lawful, and the levy being made with the consent of the members and governing bodies without fraud or oppression. *Ib.*

Chamberlain's Wharf, Lim. v. Smith (69 L. J. Ch. 783; [1900] 2 Ch. 605) and *Yorkshire Miners' Association v. Howden* (74 L. J. K.B. 511; [1905] A.C. 256) considered. *Ib.*

Person “wilfully withholding” Property of Trade Union—Summary Remedy for Recovery of Same.—The summary remedy by complaint before Justices given by section 12 of the Trade Union Act, 1871, against an officer or member of a trade union who “wilfully withholds” any money or other effects of the trade union, is limited to cases in which there has been some fraud or dishonesty by such officer or member.

Barrett v. Markham (41 L. J. M.C. 118; L. R. 7 C.P. 405) followed. *Madden v. Rhodes*, 75 L. J. K.B. 329; [1906] 1 K.B. 534; 94 L. T. 741; 54 W. R. 373; 70 J. P. 230; 21 Cox C.C. 180; 22 T. L. R. 856—D.

5. ALTERATION OF RULES.

Sick Benefit — Member becoming Insane — Alteration of Rule during Insanity to Prejudice of Lunatic—Society not Liable.—Where, in accordance with a rule in that behalf, a rule of a trade union is altered during the insanity of a member who joined the society while of sound mind, the alteration of the rule is valid as against that member, although he is prejudiced thereby. *Burke v. Amalgamated Society of Dyers*, 75 L. J. K.B. 533; [1906] 2 K.B. 583—D.

Jurisdiction to Entertain Action against Trade Union for Benefits—Rules for Benefit of Members as well as in Restraint of Trade.—*Quære*, whether an action will lie against a trade union to enforce payment of benefit to members. *Swaine v. Wilson* (59 L. J. Q.B. 76; 24 Q.B. D. 252) discussed. *Id.*

6. EXPULSION OF MEMBER.

Tea Clearing-House — Benefit — Injunction — Right to Sue—Jurisdiction.—The Tea Clearing-house Association, which by its rules imposes restrictive conditions on the conduct of the trade or business of its members, is a trade union within the Trade Union Amendment Act, 1876, s. 16, and therefore by the Trade Union Act, 1871, s. 4, no action lies by a member to restrain the committee from expelling him from the association, and no interlocutory injunction for that purpose ought to be granted. *Rigby v. Connol* (49 L. J. Ch. 328; 14 Ch. D. 482) approved and followed. *Chamberlain's Wharf, Lim. v. Smith*, 69 L. J. Ch. 783; [1900] 2 Ch. 605; 83 L. T. 238; 49 W. R. 91—C.A.

7. INDUCING BREACH OF CONTRACT.

Strike — Principal and Agent — Powers of Branch Officials—Excess of Authority in Branches — Ratification.—Officials of an association are not agents thereof in respect of acts which in the rules are expressly excluded from their powers, and the association cannot be made liable to damages for such acts. *Denaby and Cadeby Main Collieries v. Yorkshire Miners' Association*, 75 L. J. K.B. 961; [1906] A.C. 334; 95 L. T. 561; 22 T. L. R. 543—H.L. (E.)

Branch officials of the respondent association induced men to break their contracts with the appellants and go out on strike. The terms upon which branches of the association were authorised to strike were defined in the rules, and had not been observed, and the governing body of the association expressed disapproval of the strike:—*Held*, that the officials were not agents of the association in procuring the breach of contract, and that the association was not liable for such breach. *Id.*

Held also, that the association was not liable to the appellants for payments made in aid of the strikers, although such payments were unlawful by the rules, and constituted a breach of trust as between the association and its members. *Id.* And see *CONTRACT*, col. 537; and *MALICIOUS PROCEEDING*, col. 1445.

Order on Officer to Pay Money—Committal.—*See JUSTICE OF THE PEACE.*

8. PICKETING.

Watching or Besetting — Picketing.—The defendants stationed pickets to watch the plaintiffs' printing works for the purpose of inducing the workmen employed by the plaintiffs to join the union, and then to determine their employment by proper notices, the object being to compel the plaintiffs to become employers of union men and to abstain from employing non-union men. There was no evidence that the pickets invited the men to break their contracts. This was carried out without causing by violence, obstruction, or otherwise a common law nuisance:—*Held*, that this was not an offence within section 7, sub-section 4 of the Conspiracy and Protection of Property Act, 1875, and an action would not lie in respect thereof. *Per VAUGHAN WILLIAMS, L.J.*, and *FLETCHER MOULTON, L.J.*—The object of section 7 is to give, in respect of certain specified classes of acts, for which there was previously a civil remedy, a criminal remedy by summary proceedings before Justices. *Ward, Lock & Co. v. Operative Printers' Assistants Society*, 22 T. L. R. 327—C.A.

— **Maliciously Inducing Persons not to Enter into Contracts.**—Although it is not illegal for the officers of a trade union to prevent a sub-manufacturer from working for a manufacturer by withdrawing the sub-manufacturer's workmen from his employ, it is illegal for such officers to watch or beset the sub-manufacturer's premises for the purpose of persuading or otherwise preventing him from so working, or for any purpose except merely to obtain or communicate information. *Allen v. Flood* (67 L. J. Q.B. 119; [1898] A.C. 1) considered and applied. *Lyons v. Wilkins*, 67 L. J. Ch. 383; 78 L. T. 618; 46 W. R. 461—Byrne, J.

Trade Union Sued as a Society—Application of Society's Funds towards Furtherance of Illegal Objects—Injunction.—Where an injunction is sought to prevent such a wrong, the trade union society in its capacity as a registered society is not properly made a defendant. The Court refused to grant an injunction against the trustees of such a society restraining them from applying the society's funds for such illegal purposes. *Id.* And see *CRIMINAL LAW*, cols. 626-628; *MALICIOUS PROCEEDING*, col. 1445.

9. LIBEL.

Liability of Trustees of Union for—Newspaper Carried on in Interest of Members—Right of Indemnity—Action brought against Trustees so as to bind Funds of Union.—The trustees of a trade union, appointed as provided by the Trade Union Act, 1871, are entitled to be indemnified

out of the funds of the union in respect of a liability incurred by them by reason of a libel contained in a newspaper, of which as such trustees they are registered proprietors and which is carried on in the interests of the members of the trade union. Therefore, in an action brought against them for a libel contained in the newspaper, the trustees can be sued in their capacity of trustees so as to bind the funds of the trade union. *Linaker v. Pilcher*, 70 L. J. K.B. 396; 84 L. T. 421; 49 W. R. 413—Mathew, J.

10. PREVENTING WORKMAN OBTAINING EMPLOYMENT.

Liability of Union for Acts of Officers—Conspiracy.—Two or more persons, who have special power by virtue of their position (for example, as officers of a trade union) to carry out their design, commit an actionable wrong, and will be liable in damages, if they combine to prevent and in fact prevent a workman from obtaining employment in his trade or calling because they wish to compel him to pay a debt lawfully due from him. *Giblan v. National Amalgamated Labourers' Union*, 72 L. J. K.B. 907; [1903] 2 K.B. 600; 89 L. T. 886—C.A.

If the persons so acting are servants or agents of a trade union and commit the acts complained of in the service of the trade union, which is a creditor of the workman and approves of and takes the benefit of their acts, the trade union itself will also be liable in damages to the injured workman for the acts of its servants. *Ib.*

Per ROMER, L.J.—It is not essential to the plaintiff in order to succeed that he should establish that there was a combination of two or more persons to do the acts complained of. A single person wrongfully preventing a man from obtaining or holding employment will be liable for the damage suffered. *Ib.*

Quinn v. Teatlem (70 L. J. P.C. 76; [1901] A.C. 495), *Barwick v. English Joint Stock Bank* (36 L. J. Ex. 147; L. R. 2 Ex. 259), and *Taff Vale Railway v. Amalgamated Society of Railway Servants* (70 L. J. K.B. 905; [1901] A.C. 426) followed. *Ib.* And see col. 1445.

11. ACTION AGAINST.

A trade union registered under the Trade Union Act, 1871, may be sued in its registered name. *Taff Vale Railway v. Amalgamated Society of Railway Servants*, 70 L. J. K.B. 905; [1901] A.C. 426; 85 L. T. 147; 50 W. R. 44; 65 J. P. 596—H.L. (E.) But see now the Trade Unions Act, 1906 (6 Edw. 7, c. 46).

12. DISSOLUTION.

Distribution of Fund Accumulated from Subscriptions—Resulting Trust.—Where a trade union, the rules of which provide for the payment of strike or lock-out pay to continuing members, but contain no provision for the distribution of the funds accumulated from the subscriptions of members, is dissolved, the funds so accumulated are to be distributed

amongst those who were members at the date of dissolution in the proportion in which they have subscribed thereto. *Printers and Transferrers Society, In re; Challinor v. Maskery*, 68 L. J. Ch. 537; [1899] 2 Ch. 134; 47 W. R. 619—Byrne, J.

Deductions for Fines, Forfeitures, or Payments.—With a view to save expense, trouble, and delay, an account of the sums due from or received by sharing members, on account of fines, forfeitures, or strike or lock-out pay, was not directed. *Ib.*

TRAMWAY.

1. *Construction*, 2560.
2. *Maintenance and Repair*, 2562.
3. *By-laws*, 2564.
4. *Passengers*, 2565.
5. *Advertisements*, 2565.
6. *Obstruction of Traffic*, 2566.
7. *Rights of other Companies*, 2566.
8. *Purchase of Undertaking*, 2567.
9. *Other Matters*, 2569.

1. CONSTRUCTION.

Breaking-up Streets—Electricity—Connecting Tramway with Generating Station by Cables—Generating Station not Property of Tramway Company and Situate Outside District of Local Authority.—By section 27 of the London United Tramways Act, 1901, "the company may execute all such works on or in connection with the tramways and in over or under the streets roads or bridges in or over which the same are laid as may be necessary or expedient for working the tramways by mechanical power as aforesaid and may lay down construct erect and maintain on in under or over the surface or bed of any street road footway bridge river or place and may with the consent in writing of the owner and occupier of any house or building attach to such house or building such posts conductors wires tubes mains plates cables boxes and apparatus and may make and maintain such openings and ways in on or under any such surface or bed as may be necessary or convenient either for the working of the tramways or for connecting any portions of the tramways or for providing access to or forming connections with any generating station or other stations engines machinery or apparatus . . .":—*Held*, that the second part of the section was in general terms, and that it authorised the company where "necessary and convenient" to break up streets in an intervening district for the purpose of laying cables to connect their tram system with an electric generating station situate outside the district in which the company were authorised to lay tramways, and to do so notwithstanding that the generating station was not their property but belonged to an independent company. *Wandsworth Borough v. London United Tramways* (1901), *Lim.*, 3 L. G. R. 836; 69 J. P. 340; 21 T. L. R. 529—Warrington, J.

— **Footpaths.**—By a provisional order,
44—2

duly confirmed, a tramway company was empowered to "maintain on any street or road in which any of the tramways may be laid such posts and overhead electric wires as may be necessary and proper for working such tramway by electrical power":—*Held*, that this did not empower the company to break up the footpaths in the streets and lay thereunder electric feeders for the purpose of their tramways. *Hyde Corporation v. Oldham, Ashton, and Hyde Electric Tramway*, 64 J. P. 596—C.A.

"Works" — "Substantially commenced" — Evidence of Non-commencement.—Section 18 of the Tramways Act, 1870, provides that if within one year from the date of any provisional order under the Act to make a tramway "the works are not substantially commenced . . . the powers given by the Provisional Order to the promoters for constructing such tramway, executing such works, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the same as is then completed, unless the time be prolonged by the special direction of the Board of Trade. . . A notice purporting to be published by the Board of Trade in the *London . . . Gazette* to the effect that . . . the works have not been substantially commenced . . . shall be conclusive evidence for the purposes of this section of such . . . non-commencement . . .":—*Held*, first, that the notice of the Board of Trade was not the exclusive or only evidence of the non-commencement of the works which the Court could receive. *Dudley and Kingswinford Tramways Co., In re* (63 L. J. Ch. 108), disapproved. *Att.-Gen. v. Bournemouth Corporation*, 71 L. J. Ch. 730; [1902] 2 Ch. 714; 87 L. T. 252; 51 W. R. 129—C.A.

Held, secondly, that "the works" in this connection meant physical works, and did not include steps taken towards the carrying out of the undertaking; and consequently, where the promoters had within the year purchased land for a generating station, but had commenced no work upon it, and had entered into contracts for the supply of dynamos and electric plant and cars for the purpose of the tramway, but nothing was done under the contracts within the year, the works had not been "substantially commenced" within the year within the meaning of section 18. *Ib.*

Buildings, &c., Suitable to and Used for Purpose of Undertaking.—A local authority which had served notice under section 43 of the Tramways Act, 1870, requiring the tramway company to sell the tramway lines within the area of the local authority were *held* bound to purchase a certain dépôt within the area, as being suitable to and used for the purpose of the undertaking within the meaning of section 43, although in certain previous proceedings the particular dépôt had been held to be suitable for the purposes of the undertaking in other areas. *Manchester Carriage and Tramways Co. v. Ashton-under-Lyne Corporation*, 68 J. P. 576—Bigham, J.

Valuation of Undertaking—Costs of Obtaining Parliamentary Powers—Costs of Opposing Bills.—In valuing a tramway undertaking, the sale of which is required by a local authority under section 43 of the Tramways Act, 1870, regard

must be had to the Parliamentary costs and expenses incurred by the company in obtaining the right to construct and work the undertaking, but costs incurred by the company in opposing in Parliament applications for powers by rival companies cannot be taken into account in determining the value of the undertaking. *Ib.*

Alteration of Position of Pipes and Wires.—Section 30 of the Tramways Act, 1870, which empowers the promoters of a tramway undertaking to which the section applies, for the purpose of making, forming, laying down, maintaining, repairing, or renewing a tramway, where it is necessary, or appears expedient for the purpose of preventing frequent interruption of the traffic by repairs or works in connection with the same, to alter the position of gas mains, telegraphic wires, &c., is not confined to cases where the object of the alteration is to prevent interruption of traffic, but applies where the alteration is necessary to allow of the construction, &c., of the tramway. The powers of the section are not confined to alterations of pipes and apparatus in the road in which the tramway is authorised to be laid, nor to pipes, &c., within the promoters' limits of deviation; and the section by implication gives the promoters the power of entering on private land necessary to enable them to carry out the alterations it authorises. *Semble* (per BUCKLEY, L.J.), that overhead wires crossing a road, and supported by posts not standing in the road, are wires laid in the road within the meaning of subsection 1 of the section. *Rhondda Urban Council and Taff Vale Railway, In re* (No. 2), 97 L. T. 892; 72 J. P. 44; 6 L. G. R. 131—C.A.

Quere, whether in case of dispute between the promoters and the owners of the apparatus proposed to be altered under the section, the arbitrator to whom the dispute is referred under the section has power to award that the work shall be carried out by such owners at the expense of the promoters. *Ib.*

Reconstruction of Bridge—Adaptation for Use by Electric Tramway.—The plaintiffs sought to restrain the defendants from interfering with the structure of a bridge over the Regent's Canal:—*Held*, that the defendants had power under section 6 of the London County Tramways (Electrical Power) Act, 1900, to reconstruct the bridge as part of the work necessary to adapt the road passing over the bridge for use by tramways propelled by electricity, and that any question arising between the plaintiffs and the defendants must be determined by arbitration under section 33 of the Tramways Act, 1870. *Regent's Canal Co. v. London County Council*, 71 J. P. 201; 5 L. G. R. 956—Swinfen Eady, J.

Power to Obstruct Highway during Construction.—*See* WAY.

2. MAINTENANCE AND REPAIR.

Liability of Company to Keep Roadway in Proper Condition.—Under section 28 of the Tramways Act, 1870, a tramway company are bound not only to maintain and repair the part of the road for which they are responsible, but also to keep it in a proper condition for traffic. Where

an accident occurred in consequence of a tramway company having neglected to sand the road in slippery weather,—*Held*, that they were liable for the consequent damages. *Dublin United Tramways Co. v. Fitzgerald*, 72 L. J. P.C. 52; [1903] A. C. 99; 87 L. T. 532; 51 W. R. 321; 1 L. G. R. 386; 67 J. P. 229—H.L. (Ir.)

Contract—Obligations of City and Company under Contract.]—Under a contract between appellants and the respondents the latter were bound “under instructions from the city” to “keep their track free from ice and snow”.—*Held*, that the company was not bound “also to remove or cause to be removed from the streets and convey elsewhere the snow which is so cleared from its tracks.” *Ogston v. Aberdeen District Tramways* (66 L. J. P.C. 1; [1897] A.C. 111) distinguished. *Montreal City v. Montreal Street Railway*, 72 L. J. P.C. 119; [1903] A.C. 482; 89 L. T. 30—P.C.

The appellants also granted to the company “all licenses rights and privileges necessary for the proper and efficient use by electric power to operate cars . . . in the manner successfully in use elsewhere”.—*Held*, that the city was not at liberty to prohibit the company from using electric sweepers which had been found successful in other cities. *Ib.*

— Transfer of Liability for Non-repair.]—Where a tramway company enters into a contract with the local authority under the Tramways Act, 1870, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability of the tramway company under section 28 of the Act for damage caused by the non-repair of that part of the road is transferred to the road authority. *Barnett v. Poplar Borough*, 70 L. J. K.B. 698; [1901] 2 K.B. 319; 84 L. T. 845; 49 W. R. 574—D.

“Junction” between Pavement Maintained by Tramway Company and Surface Maintained by Local Authority.]—Section 57 of the Norwich Electric Tramways Act, 1897, providing that if the tramway company, by that Act authorised to carry on a tramway undertaking in the city of Norwich, fail to maintain, *inter alia*, “(5) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation,” the corporation may, after notice, execute the necessary work and recover the expense from the company, does not merely provide machinery for enforcing obligations imposed on the company *aliunde*, but, at any rate, as regards the “junction” referred to in sub-section 5, imposes an additional obligation on the company. *Norwich Corporation and Norwich Electric Tramway Co., In re*, 97 L. T. 911; 72 J. P. 50; 6 L. G. R. 101—Bray, J.

The obligation of the company as regards such “junction” under section 57 extends to remedying the inconvenience to traffic due, in streets where the portion of the roadway maintained by the company is laid with granite setts and the rest of the roadway is paved with macadam, to the formation of a ridge in consequence of the circumstance that the macadam wears down faster than the setts, whether such

ridge forms precisely along the line where the two forms of pavement meet or a few inches away from that line. *Ib.*

— By the Norwich Electric Tramways Act, 1897, the defendant company were to maintain and keep in good condition “the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation”.—*Held*, that the word “junction” could not only mean the mere point or place where the two surfaces met, but that the defendant company had to maintain the even contour of the road at the junction of the two surfaces. *Norwich Corporation v. Norwich Electric Tramways Co.*, 91 L. T. 558—Phillimore, J.

Private Act—Incorporation of General Act—Reference of Matter in Dispute—Ouster of Jurisdiction.]—The Norwich Electric Tramways Act, 1897, provided by section 57, sub-section 5, that “if the company fail to maintain and keep in good condition to the satisfaction of the corporation . . . (5) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation may if they think fit themselves at any time after seven days’ notice to the company do the work necessary for the repair and maintenance of the road and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of five per centum on such expense.” The Tramways Act, 1870, provided by section 22 for the incorporation of Parts II. and III. of that Act with any Provisional Order or Act of Parliament authorising a tramway, and by section 33 that any difference between the promoters and any local authority or road authority with respect to, *inter alia*, the propriety of or mode of execution of any work relating to any tramway, or the question whether any work is such as ought reasonably to satisfy the said authority, should (unless otherwise provided by that Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade. The company having failed to maintain and keep in good condition to the satisfaction of the Norwich Corporation the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the latter brought an action against the company claiming 53*l.* 13*s.* 10*d.* in respect of expenses incurred in the repair and maintenance of certain roads, and for a declaration of their rights under sub-section 5 of section 57 of the Norwich Electric Tramways Act, 1897:—*Held*, that the action must be dismissed, inasmuch as the jurisdiction of the Court was ousted by section 33 of the Tramways Act, 1870, and that the objection to the jurisdiction was not taken too late in the Court of Appeal though not pleaded or taken in the Court of first instance. *Norwich Corporation v. Norwich Electric Tramways Co.*, 75 L. J. K.B. 636; [1906] 2 K.B. 119; 95 L. T. 12; 54 W. R. 572; 70 J. P. 401; 4 L. G. R. 1114; 22 T. L. R. 553—C.A.

3. BY-LAWS.

Delivery of Tickets to Inspector—Passenger’s Refusal.]—The appellant, a passenger, in a

tramway-car run by a local authority under statutory powers, paid his fare, but declined to accept a ticket upon the ground that it bore an indorsement purporting to limit the liability of the local authority in cases of accident or injury to passengers, and allowed it to fall on the floor of the car; and when the ticket inspector asked him for it, pointed it out, but refused to touch it or pick it up, or to pay his fare a second time:—*Held*, that the appellant could not be convicted under a by-law of the local authority requiring each passenger to deliver up his ticket when requested, or in case of failure to produce the ticket to pay the fare for the distance travelled by him. *Wilson v. Fearnley*, 92 L. T. 647; 3 L. G. R. 470; 69 J. P. 165—D.

— Inadvertent Loss of Ticket by Passenger.]

—A passenger on a tramcar who had paid his fare, but lost the ticket given him in exchange, was, in the course of the journey, called upon by a ticket inspector to produce his ticket, pay his fare, or leave the car, but not, in so many words, to “deliver up his ticket or pay his fare”:—*Held*, that by his refusal to comply with the inspector's request the passenger had infringed a by-law of the tramway company providing that “each passenger shall show his ticket (if any) when required to do so to the conductor, or any duly authorised servant of the company, and shall also, when required to do so, either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger.” *Hunt v. Green*, 96 L. T. 23; 5 L. G. R. 67; 71 J. P. 18; 23 T. L. R. 19; 21 Cox C.C. 333—D.

By-law.—See LOCAL GOVERNMENT (BY-LAWS), col. 1415.

4. PASSENGERS.

Right of Passenger to Perform Journey on Successive Cars—Determination of Contract.]

The respondent, who was a passenger on a tramcar, paid for and obtained a ticket which entitled him to travel to a certain destination. He alighted at a stopping place short of that destination, and, having walked some distance, boarded another tramcar travelling to the same place to which he would have been entitled to go under the original ticket. The conductor demanded from him the legal fare for the journey, but the respondent refused to pay it, contending that, having already paid for and obtained a ticket, he was entitled to complete the journey by another tramcar:—*Held*, that the respondent had, by alighting from the first tramcar and allowing it to proceed, determined the contract of carriage, and that he was not entitled to travel on the second tramcar without paying the legal fare. *Bastable v. Metcalfe*, 75 L. J. K.B. 670; [1906] 2 K.B. 288; 70 J. P. 843; 4 L. G. R. 1073—D.

5. ADVERTISEMENTS.

Rents Payable in Respect of each “regular running” Car—Cars withdrawn for Re-painting or Repairing.]—By an agreement between advertising contractors and the Corporation of S. it was provided that the corporation should permit the contractors to have during a term of five years the exclusive privilege and right of

fixing advertisements upon all the electric tramcars, trailer cars, and omnibuses then belonging to the corporation. The contractors were to pay to the corporation specified annual rents for each and every regular running electric tramcar, trailer car, and omnibus, such rents to be payable in advance quarterly upon the usual quarter days. The corporation reserved the right to discontinue the use of any of the cars and omnibuses then running and to substitute new ones; and the contractors were at their own expense to remove all advertisements from any vehicles which the corporation might direct to be re-painted or repaired, and to reinstate such advertisements after the completion of such re-painting or repairing, and the contractors were not to be entitled to any compensation in respect thereof. The rents were paid during the whole period of the five years. The contractors contended that they were not liable to pay rent in respect of a vehicle while it was not running, and brought an action against the corporation for an account of the number of regular running vehicles from time to time and of the moneys paid by the plaintiffs to the defendants:—*Held*, that “regular running” cars meant cars which at the beginning of the year were such in the sense that they were part of the regular effective rolling stock of the undertaking to be used during the year, and that a car was not the less a “regular running car” because it was sometimes withdrawn for the purpose of being re-painted or repaired. *Griffiths & Millington v. Southampton Corporation*, 4 L. G. R. 316; 70 J. P. 179; 22 T. L. R. 301—Buckley, J.

6. OBSTRUCTION OF TRAFFIC.

Single Tram-line—No Room for Vehicle to Pass on Near Side—Wilful Obstruction.]

Semble, In the case of a single tram-line which in parts of its route passes so near the kerb that there is no room for an ordinary vehicle to pass on its proper side, the drivers of both ordinary vehicles and tram-cars must act reasonably—drivers of ordinary vehicles, on the one hand, having no absolute right to insist upon keeping to their proper side at that particular part of the line, and thus put all tram-cars to great inconvenience; and tram-car drivers, on the other hand, having no absolute right to insist upon all other vehicles getting out of their way at whatever inconvenience. *Hartley v. Chadwick*, 63 J. P. 512—D.

7. RIGHTS OF OTHER COMPANIES.

Gas Company—Notice of Intention to Lay Tramways—Counter-notice to Alter Gas Mains—Time for Delivering Counter-notice—Arbitration.]

—Where a tramway company whose special Act incorporated the Tramways Act, 1870, have given seven days' notice under section 30 of the latter Act to a gas company of their intention to lay down their tramways in certain streets in which the gas company's mains are situated, and have also delivered a plan and section of the proposed work, the gas company are not bound to give, within seven days from the date of service of such notice upon them, their counter-notice under the same section (requiring the tramway company to alter the

position of the gas mains) in order to entitle themselves to proceed to arbitration in respect of any difference between the two companies as to the necessity for the alteration. *Hastings Tramways Co. v. Hastings and St. Leonards Gas Co.*, 76 L. J. Ch. 60; [1906] 2 Ch. 578; 95 L. T. 684; 70 J. P. 540; 5 L. G. R. 142; 23 T. L. R. 4—C.A.

Although section 30 does not expressly fix the time for giving the counter-notice, it does impose a certain limit of time by reason of the reference to the construction of the tramway "as proposed," and therefore the time for giving the notice is at an end as soon as the proposal has ripened into execution, but not before. *Ib.*

— **Interference with Gas Mains and Service Pipes—Jurisdiction of Arbitrator.**—An arbitrator appointed to determine a difference arising under section 30 of the Tramways Act, 1870, has jurisdiction to order gas mains already laid down to be lowered, so that any new service pipes might be carried horizontally underneath the concrete bed of the tramway; and he further can order such gas mains to be moved laterally to such a distance as to enable access to be obtained to them without interference with the concrete bed. *Ilford Gas Co. and Ilford Urban Council, In re*, 88 L. T. 236; 67 J. P. 239; 1 L. G. R. 213—D.

Telephone Company—Power to Take up Streets—Licence of Postmaster-General—Consent of Tramway Company.—The Postmaster-General and his licensees have power to lay telegraph or telephone wires in that part of a public street or road which a tramway company is liable to repair, without obtaining the consent of the tramway company, under section 13 of the Telegraph Act, 1863. *Bristol Tramways and Carriage Co. v. National Telephone Co.*, 68 L. J. Ch. 566; [1899] 2 Ch. 282; 80 L. T. 836; 63 J. P. 583—North, J.

8. PURCHASE OF UNDERTAKING.

Notice to Purchase—Right to Possession—Injunction.—A tramway had been worked by a tramway company as a horse tramway. The tramway within the city of M. belonged to the corporation, but had been leased to the company until November 30, 1902. The tramway outside the city belonged to the company. The local authority gave notice to purchase under section 43 of the Tramways Act, 1870, and the amount of the purchase-money was to be ascertained by arbitration. The arbitrator made his award in the form of a Special Case, awarding different amounts. If the local authority was compelled to purchase the whole plant and stock of the company a much larger amount was payable than if the local authority was only bound to take over a proportion of the stock and plant bearing the same proportion to the whole stock and plant of the company that the tramway without the city bore to the whole tramway the company formerly worked. The local authority claimed to be entitled to take possession of the line of the company before the purchase-money had been finally ascertained:—*Held*, that, even if there had been a concluded agreement, it was impossible to say that property contracted to be sold could be treated as sold without payment of the purchase-money,

and that an injunction must be granted restraining the defendants from taking or retaining possession of the plaintiffs' property. *Manchester Tramways Co. v. Manchester Corporation*, 87 L. T. 678—Swinfen Eady, J.

Arbitration—Computation of Price—Value of Tramway—Cost of Widening Streets.—A tramway company, in pursuance of statutory powers had laid its tramway through certain narrow streets. The local authority, under section 43 of the Tramways Act, 1870, gave notice to the company requiring the company to sell their undertaking to the local authority at the then value of the tramway and its appurtenances. In the meantime, between the incorporation of the company and the notice given by the local authority, it had become the practice of Parliament, in granting statutory powers to undertakers to lay tramways in narrow streets, to impose upon them the condition that they should contribute towards the cost of widening narrow streets:—*Held*, that in assessing the value of the tramway and its appurtenances under that section, the amount which the company, if constructing its tramway at the date of the notice to purchase, would have been required to contribute towards the cost of widening streets was not to be taken into account. *London, Deptford, and Greenwich Tramways Co. and London County Council, In re*, 74 L. J. K.B. 143; [1905] 1 K.B. 316; 92 L. T. 124; 53 W. R. 411; 69 J. P. 98; 3 L. G. R. 103; 21 T. L. R. 177—Bray, J.

Purchase by Local Authority under Tramways Act, 1870, or Earlier Local Act—Basis of Valuation.—The S. Street Tramways were constructed in pursuance of their private Act in 1877 (40 & 41 Vict. c. cxxi.), and by that Act the provisions of section 43 of the Tramways Act, 1870, were incorporated. By the Southampton Corporation Tramways Act, 1897, the corporation were to purchase the undertaking of the company, and in case of dispute the price was to be settled by arbitration under the provisions of the Lands Clauses Act. And by section 2 of the same Act "the undertaking of the company means the undertaking, works, lands, easements, plant, fixed and movable stock-in-trade, buildings, equipment, rights, powers, privileges, and authorities of the company, including the right to demand and take and recover tolls, rents, and charges":—*Held*, that in determining the price to be paid under the Act of 1897 the umpire should treat the undertaking of the company as defined by that Act as an undertaking which the company only enjoyed subject to the contingency of being compelled to part therewith under the terms of section 43 of the Tramways Act, 1870, and not as an undertaking which the company enjoyed free from all obligation to part therewith otherwise than under the terms of the Act of 1897 itself. *Southampton Tramways Co. and Southampton Corporation, In re*, 80 L. T. 236—D. Affirmed, 63 J. P. 788; 81 L. T. 652—C.A.

— **Tramways within District—Land and Works outside District.**—On the true construction of section 43 of the Tramways Act, 1870, the local authority purchasing a tramway within a district must pay for lands, buildings, &c., which are suitable to and used for the purposes of the undertaking within the district, even

though such lands, buildings, &c., be outside the district. *Manchester Carriage and Tramways Co. v. Swinton and Pendlebury Urban Council*, 75 L. J. K.B. 839; [1906] A.C. 277; 93 L. T. 821; 70 J. P. 81; 4 L. G. R. 214; 22 T. L. R. 154—F.L. (E.).

— **Purchaser of Part**—“Lands, buildings, works, materials, and plant suitable to and used” for Undertaking.]—By section 43 of the Tramways Act, 1870, a local authority is empowered under certain circumstances to purchase compulsorily the tramways within its district “upon terms of paying the then value . . . of the tramways and all lands, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district.” Where part of the tramways within a local authority’s district already belonged to the authority, but were worked by the promoters of the rest of the tramways within the district jointly with such promoters’ part, on the local authority purchasing the promoters’ part it is bound under section 43 to take all the lands, works, materials, and plant used by the promoters for the joint working of the whole system as “lands, works, materials, and plant of the promoters suitable and used by them for the purposes of” the part of the tramways belonging to the promoters. *Manchester Carriage and Tramways Co. and Manchester Corporation, In re*, 87 L. T. 504; 67 J. P. 14—Bigham, J.

— **Tramway on Private Land—Easement.**]—A portion of a tramway belonging to a tramway company ran for some distance over private land and into the company’s car factory. The urban council having purchased the tramway company’s undertaking and “all lands, buildings, works, materials and plant of the company suitable to and used by them for the purposes of their undertaking within [the urban council’s] district,” a referee was appointed to fix the amount payable for such purposes. He found that the car factory was not suitable to and used by the company for the purposes of their undertaking within the district, but he gave a sum in respect of the portion of the permanent way of the tramway which was on private land:—*Held*, that the urban council must pay not merely for the materials of the tramway, but likewise for some easement over the private land; and as that apparently had been included in the amount awarded, the award would not be remitted back. *North Metropolitan Tramways Co. v. Leyton Urban Council*, 71 J. P. 536; 98 L. T. 136; 6 L. G. R. 1—D.

9. OTHER MATTERS.

Power of County Council to run Omnibuses.]—*See* STATUTE, col. 2498.

Power to Act as General Carriers.]—*See Att.-Gen. v. Manchester Corporation*, 75 L. J. Ch. 330; [1906] 1 Ch. 648; 54 W. R. 307; 70 J. P. 201; 4 L. G. R. 365—Farwell, J.

Rating Tramways.]—*See* POOR LAW, col. 1851; LOCAL GOVERNMENT, col. 1422.

Statutory Powers—Ultra Vires.]—*See* CORPORATION, col. 557.

Widening Road—Injurious Affecting.]—*See* LANDS CLAUSES ACT, col. 1265.

TREASON.

See CRIMINAL LAW, col. 647.

TREASURE-TROVE.

See CROWN, col. 663.

TRESPASS.

To Land—Possessor’s Right against Wrongdoer—Taking Goods—Jus Tertii.]—The appellants cut timber on land afterwards licensed to the respondent, and removed the timber after the actual grant of the licence to the respondent, their contention being that the logs having been cut before the commencement of the respondent’s title were not his property, but the property of the Crown:—*Held*, that the appellants were wrongdoers, and that the respondent’s possession was good as against them, and they were not entitled to set up a *jus tertii* against the respondent. *The Winkfield* (71 L. J. P. 21; [1902] P. 42) approved. *Glenwood Lumber Co. v. Phillips*, 73 L. J. P.C. 62; [1904] A.C. 405; 90 L. T. 741; 20 T. L. R. 531—P.C.

Laying Tramway without Requisite Consents—Damages.]—A company had statutory power to lay a second line of tramway on obtaining certain consents. Without obtaining such consent they laid the rails:—*Held*, that they were liable for a trespass, and that as damages they were liable in any event for the cost of restoring the road. *Bideford Urban Council v. Bideford Railway*, 68 J. P. 123—Farwell, J.

Father and Son—Parental Obligations—Injunction.]—A son, aged thirty-five, strong in body, and by education capable of earning his living, insisted on visiting his father’s house and staying there contrary to his father’s wishes. The father was willing to maintain him elsewhere. In an action brought by the father against the son for an injunction restraining the son from entering or remaining, &c.,—*Held*, that a case for granting an injunction had not been made out; it was inadvisable to put it in the power of a father to get his son committed to prison for coming to visit him. Observations on the duties of parents to children. *Waterhouse v. Waterhouse*, 94 L. T. 133; 22 T. L. R. 195—Buckley, J.

Measure of Damages—Local Authority.]—In an action against a local authority for damages for trespass committed under circumstances of aggravation it is a misdirection, in respect of which a new trial may be ordered, to tell the jury that the damages should be measured by the out-of-pocket expenses to which the plaintiff was put. *Davis v. Bromley Urban Council*, 1 L. G. R. 668; 67 J. P. 275—C.A.

Measure of Damages—Injury to Chattel—Collision.]—The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequent thereon. *The Mediana*, 69 L. J. P. 35;

[1900] A.C. 113; 82 L. T. 95; 48 W. R. 398; 9 Asp. M.C. 41—H.L. (E.)

Game—In Pursuit of.]—See GAME, col. 890.

Highway, to.]—See WAY.

Overhanging Tree.]—See NUISANCE, col. 1760.

Person, to—False Imprisonment.]—See MALICIOUS PROCEEDING AND FALSE IMPRISONMENT, col. 1446.

TROVER.

Conversion — Non-negotiable Instrument — Estoppel—Negligence.]—Where a signed form of order for delivery of goods, in which the number of parcels to be delivered is left blank, has been entrusted by those entitled to them to a third person, who is at the same time authorised to fill it up by inserting a given number of parcels, warehouse keepers are justified in delivering the whole number of parcels appearing on the face of the order, and are not liable in trover, notwithstanding that such third person's authority was limited to a less number of parcels than the actual number he inserted, and that he had fraudulently exceeded his authority by inserting a greater number. *Union Credit Bank v. Mersey Docks and Harbour Board*, 68 L. J. Q.B. 842; [1899] 2 Q.B. 205; 81 L. T. 44—Bigham, J.

Secus where the signed form of order was duly filled up with a certain number of parcels to be delivered before it was entrusted to such person, and he, fraudulently taking advantage of a blank space in the form immediately above the signature of those who entrusted him, has inserted an additional number of parcels. *Ib.*

Where such third person to secure an advance from his bankers, who act in good faith, transfers the goods, the subject of his fraudulent insertion in the delivery order, into their names in the warehouse keepers' books, and, having subsequently paid off the advance, procures a delivery order from his bankers addressed to the warehouse keepers, by means of which he obtains actual possession of the goods and makes away with them, the constructive possession of the goods by the bankers during the period they are so pledged is not a conversion, nor does it render them liable to an action in trover. *Young v. Grote* (5 L. J. (o.s.) C.P. 165; 4 Bing. 253) considered. *Ib.*

Stolen Goods—In Possession of Police—Acquittal of Person Charged—Demand by True Owner—Delivery by Police to Other than True Owner.]—When a subordinate police officer having the possession of stolen goods, after a demand by the true owner for their delivery to him, delivers the same to a person other than the true owner, he is liable in trover, although he acted upon the orders of a superior officer. A bought a gig. It was stolen from him, and afterwards found by the police in the possession of B. B was indicted for larceny of the gig and acquitted. B on his acquittal wrote to the police officer in possession of the gig demanding delivery of it to him, and A afterwards by letter and personally applied for its

delivery over to him. The police officer, acting on the instruction of his superior officer, after giving notice to A of his intention to do so, delivered the gig to B as the person from whom it had been taken by the police:—*Held*, that the police officer so delivering it was liable in trover to A, who was found to be the true owner of the gig. *Hollins v. Fowler* (L. R. 7 H.L. 757) and *Stephens v. Elwall* (4 M. & S. 259) followed. *Winter v. Bancks*, 84 L. T. 504; 49 W. R. 574; 65 J. P. 468; 19 Cox C.C. 687—D.

Pledge—Knowledge of Pawnor—Statute of Limitations—Action against Executor.]—In September, 1889, the plaintiff pledged a piano with the husband of the defendant. The same year he converted it to the knowledge of the plaintiff. In March, 1897, he died, and the plaintiff then tendered the money to the present defendant, his executrix and widow, and demanded the return of the piano:—*Held*, that the defendant could not be liable, and that, as she never had possession of or any property in the piano, no action of conversion would lie against her. *Hinchcliffe v. Sharpe*, 77 L. T. 714—D.

Letter—Publication of Letter by Stranger—Wrongful Act—Claim by Receiver of Letter for Damages for Conversion—Measure of.]—The defendant wrongfully communicated to another person a letter which had been written by a third person to the plaintiff and which had got into the defendant's possession, and the plaintiff brought an action to recover damages for the detention and conversion of the letter:—*Held*, that the plaintiff could recover substantial damages, and not merely the value of the thing converted. *Thurston v. Charles*, 21 T. L. R. 659—Walton, J.

Conditional Order for Payment of Money—Damages—Money Had and Received—Negligence.]—The owner of a conditional order in writing for the payment of money may recover the amount realised by its conversion as money had and received; and, *semble*, the measure of damages for its conversion may be the face value of the document. *Bavins v. London and South-Western Bank*, 69 L. J. Q.B. 164; [1900] 1 Q.B. 270; 81 L. T. 655; 48 W. R. 211; 5 Com. Cas. 1—C.A.

The plaintiffs were the owners of an order in writing for payment of 69l. 7s., provided that a receipt form at the foot thereof was duly signed. This receipt form was never duly signed. The order was stolen from the plaintiffs, and was negligently received by certain bankers for collection. The amount was collected by the bankers and credited to a customer in a running account:—*Held*, that the plaintiffs could recover from the bankers the 69l. 7s. as money had and received. *Quere*, whether, alternatively, as damages in trover. *Ib.*

Waiver of Tort—Election—Joint Tort-feasors—Compromise with One—Reservation of Rights against the Other.]—An agent wrongfully sold his principal's goods to a purchaser and paid the proceeds into his account at a bank. The principal issued one writ against the agent and the bank, claiming—first, against the agent damages for conversion, and alternatively a sum of 1,500l. standing to the agent's credit at

the bank as money had and received, and an injunction to restrain him from dealing with that sum; and secondly, against the bank payment of the 1,500*l.* and an injunction to restrain the bank from parting with that sum. He then filed an affidavit stating his belief that the 1,500*l.* represented the proceeds of the sale of part of the goods, upon which he obtained an interim injunction restraining the agent and the bank from dealing or parting with the 1,500*l.* until the trial of the action. The purchaser of the goods bought them knowing that the agent was improperly dealing with them. The principal issued another writ against him for conversion, claiming 5,000*l.* damages. He then compromised the action against the agent and the bank, receiving part of the 1,500*l.* in full settlement of all claims against the agent, but reserving all rights against the purchaser:—*Held*, that the proceedings against the agent and the bank did not constitute a conclusive election by the principal to waive the tort, but that he could proceed in his action against the purchaser and recover such damage as he had sustained after giving credit for what he had recovered from the agent and the bank. *Morris v. Robinson* (3 B. & C. 196; 5 Dowl. & Ry. 34) and *Burn v. Morris* (3 L. J. Ex. 193; 4 Tyrw. 485; 2 Cr. & M. 579) followed. *Rice v. Reed*, 69 L. J. Q.B. 33; [1900] 1 Q.B. 54; 81 L. T. 410—C.A.

TRUCK ACT.

See MASTER AND SERVANT, col. 1475.

TRUST AND TRUSTEE.

1. *Statute*, 2574.
2. *Creation of Trust*, 2574.
3. *Classes of Trusts*, 2576.
 - (a) *Secret Trust*, 2576.
 - (b) *Constructive Trust*, 2576.
 - (c) *Precatory Trust*. See WILL.
 - (d) *Resulting Trust*, 2578.
 - (e) *Conditional*, 2579.
4. *Trust Property*, 2579.
5. *Powers and Duties of Trustees*, 2580.
 - (a) *Generally*, 2580.
 - (b) *Investments*, 2584.
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6. *Liability of Trustees*, 2597.
 - (a) *Accounts and Administration*, 2597.
 - (b) *Breach of Trust*, 2599.
 - (c) *Negligence of Trustee*, 2604.
 - (d) *Trustee Buying for Himself*, 2605.
 - (e) *Profit out of Trust*, 2605.
 - (f) *Representation as to Incumbrances*, 2605.
 - (g) *Co-Trustee*, 2606.

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(i) *Relief*, 2607.

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7. *Appointment of New Trustees*, 2611.
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9. *Payment into and out of Court*, 2614.
10. *Remuneration*, 2614.
11. *Costs*, 2615.
12. *Other Matters*, 2616.

1. STATUTE.

63 & 64 Vict. c. 62 is the *Colonial Stock Act*, 1900.

2. CREATION OF TRUST.

Land in Trust—Numerous Allottees—Beneficial Ownership.—The use of the word “trust” is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings. Thus, where lands were granted to an individual to be held in trust for an unascertained and practically unascertainable class of loyal natives, no beneficial ownership is conferred on individual members of such a class. *Te Tiera v. Te Roera Tareha*, 71 L. J. P.C. 11; [1902] A.C. 56; 85 L. T. 558—P.C.

Registered Holder of Shares—Assignment of Beneficial Interest—Calls—Liability of Assignee—Indemnity.—The relation of trustee and *cestui que trust* is established as soon as it is shown that the legal title is in one and the equitable title is in another; and where the only *cestui que trust* is *sui juris* the trustee's right to indemnity by the *cestui que trust* against liabilities incurred by the trustee, as such, is not limited to the trust property, but also imposes on the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee, and the obligation attaches not only where the *cestui que trust* has created the trust, but where he has accepted a transfer of the beneficial ownership with a full knowledge of the facts. *Hardoon v. Belihios*, 70 L. J. P.C. 9; [1901] A.C. 118; 83 L. T. 573; 49 W. R. 209—P.C.

Incomplete Gift—Subscriptions—Testimonial for Past Services.—A number of persons, principally in the county for which B. was M.P., subscribed to present him with a testimonial. The amount subscribed was transferred to treasurers, the present defendants, to be retained by them until a meeting should be held at which a public presentation of the testimonial was to be made to B. Before the meeting took place political differences arose between the subscribers and B., in consequence of which the defendants refused to give B. the amount subscribed:—*Held*, that there was no trust created in favour of B. *O'Brien v. McMeel*, [1898] 1 Ir. R. 366—C.A.

Voluntary Settlement—Realty—Common-law Grant—Covenant for Further Assurance—No Power of Revocation Reserved—Disclaimer of Trustee by Deed—Effect on Settlement—Subsequent Mortgage by Settlor—Marshalling.—Where real estate was in 1866 settled by a voluntary deed operating by way of common-

law grant, and containing a covenant by the settlor for further assurance, but no power of revocation, and the trustee, who had not executed the settlement, in March, 1867, by deed disclaimed the trusts, and the settlor by deed-poll in April, 1867, purported to revoke the settlement, and in 1888 conveyed certain of the estate comprised in the settlement by way of mortgage, and died in 1898, and the mortgage was in 1899 transferred to the executors of his will in trust for his estate, the mortgagee having been paid off out of his assets, it was held that the settlement had been duly constituted, and that the legal estate in the settled realty passed to the trustee and continued in him up to the time of his disclaimer, and that upon such disclaimer the trust created by the settlement was not destroyed, but that the settlor thereupon became the trustee thereof; and further, that, under the doctrine of marshalling, the persons claiming under the settlement were entitled to have the amount of the mortgage thrown primarily on the unsettled estate. *Sheppard's Touchstone* (Preston's Ed.), p. 285, explained. *Jones v. Jones* (9 L. J. N.C. 150; W. N. (1874), p. 190), followed. *Hales v. Cox* (32 Beav. 118) applied. *Mallott v. Wilson*, 72 L. J. Ch. 664; [1903] 2 Ch. 494; 89 L. T. 522—Byrne, J.

Express Trustees — Executors — Statute of Limitations.]—In the absence of special circumstances, executors were not, prior to the Executors Act, 1830, regarded by Courts of equity as express trustees, and the trusteeship created by that Act was not intended to be different in its nature from that which previously existed. *Lacy, In re*; *Royal General Theatrical Fund Association v. Kydd*, 68 L. J. Ch. 488; [1899] 2 Ch. 149; 80 L. T. 706; 47 W. R. 664—Stirling, J.

Where a testator, who died in 1873, gave all his property, which included freeholds and leaseholds, to the trustees of a charity, charged with certain annuities, and appointed an executor, to whom he bequeathed a legacy for his trouble, and the executor read over the will to the testator's heir-at-law and sole next-of-kin, but did not inform him of his rights under the testator's will in respect of the gift to the charity, and subsequently entered into possession and received the income of the real and personal estate on behalf of the trustees of the fund for nearly twenty years, it was held that the claim of the heir-at-law to the freeholds was barred by the Statute of Limitations, and that the executor was not an express trustee for the next-of-kin, and that consequently the title of the latter to the leaseholds was barred by the Law of Property Amendment Act, 1860, s. 13. *Ib.*

Salter v. Cavanagh (1 Dr. & Wal. 668) and *Patrick v. Simpson* (59 L. J. Q.B. 7; 24 Q.B. D. 128) distinguished. *Ib.*

Intended Transfer of Money—Deposit Receipt—Invalid Declaration of Trust.]—On June 15, 1905, O. lodged a sum of 60*l.* on deposit receipt in a branch bank, the receipt being in the following form: "Received from the parish priest of B. the sum of 60*l.* for masses to be accounted for at our office here." On the same day he lodged on deposit receipt in the same

bank in a similar form 50*l.* for the parish priest of B. for repairs and building to church; and he also lodged two sums of 385*l.* each in the joint names of himself and each of two nieces. This was done in consequence of a conversation with the bank manager, during which O. stated that he wished to give the two sums of 50*l.* and 60*l.* for the purposes mentioned, but he did not wish to make a will. Two days after O. drew out the 50*l.* lodged on deposit receipt for repairs to the church and placed the amount to the credit of his current account. On September 21, 1905, O. lodged 100*l.* on deposit receipt in the same bank for the parish priest of B. for repairs and building to church. This was done in consequence of a conversation with the bank manager, at which two other persons were present, in which O. stated that he desired to leave this money to his successor for repairs to the church. This 100*l.* was made up by taking 50*l.* from each of the deposit receipts in favour of the nieces. O. died on November 15, 1905:—*Held*, that as the money on deposit receipt remained in the possession and under the control of O. during his life, the relationship of the bank and O. was that of debtor and creditor and that a valid trust had not been created. *O'Flaherty v. Browne*, [1907] 2 Ir. R. 416—C.A.

Express Trust—Action against Executor to Recover Legacy—Statute of Limitations.]—*See LIMITATIONS, STATUTE OF*, col. 1282. *See also PRINCIPAL AND AGENT*, col. 1959.

3. CLASSES OF TRUSTS.

(a) Secret Trust.

Wishes Confided to Wife.]—A testator left all his property to his wife, resting satisfied that she would faithfully carry out his wishes regarding the same in the interest of their children, the particulars of which she was aware of. The will was witnessed by two of the children. The testator about the same time wrote a letter addressed to his wife, which stated his wishes as to the disposal of the property he had left to her by his will, and contained the following sentence: "I think this disposition is as fair as I can make it, and I hope it will satisfy all; but you, of course, may modify it if you think or find it desirable." Shortly afterwards the testator read out the will and letter in the presence of his wife and children, and she acquiesced in it:—*Held*, that the circumstances were such as make would the letter a binding trust if it were intrinsically capable of creating a trust; but that, by reason of the sentence in question, there was no binding trust. *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193—M.R.

Creation by Will.]—*See WILL.*

(b) Constructive Trust.

Lease of Partnership Premises—Purchase of Freehold Reversion—Trustee.]—The principle of *Keech v. Sandford* (Select Ca. Ch. 61), as extended by *Phillips v. Phillips* (54 L. J. Ch. 943; 29 Ch. D. 673), that a trustee, or person

n a fiduciary position, cannot purchase for his own benefit the freehold reversion expectant on the determination of a lease, being part of the trust property, only applies in the case of leases renewable by contract, or where there is a reasonable expectation that the lease will be renewed. *Randall v. Russell* (3 Mer. 190) and *Longton v. Wilsby* (76 L. T. 470) followed. *Bevan v. Webb*, 74 L. J. Ch. 300; [1905] 1 Ch. 320; 93 L. T. 298; 53 W. R. 651—Warrington, J.

Leasehold Property of Intestate—New Lease Obtained by Next-of-Kin.]—The rule in *Keech v. Sandford* (Select Ca. Ch. 61; 2 Wh. & Tud. L. C. 693) as to the benefit of a renewal lease, does not apply to one of the next-of-kin taking a new lease in his own right after the expiration of a former lease which formed part of an intestate's estate; and in the absence of unfair dealing he is entitled to hold the new lease for his own benefit. *Grace, Ex parte* (1 Bos. & P. 376), *Rauve v. Chichester* (2 Amb. 715), and *Palmer v. Young* (1 Vern. 276) discussed and distinguished. *Biss, In re*; *Biss v. Biss*, 72 L. J. Ch. 473; [1903] 2 Ch. 40; 88 L. T. 403; 51 W. R. 504—C.A.

Per ROMER, L.J.—Where a person renewing a lease does not occupy a fiduciary position, he is only held to be a constructive trustee of the renewed lease if in respect of the old lease he occupied some special position, and owed by virtue of that position a duty towards the other persons interested. *Id.*

Contract to Convey Real Estate—Refusal to Execute Conveyance—Vesting Order.]—A (a Scotch peer) was entitled to the lands of H. in the county of Wexford in fee-simple; he was also entitled, as first heir of entail by Scotch law, to a sum of 80,000*l.*, of which his eldest son B was next heir of entail. This sum of 80,000*l.* represented the balance of the purchase-money of a settled estate in Perthshire, which had just been sold. By agreement in writing dated March 30, 1892, A agreed with B that in consideration of B consenting to disentail the 80,000*l.*, and agreeing that out of that sum the debts of A to the extent of 9,000*l.* should be paid; that an annuity of 1,000*l.* should be secured for the lives of A and his wife and the survivor; that the remainder of a sum necessary to secure portions for younger children should be provided; and that the balance of the fund should be secured for B. A agreed to convey the lands of H. to trustees upon certain trusts with a power of sale. The terms of the agreement had all been carried out, except the conveyance of the H. estate which A refused to execute. An action was brought in the Court of Session in Edinburgh, in which a decree was obtained ordering him to execute the conveyance; but he refused to do so. On an application under section 26 of the Trustee Act, 1893, for an order vesting the H. estate in the trustees of the agreement,—*Held*, that A was a trustee within that section, and that a vesting order should be made. *Rutliven's Trusts, In re*, [1906] 1 Ir. R. 236—C.A.

Tenant for Life—Mortgage—Purchase from Mortgagee—Fiduciary Relation.]—Where a tenant for life in possession of mortgaged

houses purchases the houses from the mortgagee under a power of sale contained in the mortgage, he holds the houses as trustee for the remaindermen and is not entitled to deal with them as his own property. The principle of *Keech v. Sandford* (Select Ca. Ch. 61; 2 Wh. & Tu. L.C. (7th ed.), 693) applied. *Griffith v. Owen*, 76 L. J. Ch. 92; [1907] 1 Ch. 195; 96 L. T. 5; 23 T. L. R. 91—Parker, J.

(c) *Precatory Trust.*—See WILL.

(d) *Resulting Trust.*

Money Placed in Name of Third Person.]—The testatrix placed a sum of 500*l.* on deposit at a bank in the name of her niece, towards whom she was not *in loco parentis*. She retained the deposit note in her own possession, and did not inform her niece of the fact of the deposit having been made. The testatrix subsequently made a codicil to her will purporting to dispose of the money:—*Held*, that there was a presumption of a resulting trust in favour of the testatrix and no evidence to rebut the presumption. *Howes, In re*; *Howes v. Platt*, 21 T. L. R. 501—Swinfen Eady, J.

Will—Construction—No Residuary Bequest—Trustees—Executors—Undisposed-of Surplus.]—A testatrix gave, devised, and bequeathed to four persons all her moneys and securities for money, plate, linen, &c., and also her freehold property, consisting of two farms, upon trust to sell the same, and out of the proceeds to pay her "funeral and testamentary expenses and debts, and then the legacies following"; and after mentioning the legacies, and declaring that the trustees might reimburse themselves out of the moneys coming to their hands, she appointed the same four persons executors of her will. After all payments had been made, there remained a considerable surplus of the personalty, and also the proceeds of the realty:—*Held*, distinguishing *Croome v. Croome* (59 L. T. 582), that the surplus residue did not go to the trustees beneficially, but went to the co-heirs and next-of-kin of the testatrix by virtue of a resulting trust. *West, In re*; *George v. Grose*, 69 L. J. Ch. 71; [1900] 1 Ch. 84; 81 L. T. 720; 48 W. R. 138—Kekewich, J.

Fund Subscribed "for or towards the education of B.'s children"—Surplus—Division among Adult Beneficiaries.]—A fund having been subscribed to defray the educational expenses of certain children, various sums had been spent out of their father's estate, to which they were entitled equally, upon their education and maintenance during their minorities. Upon a summons taken out by them when all of full age asking for a division of the remaining subscribed fund proportionate to the respective expenditure on each child,—*Held*, that there was no resulting trust in favour of the subscribers, and that the children were not entitled to be recouped the expenditure upon them respectively, but that the balance of the fund belonged to the children absolutely, and must be equally divided between them. *Sanderson's Will, In re* (26 L. J. Ch. 804; 3 K. & J. 497), distinguished. *Andrew's Trust, In re*; *Carter v. Andrew*, 74 L. J. Ch. 462; [1905] 2 Ch. 48;

92 L. T. 766; 53 W. R. 585; 21 T. L. R. 512—Kekewich, J.

Subscriptions to Charity for Support of Indigent Persons—Unapplied Surplus.]—A fund was collected for the support of two ladies and was supplemented by annual subscriptions and donations. The circular inviting subscriptions stated that the object was to enable the two ladies, who had been deprived of means of support, to reside in lodgings in Cambridge, and to provide for their very moderate wants, and that annual statements would be furnished to donors. No accounts were in fact ever furnished to the donors. At the death of the survivor of the two ladies there remained a surplus unapplied:—*Held*, that the proper inference was that the subscribers contributed on the footing that the fund would be applied for the benefit of the ladies, and not that they were to become the absolute owners of the fund, and that there was accordingly a resulting trust of the surplus in favour of the subscribers. *Abbott Fund, In re; Smith v. Abbott*, 69 L. J. Ch. 539; [1900] 2 Ch. 326; 48 W. R. 541—Stirling, J.

Life Policy.]—See INSURANCE, col. 1032.

Purchase in Husband's Name with Wife's Money.]—See *Mercier v. Mercier*, 72 L. J. Ch. 511; [1903] 2 Ch. 98—C.A.; *ante*, HUSBAND AND WIFE, col. 983.

(e) *Conditional.*

Trust for Wife so long as she should Cohabit with Husband—Separation by Agreement.]—*Hope Johnstone, In re; Hope Johnstone v. Hope Johnstone*, 73 L. J. Ch. 321; [1904] 1 Ch. 470; 90 L. T. 253.

4. TRUST PROPERTY.

Trust Fund—Policy of Insurance—Security—Addition to Value of Policy—Payment of Additional Premium by Trustee out of His Own Money—Participating Policy—Profits.]—A trust fund of 1,000*l.* was put in settlement on the marriage of T., who took a life interest therein. The trustees of the settlement, who had very wide powers of investment, lent the trust fund to T., who gave his bond and warrant of attorney and contracted to insure his life for 1,000*l.* He also by deed directed and appointed that the trustees should during his life stand possessed of an annual rent-charge of 50*l.*, in the first place for the payment of premiums. No policy of insurance for 1,000*l.* was effected, but instead thereof there were two separate policies for 500*l.* effected. One of the trustees of the settlement, out of his own money, paid for several years an additional 1*l.* annual premium on one 500*l.* policy, and thus converted it from a policy without profits into a participating policy, and so entitled to profits or bonus. After the death of T. there were profits or bonus to the amount of 326*l.* paid in respect of this 500*l.* policy:—*Held*, that the sum of 326*l.*, representing profits or bonus, did not belong to the *cestuis que trust* under the settlement, but went to the representative of the trustee who paid the additional 1*l.* annual premium. *Flynn v. Dalgleish*, [1901] 1 Ir. R. 255—M.R.

Compromise—Distribution of Fund amongst Bondholders—Absent Parties—No Limit of Time Originally Fixed—Application to Limit a Time, within which Absent Parties must come in.]—In a bondholders' action to administer a trust fund, the Court in 1894 sanctioned a scheme of compromise binding upon absent parties under Order XVI. rule 9A, whereby a sum of money was appropriated for distribution in respect of 61,383 outstanding bonds when and so soon as the holders thereof should be ascertained, at the rate of 2*l.* 10*s.* per bond. The bonds were issued by a railway company and were to bearer. The holders of all but 1,700 of the outstanding bonds had been ascertained, and had come in under the scheme. After the lapse of six years, the railway company applied for an order limiting a short time within which the holders must come in or be deemed to have elected not to take the benefit of the scheme:—*Held*, by RIGBY, L.J., and STIRLING, L.J. (*dissentiente* VAUGHAN WILLIAMS, L.J.), that it would be wrong to introduce a time-limit into the scheme to the disadvantage of the unascertained bondholders, and that no order ought to be made. *Held*, by VAUGHAN WILLIAMS, L.J., that a reasonable time-limit ought to be read into the scheme and a proper order now made on that footing. *Collingham v. Sloper*, 70 L. J. Ch. 361; [1901] 1 Ch. 769; 84 L. T. 289; 49 W. R. 404—C.A.

Distribution of Trust Fund—Assignee of Cestui que Trust—Deed of Assignment—Right to Custody.]—Where a trustee is distributing a trust fund of personalty, some shares of which have been assigned by the *cestuis que trust*, he is not entitled, on paying such shares to the assignees, to require the deeds of assignment to be delivered up to him. *Palmer, In re; Lancashire and Yorkshire Reversionary Interest Co. v. Burke*, 76 L. J. Ch. 406; [1907] 1 Ch. 486; 96 L. T. 816—Swinfen Eady, J.

Assignment of Reversionary Interest—Settlement—Notice to One only of Three Trustees—Death of Trustee—Subsequent Assignment—Priority.]—One only of the three trustees of a will had notice of the settlement of a reversionary share in funds comprised in the will. He predeceased his co-trustees without having imparted this knowledge to them. A subsequent assignee of the share under the will, who made all proper enquiries as to incumbrances and was not told of the settlement, gave notice of his assignment to all the existing trustees of the will. On the share falling into possession, —*Held*, that the subsequent assignee was entitled to it in priority to the beneficiary under the settlement. *Freeman v. Laing* (68 L. J. Ch. 586; [1899] 2 Ch. 355) followed. *Phillips' Trusts, In re*, 72 L. J. Ch. 94; [1903] 1 Ch. 183; 88 L. T. 9—Kekewich, J.

Notice to Trustees.]—See ASSIGNMENT, col. 58.

Power to Distribute Estate—Presumption of Death.]—See EVIDENCE, col. 811.

5. POWERS AND DUTIES OF TRUSTEES.

(a) *Generally.*

Power to Deal with or Affect the Trust Property—Personal Discretion.]—Every power given

to trustees which enables them to deal with or affect the trust property is *prima facie* given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *prima facie* presumption. *Smith, In re; Eastick v. Smith*, 73 L. J. Ch. 74; [1904] 1 Ch. 139; 89 L. T. 604; 52 W. R. 104; 20 T. L. R. 66—Farwell, J.

The testator's reliance on the individuals, to the exclusion of the holders of the office for the time being, in order to be effectual, must be expressed in clear and apt language. *Ib.*

Disclaimer—Trustee of Will Comprising Property in England and Abroad—Disclaimer as to English Property only—Validity.—A trustee of a will comprising property in England and abroad cannot disclaim the trusts relating to the property in England only, and unless he disclaims the trusts *in toto* he remains a trustee for all purposes. *Lord and Fullerton, In re*, 65 L. J. Ch. 184; [1896] 1 Ch. 228—C.A.

Power of Advancement—Discretion—Improper Exercise of Power—Advance to Daughter of Money to be Applied in Payment of her Husband's Business Debts to Trustee—"Presumptive share."—A testator by his will left all his property to trustees to stand possessed of the income thereof in trust for his two daughters in equal shares, and upon certain other trusts after their death. There were trusts for their maintenance up to the age of twenty-one, and after attaining that age they were to be paid the income for their separate use and not by way of anticipation. The trustees were further empowered "to apply in or towards the advancement in life of each daughter a sum not exceeding 500*l.* of her presumptive share," and they were to be "the sole judges of the advisability of such payment and of what the term 'advancement in life' might signify." After the daughters had each attained the age of twenty-one (their respective shares having in consequence become vested) and the younger daughter had married, the trustees, at their request, paid to them two sums of money, under the power of advancement above set out, which they handed to the husband of the married daughter, to be used by him for the purposes of his business, and he, with their consent, paid these two sums over to one of the trustees to whom he owed money in respect of his business:—*Held*, that, even assuming the trustees to be empowered to make such a payment at a time when the shares were actually vested, notwithstanding the use of the words "presumptive share" in the advancement clause, the payment was not made *bona fide* for the advancement in life of the daughters, and that the trustees in making it were guilty of a breach of trust. *Molyneux v. Fletcher*, 67 L. J. Q.B. 392; [1898] 1 Q.B. 648; 78 L. T. 111; 46 W. R. 576—Kennedy, J.

Expenditure—Sanction of Court—Devise of Mansion-house—Repairs—Salvage.—Testator devised a freehold house to trustees in fee-simple upon trust for successive tenants for life,

with remainders upon trust for their respective sons in tail, with a condition that each tenant for life should keep the house in substantially the same repair as that in which it was at the testator's death. The trustees had no powers of management over the property. The testator also bequeathed personal estate to the trustees upon trust to invest and hold on corresponding trusts. The house at the testator's death was in a general state of disrepair. On an application by the trustees as to whether they could apply the capital of the personal estate in putting the house in good repair,—*Held*, that the Court ought not to authorise the proposed expenditure either under the terms of the will or on the doctrine of salvage. *Willis, In re; Willis v. Willis*, 71 L. J. Ch. 73; [1902] 1 Ch. 15; 85 L. T. 436; 50 W. R. 70—C.A.

Equitable Tenant for Life—Bare Legal Estate in Trustees—Settled Land Acts.—In the case of mere legal estates or of equitable estates (where the trustees take a bare legal estate only without powers of management) the Court will not sanction expenditure out of capital on the application of the tenant for life, unless the expenditure is such as is authorised to be made out of capital moneys by the provisions of the Settled Land Acts. The rule laid down by CHITTY, J., in *De Teissier, In re; De Teissier v. De Teissier* (62 L. J. Ch. 552; [1893] 1 Ch. 153), approved and followed. *Ib.*

Power to Retain Testator's Assets in Partnership Business—Partners Trustees of a Deceased Partner—Retirement of One Partner—Discharge from Liability—Breach of Trust—Continuing Liability of Retired Partner—Following Trust-money.—Power in a testator's trustees to lend trust funds to a firm does not authorise a loan to what is constituted a new firm by the retirement of a partner, and on the insolvency of the new firm the retired partner, who has notice of the breach of trust, is still liable to make good the trust estate, although the trustees have affected to grant him a discharge. Still less is such a loan authorised when the trustees of the will were the testator's partners. *Smith v. Patrick*, 70 L. J. P.C. 19; [1901] A.C. 282; 84 L. T. 740—H.L. (Sc.)

The substitution of new trustees is no bar to an action against the retired partner to make good the trust fund, though the old trustees are neither parties nor witnesses, and there are concurrent remedies both against the partnership estate and the estate of the retired partner. *Ib.*

A testator appointed two of his partners his trustees, and empowered them to leave his estate in the business. A third partner retired and received the value of his share. The two trustees executed a discharge of all liability in favour of the retiring partner, treating the trust fund as a debt due from the continuing partners. At this time the business was solvent. Subsequently it became unable to meet its obligations; new trustees were appointed, and they sued the retired partner to make good the deficit of the testator's trust fund:—*Held*, that the retired trustee, having been party to a fraudulent breach of trust, was liable to make good the trust fund. *Ib.*

Shares in Company—Reconstruction—Exchange for Shares in New Company—Sanction of Court—Jurisdiction—Compromise.—As a rule the Court has no jurisdiction to give its sanction to the performance by trustees of acts with reference to the trust estate which are not authorised by the terms of the instrument creating the trust; but where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the Court, in the emergency that has arisen, has jurisdiction, for the benefit of the estate, to sanction acts by the trustees which in ordinary circumstances they would have no power to do. *New's Settlement, In re; Langham v. Langham*, 70 L. J. Ch. 710; [1901] 2 Ch. 534; 85 L. T. 174; 50 W. R. 17—C.A.

Shares in a limited company were held by trustees, and circumstances arose which made it desirable in the interests of all the shareholders to reconstitute the company and substitute for its shares shares in a new company to be formed to take over its business. The trustees had no express power to enter into the reconstruction agreement and exchange their shares for those in the new company:—*Held*, that the Court had jurisdiction to allow the trustees to enter into the reconstruction agreement. *Crawshaw, In re; Dennis v. Crawshaw* (60 L. T. 357), and *Morrison, In re; Morrison v. Morrison* (70 L. J. Ch. 399; [1901] 1 Ch. 701) distinguished. *Ib.*

Appropriation of Specific Assets—Will—Residue—Settled Shares—Infant.—Executors or trustees have power to appropriate specific assets to answer settled shares of residue, though the interests of infants are concerned. *Lepine, In re; Doussett v. Culver* (61 L. J. Ch. 153; [1892] 1 Ch. 210), and *Richardson, In re; Morgan v. Richardson* (65 L. J. Ch. 512; [1896] 1 Ch. 512), applied and extended. *Nickels, In re; Nickels v. Nickels*, 67 L. J. Ch. 406; [1898] 1 Ch. 680; 78 L. T. 379; 46 W. R. 422—Stirling, J.

Right to Pay—Mortgagee to Receive Whole of Fund Mortgaged.—Trustees of a fund which is mortgaged are, under section 22, sub-section 1 of the Conveyancing and Law of Property Act, 1881, if they act honestly, and without notice of anything wrong, safe in handing over the money to the mortgagee upon his receipt, and are not concerned to enquire whether any money remains due on the mortgage or not. They are not, however, obliged to do so in all cases, and if there is any circumstance which makes it reasonable for the trustees to decline to be satisfied with the statutory receipt they will be justified in paying the money into Court under the Trustee Act, 1893. *Bell, In re; Jeffery v. Sayles* (65 L. J. Ch. 188; [1896] 1 Ch. 1), approved. *Hockey v. Western*, 67 L. J. Ch. 166; [1898] 1 Ch. 350; 78 L. T. 1; 46 W. R. 312—C.A.

Mortgage of Sheep Farm—Power to Trustees to Raise Money on Mortgage—Salvage.—A sum of 125,000*l.*, portion of trust property held in trust for beneficiaries (the shares of some being in settlement and some of them being infants), was invested in a mortgage on a sheep farm in Australia. The mortgagor had purchased the farm for 450,000*l.*, and had expended consider-

able sums thereon. Owing to drought, the farm deteriorated, and the mortgagor got into difficulties and became unable to pay interest on the mortgage. There was an attempted sale by the mortgagor, but there was no bidding, and the farm was unoccupied. The trustees of the trust property had taken proceedings in the Australian Court for foreclosure, and the decree would shortly be made absolute. The vacant farm was deteriorating, but rain had fallen, and there was a promise of better seasons. The mortgaged property was subject to land tax and certain penalties for not keeping down rabbits:—*Held*, that the Court had jurisdiction to, and would, allow the trustees to raise by mortgage of the sheep farm itself 80,000*l.* for the expenses of working and managing the farm and paying outgoings. *Neill v. Neill*, [1904] 1 Ir. R. 513—Kenny, J.

Reconveyance by Married Woman—Trustee—Mortgagee—Concurrence of Husband—Separate Acknowledgment.—Under section 16 of the Trustee Act, 1893, a married woman who, as sole surviving trustee, is mortgagee of a mortgage executed before the Married Women's Property Act, 1883, is competent to reconvey the property without the concurrence of her husband or a deed of separate acknowledgment. *Howgate and Osborn's Contract, In re*, 71 L. J. Ch. 279; [1902] 1 Ch. 451; 86 L. T. 180—Kekewich, J.

Powers—Appropriation of Assets.—See EXECUTOR, col. 842.

(b) Investments.

Investment Clause—"Securities"—Power to Vary or Transfer—Purchase of Ground-rents—Implied Power to Sell—Trustees for Purposes of Settled Land Acts.—Under a marriage settlement the trustees were directed to stand possessed of certain scheduled shares, stock, and securities upon trust at any time, with the usual consents, to sell the same and invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature." The trustees purchased freehold ground-rents, and in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of the Settled Land Acts:—*Held*, that the word "securities" in this settlement meant anything to be purchased under the power, and that, having regard to the power to vary and transfer the "securities," the trustees had power to sell the ground-rents, and were consequently trustees for the purposes of the Settled Land Acts. *Tapp and London and India Docks Co.'s Contract, In re*, 74 L. J. Ch. 523; 92 L. T. 829—Kekewich, J.

Will—"Any corporation or company municipal commercial or otherwise."—The will of an English testator authorised investment of the trust fund in the public funds of Great Britain or India or any British colony or foreign country, or upon freehold, copyhold, leasehold, or chattel real securities in Great Britain, or on

life interests in real or personal property, or in Bank of England stock, or in the stocks, funds, or securities of "any corporation or company municipal commercial or otherwise," or in Indian annuities, or in any trustee securities authorised by English law:—*Held*, that the trustees had power to invest in the stocks, funds, or securities of companies, incorporated and unincorporated, formed or registered within the United Kingdom but carrying on business abroad, and also of companies formed or registered outside the United Kingdom. *Stanley, In re; Tennant v. Stanley*, 75 L. J. Ch. 56; [1906] 1 Ch. 131; 93 L. T. 661; 54 W. R. 103—Buckley, J.

Power with Consent of Tenant for Life to Lend on Personal Credit without Security—Advance to Tenant for Life.—Trustees having power with the consent of the tenant for life to lend upon personal credit without security can lend trust money on the personal credit of the tenant for life, provided the tenant for life is a person to whom such an advance might otherwise be prudently made. The contrary statement of the law in *Lewin on Trusts* (10th ed.), 335, disapproved. *Keays v. Lane* (Ir. R. 3 Eq. 1) disapproved. *Laing's Settlement, In re; Laing v. Radcliffe*, 63 L. J. Ch. 230; [1899] 1 Ch. 593; 80 L. T. 228; 47 W. R. 311—Kekewich, J.

Convertible Securities—Bearer Bonds—Custody.—Where trustees are expressly authorised to retain or invest in convertible securities, such as bonds transferable by delivery with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit them in their joint names with the bankers to the trust upon a simple acknowledgment by the bankers of the receipt thereof. *Field v. Field* (63 L. J. Ch. 233; [1894] 1 Ch. 425) distinguished. *De Pothonier, In re; Dent v. De Pothonier*, 69 L. J. Ch. 773; [1900] 2 Ch. 529; 83 L. T. 220—Cozens-Hardy, J.

Land—Power to Invest in Purchase of—"Securities"—"Investments"—Power to Vary and Transpose Securities—Purchased Land—Power of Sale.—A testator authorised his trustees to invest trust moneys in the purchase or upon mortgage of freehold or leasehold properties, or in or upon Government stocks or funds, or debentures or preferential stocks of certain railway companies, or in or upon trustee investments authorised by law, with "power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorised." On the sale by the trustees of real estate purchased by them out of the trust funds, —*Held*, that the testator had used "securities" as synonymous with "investments," and that, by virtue of the power to vary and transpose securities, the trustees could sell the real estate in question and give the purchaser a valid receipt for the purchase-money. *Gent and Eason's Contract, In re*, 74 L. J. Ch. 333; [1905] 1 Ch. 387; 92 L. T. 356; 53 W. R. 334—Farwell, J.

— **"Freehold ground-rents"—"Leasehold ground-rents"—Power to Purchase.**—A testator gave his estate and effects upon trust for conversion and to invest, amongst other things, "upon freehold ground-rents or upon leasehold ground-rents not having less than 60 years

unexpired and held direct from the freeholder." The will contained no trust or power for conversion of freehold or leasehold property purchased by the trustees:—*Held*, that the investment clause authorised not mortgages upon the security of, but purchases of, freehold and leasehold ground-rents. *Mordan, In re; Legg v. Mordan*, 74 L. J. Ch. 319; [1905] 1 Ch. 515; 92 L. T. 488; 53 W. R. 599—C.A.

— **Real or Heritable Security—Harbour Rates—Insufficiency of Security—Liability.**—A harbour bond in which there is an assignment of "the rates, duties, and other revenues" of the trust, with power to appoint a judicial factor in case of default, but no assignment of the undertaking itself, is not a "real or heritable security" within the meaning of the Trusts (Scotland) Amendment Act, 1884. Nor is such an investment a loan "secured on rates or taxes levied under the authority of an Act of Parliament by a municipal corporation." The accountant of Court has no power to approve improper investments, and his audit will not exonerate a *curator bonis* from liability. *Hutton v. Annan*, 67 L. J. P. C. 49; [1898] A. C. 289—H. L. (Sc.)

Bond or Debenture of "public company corporate, municipal, commercial, or otherwise"—Investment in Bond of Unincorporated Body.—A power to invest trust moneys in "bonds, mortgage debentures, debenture stock, preference or other shares of any public company or body corporate, municipal, commercial, or otherwise," is confined to such investments in public companies and bodies duly incorporated. A trustee invested trust funds subject to such a power in the bond or debenture of a body called "The Trustees for the Town and Harbour of Whitehaven," which at the time of investment were unincorporated:—*Held*, that the word "corporate" was attached to the word "body," so that the clause should read "any public company or body corporate, whether municipal, commercial, or otherwise," and consequently such an investment was a breach of trust. As to whether the trustee might be relieved from liability under the Judicial Trustee Act, 1896, s. 3, *quære*. *Wood v. Middleton*, 79 L. T. 155—Stirling, J.

"Nominal debenture."—The special power of investment in "nominal debentures or in nominal debenture stock issued under the Local Loans Act, 1875," conferred by section 5, sub-section 3 of the Trustee Act, 1893, upon trustees already "having power to invest money in the debentures or debenture stock of any railway or other company," is conferred only upon trustees possessing this previous power by the special provision of the instrument creating the trust. It is not conferred upon trustees possessing this previous power merely by virtue of section 1, sub-section (g) of the same statute, even assuming—which is questionable—that the statutory powers conferred by this last section do really amount to a "power to invest money in the debentures or debenture stock of any railway." *Tattersall's Trusts, In re; Topham v. Armitage*, 75 L. J. Ch. 680; [1906] 2 Ch. 399; 95 L. T. 553; 54 W. R. 603; 4 L. G. R. 1083; 70 J. P. 537—Swinfen Eady, J.

Shares in Company—Power to Retain in

"present form of investment"—Shares in Reconstructed Company.—Testator, by his will, gave all his residuary real and personal estate to his trustees upon trust to sell and convert, and authorised them to retain any part thereof "in its present form of investment." At his death he was the holder of 750 fully paid ordinary shares of 5*l.* each in a limited company. The shares being of considerable value, the trustees retained 520 of them. Subsequently, with a view to increasing its capital, the company was reconstructed, its assets being transferred to a new company with the same name, and the original company wound up. Under the scheme of reconstruction provision was made for the issue of one preference share of 5*l.* and one ordinary share of 5*l.* (both fully paid) in the new company for every ordinary share in the old company; but no option was given to the shareholders of the old company to take cash instead of shares. The trustees accepted preference and ordinary shares in the new company in exchange for the shares held by them in the old company:—*Held*, that the ordinary shares fell within the words "in its present form of investment" in the retainer clause in the will, and that the trustees were justified in retaining them unsold. *Smith, In re; Smith v. Lewis*, 71 L. J. Ch. 885; [1902] 2 Ch. 667; 51 W. R. 11—Buckley, J.

Shares in Company Illegally Formed to Hold Shares in other Companies—Transformation of Shares—Settlement—Power to Retain "in the present state of investment"—Accretion of Premiums or Profits.—Part of the husband's fund settled by a marriage settlement consisted of shares in an American company formed to hold as investments the securities of other corporations. The trustees of the settlement were empowered to retain existing investments or to invest in certain authorised investments (not including American companies), and in case any preferential right to take "any new or other shares or stock in any company should be offered to the trustees as holding any shares or stock in such company," they might in their discretion give up such right absolutely or in favour of the tenant for life, or otherwise subscribe for such new or other shares, and apply the profits as income. The American company having been held illegal as to its constitution, its shares were converted by an arrangement under which stock in two American railway companies was delivered against surrendered stock, and options were also given to take up new shares in the railway companies:—*Held*, that the shares in the railway companies were not shares which the trustees were authorised to retain, and that the tenant for life was not entitled to the benefit of the options and sale of rights in new shares as accretions to trust investments. *Smith, In re; Smith v. Lewis* (71 L. J. Ch. 885; [1902] 2 Ch. 667), discussed and distinguished. *Anson, In re; Lovelace v. Anson*, 76 L. J. Ch. 641; [1907] 2 Ch. 424; 97 L. T. 472—Kekewich, J.

"Public company"—United Kingdom.—The will of an English testatrix contained the following investment clause: "I declare that any moneys hereby directed to be invested may be invested in the name of my trustee in or upon any of the public funds or in Government or real or leasehold securities or upon the stocks

shares or securities of any railway or other public company and such investments may be varied from time to time as my trustee shall think fit":—*Held*, that "public company" was confined to companies within the United Kingdom. *Castlehow, In re; Lamont v. Carter*, 72 L. J. Ch. 211; [1903] 1 Ch. 352; 88 L. T. 455—Byrne, J.

Stock of Municipal Borough—Limit of Population—Returns of Last Census.—Bournemouth Corporation 3*l.* per Cent. Redeemable Stock is an authorised investment within the Trustee Act, 1893, s. 1 (*m*), the corporation with its extensions having, according to the returns for the last census, a population exceeding 50,000. *Druitt, In re; Druitt v. Dehler*, 72 L. J. Ch. 441; [1903] 1 Ch. 446; 88 L. T. 483; 67 J. P. 99; 1 L. G. R. 353—C.A.

"No other securities"—Cash under Control of Court.—Where a testator directs funds to be invested in "Consols" and in no other securities, and the funds being in Court are invested in that security, the Court will not authorise a change of investment to other trustee investments in order to increase the income arising therefrom. *Wedderburn's Trusts, In re* (47 L. J. Ch. 743; 9 Ch. D. 112), not followed. *Ovey, In re; Ovey v. Ovey*, 69 L. J. Ch. 804; [1900] 2 Ch. 524; 83 L. T. 311; 49 W. R. 45—Cozens-Hardy, J.

Option to Trustees to take Improper Investment.—The liability of a trustee for an improper investment will not be affected by the fact that the security upon which the improper investment was made has been since disposed of, as against a *cestui que trust* who never consented to the improper investment or did anything to put it out of the power of the trustee to obtain the benefit of such investment. *Salmon, In re; Priest v. Uppleby* (42 Ch. D. 351), considered. *Head v. Gould*, 47 L. J. Ch. 480; [1898] 2 Ch. 250; 78 L. T. 730; 46 W. R. 497—Kekewich, J.

Unauthorised Investment—Power of Trustee to Realise.—In the case of an unauthorised purchase of land by a trustee, a good title can be made by the trustee to a purchaser with notice provided that all the beneficiaries are not competent and desirous to take the land in specie. *Patten and Edmonton Union, In re* (52 L. J. Ch. 787), followed. *Power v. Banks*, 70 L. J. Ch. 700; [1901] 2 Ch. 487; 85 L. T. 376; 49 W. R. 679; 66 J. P. 21—Cozens-Hardy, J.

Claim of Indemnity against Beneficiary Requesting or Consenting to Investment.—Trustees who had invested trust funds in breach of trust, and who were held liable for the consequent loss, pleaded that they were entitled to be indemnified against this liability to the extent of the interest in the trust estate of a beneficiary who, they alleged, had consented in writing to the investment, and they relied on certain correspondence as shewing this. From this correspondence it appeared that the investment in question was made without any previous communication with the beneficiary, and that though he subsequently acquiesced in its being retained as a trust investment, he did so in reliance on the judgment of the trustees as to the investment being *intra vires* and prudent:—

Held, that the trustees were not entitled to the indemnity. *Somerset v. Poulett (Earl)* (63 L. J. Ch. 41; [1894] 1 Ch. 231) observed upon. *Henderson v. Henderson's Trustees*, 2 F. 1295—Ct. of Sess.

— **Profits on Illegal Investment—Extent of Trustees' Liability.**—Trustees who had guaranteed an issue of debenture stock in a colonial bank received as commission a bonus of 80%, with which they credited the trust. Under this guarantee they ultimately became liable to take up debenture stock to the value of 1,285*l.* They paid for this stock with trust funds, thereby committing a breach of trust:—*Held*, that the trustees, in accounting with the beneficiaries for a loss arising from the debenture stock, were entitled to take credit for the bonus of 80%. *Ib.*

— **Excess Income—Capital or Income—Invalid Trust for Sale—Class, Ascertainment of.**—A trustee who has paid the whole of the income arising from unauthorised investments of a trust fund to the tenant for life cannot, where no loss has resulted to the fund, be called upon to repay to the estate, as part of the capital of the fund, so much of the income as exceeded the amount which would have arisen if the fund had been properly invested. A testator directed his trustees to sell his real estate at a time beyond the period allowed by the rule against perpetuities, and to hold the proceeds of sale upon trust for persons and classes of persons ascertainable within the period:—*Held*, that the trust for sale was mere machinery, and that the equitable interests in the property went to the persons who would have taken them under the trust for sale if it had been valid; but that these equitable interests passed as real and not as personal estate. *Dictum* of STIRLING, J., in *Goodier v. Edmunds* ([1893] 3 Ch. 455), followed. *Appleby, In re*; *Walker v. Lever*, 51 W. R. 153—Byrne, J.

— **Capital Replaced—Recovery of Interest—Excess of Interest Obtained by Breach—Excess Paid to Tenant for Life—Excess not Attributable to Capital.**—A trustee took trust money out of Consols and by an improper use of it received 5 per cent. interest, which interest, it was assumed, had been paid by him to the tenant for life. The trustee subsequently restored the money to the trust, and invested it in authorised securities:—*Held*, that no part of the interest was attributable to capital, so that the remainderman had no right to insist that the excess of interest beyond what would have been received from Consols should be added to capital or accounted for. *Slade v. Chaine*, 97 L. T. 192—Kekewich, J.

— **Investment in Trustee's Business—Recovery of Interest—Rate.**—In a case in which a trustee had improperly used a trust fund in his own business, and the *cestui que trust* had elected to recover interest, the Court declined, notwithstanding the decrease in the rate of mercantile interest ordinarily obtainable, to give less than the rate of 5 per cent. prescribed as chargeable in such cases in *Vyse v. Foster* (42 L. J. Ch. 245, 248; L. R. 8 Ch. 309, 329). *Davis, In re*; *Davis v. Davis*, 71 L. J. Ch. 539; [1902] 2 Ch. 314; 86 L. T. 523; 51 W. R. 8—Farwell, J.

— **Indemnity against Co-trustee.**—A trustee (or his estate) is liable to contribute a rateable proportion of any loss suffered upon an unauthorised investment made with his knowledge by his co-trustee, although as between third parties and the first-named there is no liability to pay the loss or any part of it. *Jackson v. Dickinson*, 72 L. J. Ch. 761; [1903] 1 Ch. 947; 88 L. T. 507—Swinfen Eady, J.

— **Delay in Realisation—Negligence.**—Delay in realisation of the investment, in the absence of negligence, does not release him (or his estate) from liability. *Ib.*

— **Re-sale—Beneficiaries—Incapacity—Election.**—Where trust funds have been wrongfully invested in an unauthorised purchase of leaseholds, and some one or more of the beneficiaries are incapable, through infancy, of electing whether to take the property in specie or not, the trustees can make a good title to a purchaser with notice without joining a beneficiary in the conveyance. *Jenkins and Randall's Contract, In re*, 72 L. J. Ch. 693; [1903] 2 Ch. 362; 88 L. T. 623—Swinfen Eady, J.

— **Proposed Investment in Unauthorised Security for Benefit of Family—Sanction of Court—Jurisdiction.**—The Court has no jurisdiction to give its sanction to a scheme, however beneficial to the *cestuis que trust* it may appear to be, whereby trustees are to make a continuing investment not authorised by the will of their testator. *Tollemache, In re*, 72 L. J. Ch. 539; [1903] 1 Ch. 955; 88 L. T. 670; 51 W. R. 597—C.A.

The extreme limits of the jurisdiction of the Court to authorise trustees to go beyond the terms of a trust instrument are laid down in *New's Settlement, In re*; *Langham v. Langham* (70 L. J. Ch. 710; [1901] 2 Ch. 534). *Ib.*

(c) Sale.

— **Trust for Sale of Realty—Discretionary Power of Postponement—Power to "make outlay out of capital of real estate" for Improvements and Repairs—Implication of Power to Mortgage.**—A testator gave his real and personal property to trustees upon trust for sale with a discretion as to the postponement of any such sale, and then empowered his trustees, during postponement, to manage or cultivate his real and leasehold estates, and to make any outlay they considered proper out of the income or capital of his real or personal estate, for the renewals of leases, &c., improvements, repairs, or otherwise for the benefit of his real or personal estate. The will contained no express power for the trustees to mortgage:—*Held*, nevertheless, that under this clause in the will the trustees had power to raise money for the purposes specified by mortgage or charge of the unsold real estate. *Bellinger, In re*; *Durell v. Bellinger*, 67 L. J. Ch. 580; [1898] 2 Ch. 534; 79 L. T. 54—Kekewich, J.

— **Direction to Trustees to Sell at Absolute Discretion—Direction that Trustees may Sell or not at Absolute Discretion—Income of Tenants**

for Life—Liberty to Trustees to Abstain from Selling for Three Years if they think fit.]—A testator gave his personal estate and the whole of his real estate to trustees upon trust “for sale and conversion at their absolute and unfettered discretion, and to invest the proceeds and pay the net income” equally between his two sisters during their lives for their separate use without power of anticipation, and after the decease of either of them upon trust for her children equally or only child, in case of a son at twenty-one or of a daughter at twenty-one or marriage, with a proviso that if either sister should die after his decease without issue, then the whole trust premises should go to the survivor and her descendants. The will contained no provisions for the management of the testator’s real estate. One of the testator’s sisters was married and had two infant children, and their only means of support was the half share of income given by the will. The other sister remained unmarried. The only real estate of the testator was in Ireland, let in 114 holdings, for the most part at judicial rents fixed under the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49). It was charged with the payment of annuities; but the net annual income, after satisfying all outgoings, amounted to about 5711. 3s. 8d. The annual income of the testator’s personal estate amounted only to about 381. Up to the year 1898 the trustees had found, after enquiries, that a sale of the real estate was impracticable; but in that year the surviving trustee obtained a report from an Irish land agent that it might with some difficulty be sold at a price which in Guaranteed Land Stock would produce a net annual income of about 2001. available for division between the tenants for life, who urged him to postpone the sale. On a summons by the surviving trustee against the tenants for life and the husband and children of the married one, as defendants, asking for liberty to postpone the sale of the Irish estate until order, *Held*, that a direction to trustees to sell at their absolute discretion was not equivalent to a direction that they may sell or not at their absolute discretion; and that in the first case the time and mode of sale were in their discretion, but they were not entitled to abstain from following the directions of the will because the tenants for life would then receive a better income; and, in consequence of the difficulty of deciding whether a sale would be beneficial in the interest of the tenants for life and those entitled in remainder regarded as one, the summons was ordered to stand over for three years, with liberty to the trustee to abstain, if he thought fit, from selling during that period, and with liberty for all parties to apply, but so as not to prevent the trustee from selling without application to the Court if he considered a sale advisable. *Atkins, In re; Newman v. Sinclair*, 81 L. T. 421—North, J.

— Discharge of Trustee—Purchase of Trust Property after Lapse of Twelve Years—Disability.]—Apart from any circumstances of doubt or suspicion, there is no rule of the Court that a person who has ceased to be a trustee of an instrument which contains a trust for sale cannot become a purchaser of the property subject to the trust. *Boles and British Land Co.’s Contract, In re*, 71 L. J. Ch. 130; [1902] 1 Ch. 244; 85 L. T. 607; 50 W. R. 185—Buckley, J.

In 1885, a trustee of a will which contained a trust for sale, and who had acted in the trusts, by deed-poll under section 32 of the Conveyancing and Law of Property Act, 1881, retired from the trusteeship. In 1897 he purchased part of the trust property. *Held*, that the mere fact that he had originally been a trustee for sale of the property twelve years before the purchase did not preclude him from becoming the purchaser. *Ib.*

— Trustees’ Indemnity and Reimbursement Clause—Unexhausted Residue—Resulting Trust.]

—A gift of property to trustees on trust for sale, followed by a declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there will be a resulting trust of the unexhausted residue in favour of the testator’s heir and next-of-kin. The insertion of a trustees’ indemnity and reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale. *West, In re; George v. Grose*, [1900] 1 Ch. 84; 48 W. R. 138—Kekewich, J.

Power of Sale, with Power of Postponement—Sale Impeached by Beneficiaries on Ground of Improvidence—Valuation of Property.]—A testator who died in September, 1904, devised and bequeathed his residuary estate to trustees upon trust for sale with a power of postponement, and upon trust out of the proceeds to pay his debts, an annuity to his widow, and a yearly sum for the maintenance and education of his children. Part of the testator’s estate was a freehold house, let to a tenant for twenty-one years from September 29, 1898, at a yearly rent of 2251., the lease being determinable at the tenant’s option at the expiration of seven years. The house, which was subject to a mortgage for 3,5001., was valued for probate at 4,1001., the trustees having accepted that valuation from the beneficiaries’ solicitor, who had some knowledge of property in the district. In January, 1905, the trustees, on the advice of a firm of auctioneers and estate agents, whose manager, though not a qualified valuer, had viewed and reported on the house, offered to sell the house to the tenant for 4,0001., but this offer, as well as another to sell for 3,7001., was refused by the tenant, who, however, offered to purchase it for 3,0001. The trustees, who had heard that the tenant was likely to exercise his option to determine the lease and had obtained a further report that the property had considerably deteriorated in value since the date of the lease, agreed, after taking the advice of counsel, to accept the tenant’s offer, and a contract was entered into in February, 1905: *Held*, in an action by the beneficiaries, who impeached the contract on the ground that the price was grossly inadequate, and that the trustees had not taken steps to ascertain the best price obtainable for the property, and that the trustees had not informed them of the existence of the negotiations, that there was no obligation to consult the beneficiaries’ solicitor, and that the trustees having acted on the advice of a firm of high reputation, and there being no evidence that there was any market for such a house at a higher price or at any price, the contract could not be impeached. *Grove v. Search*, 22 T. L. R. 290—Kekewich, J.

Charge of Real Estate with Payment of Debts and Legacies—Devise of Real Estate to Trustees—Right to Sell.]—A testator, after appointing an executrix and directing his debts and funeral and testamentary expenses to be paid, and, subject thereto, making certain pecuniary bequests, gave all the rest, residue, and remainder of his real and personal estate to trustees upon trust to pay to or permit and suffer his wife to receive the rents and profits of his real estate and the income of his personal estate (which last he directed to be converted) during her life, and after her decease to pay to or permit and suffer his niece to receive the same during her life for her separate use, and after the death of the survivor the testator directed the trustees to pay legacies to two persons if then living, and after payment thereof to stand possessed of his real estate and residue of his personal estate in trust for the children of his niece when they should attain twenty-one years, with a gift over in default of such children:—*Held*, that the testator had charged his real estate with the payment of his debts and legacies, both with those payable immediately on his own death (*Greville v. Browne*, 7 H.L. C. 639, followed), and also with the reversionary legacies payable on the death of the tenants for life; but that, inasmuch as the first tenant for life, being entitled to the rents and profits of the real estate, not for her separate use, took, according to *Doe d. Leicester v. Biggs* (2 Taunt. 109), the legal estate during her life, the testator had not devised the same so charged to the trustees for the whole of his estate and interest therein, and that, consequently, the trustees had not power to sell the real estate under section 14 of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act). *Adams and Perry's Contract, In re*, 68 L. J. Ch. 259; [1899] 1 Ch. 554; 80 L. T. 149; 47 W. R. 326—Stirling, J.

Harton v. Harton (7 Term Rep. 652), recognised in *Van Grutten v. Foxwell* (66 L. J. Q.B. 745; [1897] A.C. 658), distinguished, on the ground that, in the present case, the trustees having no active duties to perform during the life of the first tenant for life, there was no reason why they should be held to take the legal estate during that period. *Doe d. Noble v. Bolton* (11 Ad. & E. 188; 3 P. & D. 135) followed. *Ib.*

Constructive Trustee—Concurrence of Beneficiaries.]—A testatrix by her will dated March 3, 1849, appointed R. J. and U. M. executors, and gave them powers to apply income in maintenance and to sell certain hereditaments after the death of the survivors of her daughters. The testatrix died on December 25, 1850. R. J. alone proved the will, and died, leaving J. W. and M. W. his executors. In 1873 a petition was presented by all parties beneficially interested, and new trustees of the will were appointed under the Trustee Act, 1850. After the death of the survivor of the daughters the trustees contracted to sell the hereditaments. The purchaser required the concurrence of the beneficiaries:—*Held*, that the concurrence of the beneficiaries could not be required. *Perrott and King's Contract, In re*, 90 L. T. 156—Swinfen Eady, J.

Duration—Lunatic Absolutely Entitled—

Right to Call for a Transfer.]—A power of sale over real estate, to be exercised during the life of a person made tenant for life of that estate, does not come to an end upon the tenant for life becoming absolutely entitled in possession, where, by reason of his being *non compos mentis*, he is not in a position to call for a transfer to himself. *Jump, In re; Galloway v. Hope*, 72 L. J. Ch. 16; [1903] 1 Ch. 129; 87 L. T. 502; 51 W. R. 266—Swinfen Eady, J.

Power to Sanction Sale of Land and Minerals Separately—Form of Order.]—The trustee of a settlement having a power of sale with the consent of the tenant for life and her husband agreed to sell the minerals under part of the settled land, apart from the land, to a tenant who held the minerals under a lease, and applied to the Court on motion under section 44 of the Trustee Act, 1893, to sanction the sale. The Court made an order in the terms of the section, without entering into the question whether the sale was a beneficial one. *Hallowes' Trusts, In re*, [1906] 1 Ir. R. 526—M.R.

Leasehold Property—Sale in Lots of Property under One Lease—Under-leases to Purchasers—Power of Trustees to Grant.]—Trustees selling under a trust for sale leasehold property held under one lease at an entire rent can sell by auction in lots at apportioned rents, subject to a condition that if all the lots are sold the purchaser of the largest in value of the lots or, in the event of equality, the purchaser of the first lot in order of sale, should take an assignment of the lease and execute under-leases to the respective purchasers of the other lots for the whole term less one day, at the apportioned rents and subject to covenants and conditions corresponding with those in the original lease, and that if any of the lots should remain unsold the vendors would grant to the purchaser or purchasers of the lot or lots sold such an under-lease as aforesaid of the lot or lots sold. Such a transaction is in substance and reality a sale and not a leasing by the trustees. *Walker and Oakshott's Contract, In re, infra* (70 L. J. Ch. 666; [1901] 2 Ch. 383), overruled. *Judd and Skelcher's Contract, In re*, 75 L. J. Ch. 403; [1906] 1 Ch. 634; 94 L. T. 595; 54 W. R. 513—C.A.

Leasehold Property—Sale in Lots—Assurance—Under-leases to Purchasers—Duty of Trustees.]—Trustees, who are assignees of leasehold property held under one lease, cannot, in exercise of an ordinary power of sale, carry out a sale of such property in lots by retaining in themselves the original term and granting under-leases for the whole term less one day to the purchasers of the respective lots at apportioned rents, for by adopting such a method of assurance the trustees do not perform their duty and get rid of their liability by privity of estate to the lessor. *Walker and Oakshott's Contract, In re*, 70 L. J. Ch. 666; [1901] 2 Ch. 383; 84 L. T. 809; 50 W. R. 41—Kekewich, J.

Power to Postpone—"Uncontrolled discretion"—Payment of Legacy in Full—Admission of Assets.]—A testator by will gave his property to trustees upon trust for sale and conversion, with power to the trustees to postpone conversion so long as they should in their uncontrolled discretion deem proper, and the testator declared that without limiting the general operation of that power he specially intended

that it should be made applicable to his shares in a named company. After his death the trustees, in the *bona fide* exercise of their discretion, held the shares for some years on a generally falling market:—*Held*, that, having exercised their discretion *bona fide*, they were not liable for loss incurred thereby. *Held*, also, that the fact that some of the trustees, in exercising their discretion honestly, modified their opinion as to a sale in deference to the views of a co-trustee who had a personal interest in the matter, did not amount to a failure to exercise a discretion and was not a breach of trust. The mere payment of a legacy by an executor of a will is not conclusive as an admission of assets. *Schneider, In re; Kirby v. Schneider*, 22 T. L. R. 223—Warrington, J.

Title—Conversion—Election to take in Specie—Assent of Third Parties—Trust for Sale—Perpetuity.]—To establish an election to take in specie and free from a trust to convert, it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties; and, where it is sought to establish such an election by a person only entitled subject to the rights of third persons, it must be shewn in like manner that such persons have assented. *Sisson v. Giles* (32 L. J. Ch. 606; 3 De G. J. & S. 614) and *Mutlow v. Biggs* (45 L. J. Ch. 282; 1 Ch. D. 385) applied. *Douglas and Powell's Contract, In re*, 71 L. J. Ch. 850; [1902] 2 Ch. 296—Byrne, J.

Semble, an immediate trust for sale, the parties to take under the will which creates it being all lives in being at its date, is not void for perpetuity, though the exercise of it is not confined within the proper limit. *Goodier v. Edmunds* (62 L. J. Ch. 649; [1893] 3 Ch. 455) distinguished. *Id.*

Purchase by Trustee of Beneficiary's Interest—Non-disclosure of Valuation.]—There is no difference between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their *cestuis que trust*. As expressed by LORD CAIRNS in *Thomson v. Eastwood* (2 App. Cas. 215, 236), the law is: "There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*, but it is a well-known doctrine of equity that if a transaction of that kind is challenged in proper time a Court of equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold." *Dougan v. Macpherson*, 71 L. J. P.C. 62; [1902] A.C. 197; 86 L. T. 361; 50 W. R. 689—H.L. (Sc.)

Purchase by a trustee of his brother's share in trust funds set aside on the ground of non-disclosure of a valuation obtained by the trustee. *Id.*

Power of Sale—Exercise by Survivor.]—See *Bacon, In re; Toovey v. Turner*, 76 L. J. Ch. 213, *ante*, POWERS, col. 1888.

Conflict of Powers.]—See *Osborne to Brights, Lim., In re*, 71 L. J. Ch. 325, *ante*, SETTLED LAND, col. 2241.

Sale by Liquidator of Company to Himself.]—See *Silkstone and Haigh Moor Coal Co. v. Edey, ante*, col. 461.

(d) Leasing.

Unopened Mines.]—A testator settled his real estate, making no mention of mines or minerals, and gave his trustees a general and unrestricted power of leasing any portion of his estate, but no special power of granting mining leases. After the testator's death seams of coal were discovered under a portion of his estate. There had never been any open workings of mines on any part of his estate:—*Held*, that the trustees might under the power demise the unopened mines. *Barker, In re; Wallis v. Barker*, 88 L. T. 685—Kekewich, J.

(e) Mortgaging.

Mortgage of Trust Estate by Trustee Jointly with His Own Property—Apportionment.]—Where a trustee wrongfully raises money on the security of the trust estate jointly with his own property in proportion to their respective values, he must account to the trust estate for the sum received in the same proportion. *Roche-foucauld v. Boustead*, 67 L. J. Ch. 427; [1898] 1 Ch. 550—C.A.

Trustees of Literary Institution—Power to Mortgage.]—See *Mansel v. Cobham (Viscount)*, 74 L. J. Ch. 327; [1905] 1 Ch. 568; 92 L. T. 230—Buckley, J.

(f) Custody of Title-deeds.

Stock Certificates—Joint Custody or Control—Rights of Co-trustees.]—The Court will not at the instance of one trustee compel his co-trustee, whose position and integrity are unimpeached, to place title-deeds and certificates of railway stock belonging to the trust estate, and which have remained in the co-trustee's sole custody for many years and are not in jeopardy, in a box accessible only to the trustees jointly and deposited at a bank to be approved of by them. *Sisson's Trusts, In re; Jones v. Trappes*, 72 L. J. Ch. 212; [1903] 1 Ch. 262; 87 L. T. 743; 51 W. R. 411—Swinfen Eady, J.

Lien of Trustees on Land to Secure Purchase-moneys—Custody of the Title-deeds—Land Purchased by Equitable Tenant for Life, under Power, with Moneys Belonging to Personal Estate.]—A testator gave real and personal property in trust to accumulate rents and profits during the minority of H., who was to be (and in fact was) let into possession on attaining twenty-one as tenant for life. A private Act authorised land to be purchased by the Court at the instance of a tenant for life of full age, and to be paid for out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate, which debt was to be held by the trustees as part of the personalty and secured by a lien on the purchased land. Subject to such lien, the purchased land was to be settled on the trusts of the will:—*Held*, that, as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title-deeds. *Wheeler v. Tootell*, 51 W. R. 693—Swinfen Eady, J.

(g) *Separation Deed.*

Assignment of Husband's Leaseholds on Trust for Wife for Life—Ultimate Trust for Husband—Covenant by Husband to Pay Annuity to Wife—No Covenants by Wife or Trustees—Voluntary Settlement—Bankruptcy of Husband—Arrears of Annuity—Lien—Right of Trustees to Retain Property until Arrears Paid.—A person entitled in equity to property legally vested in trustees cannot compel the trustees to hand over the property to him until he has satisfied a debt due to such trustees in that capacity, at all events where the debt arises under the instrument which creates the trust. *Weston, In re*; *Davies v. Tagart*, 69 L. J. Ch. 555; [1900] 2 Ch. 164; 82 L. T. 591; 48 W. R. 467—Stirling, J.

By a separation deed in 1864, after reciting that differences had arisen between the husband and wife, and that they had agreed to live apart, the husband assigned to trustees leaseholds upon trust to pay the rents to the wife for life for her separate use, and after her death upon trust for sale, and in the events which happened the proceeds were to be in trust for the husband, and the husband covenanted if the rents should not amount to 300*l.* a year to make up the income to 300*l.* There was a proviso for determination if the wife should return to cohabitation, and a covenant by the husband that the wife should live apart from him, but there was no covenant by the wife or trustees either for payment of debts or otherwise. The husband became bankrupt in 1865, and obtained his discharge in the same year, but, as the law then stood, the discharge did not release him from his obligations under the covenant. On the death of the wife in 1899 a large sum was due from the husband's estate under the covenant to make up the income to 300*l.*—*Held*, that the deed, having regard to the recital, was not voluntary, and that the trustees were entitled, as against the assignee in bankruptcy of the husband, to retain the trust property until the arrears due under the covenant were satisfied. *Ib.*

Quære, whether the right claimed by the trustees would not exist even in the case of a voluntary settlement effectually completed so as to be enforceable by the Court. *Ib.* And see HUSBAND AND WIFE, cols. 977-981.

6. LIABILITY OF TRUSTEES.

(a) *Accounts and Administration.*

Account Claimed on Footing of Wilful Default—Right to Common Account—Full Decree unnecessary—Discretion.—An action was brought against the trustee of a creditors' deed claiming an account of all dealings and transactions on the footing of wilful default. The claim as for wilful default failed at the trial, but certain small charges were substantiated. The Court, however, in the exercise of the discretion conferred by Order LV. rule 10, refused the full decree for a common account, inasmuch as full justice between the parties could be done without such decree. Circumstances under which the discretion will be exercised considered. *Campbell v. Gillespie*, 81 L. T. 514; 49 W. R. 151—Cozens-Hardy, J.

Neglect to Furnish—Proceedings by Beneficiaries—Administration—Taking Account.—Under the old practice prevailing before the Rules of the Supreme Court, 1883, came into operation, an order for an account in an administration action went as a matter of course, and the costs of taking the account came out of the estate; but under the modern practice introduced by those rules, such costs are in the discretion of the Court, and where executors or trustees have been guilty of gross neglect in furnishing proper accounts the Court has power to visit them not only with the costs of proceedings instituted by a beneficiary for the purpose of obtaining an account and administration (so far as necessary) of the trust estate, but also with the costs of taking the account. *Skinner, In re*; *Cooper v. Skinner*, 73 L. J. Ch. 94; [1904] 1 Ch. 289; 89 L. T. 663; 52 W. R. 346—Farwell, J.

Action by Beneficiaries—No Loss of Trust Estate—Costs—Indemnity to Co-trustee.—Where one of two trustees, who was a solicitor and managed the affairs of the trust, had neglected to furnish proper accounts, although repeatedly requested so to do by the *cestuis que trust* and also by his co-trustee, with the result that an action was brought by the beneficiaries against the trustees, in which both trustees were ordered to furnish accounts and to pay the costs of the action down to judgment, the solicitor-trustee, although he had acted honestly and there had been no loss of the trust estate, was in the same action ordered to pay the costs of his co-trustee as between solicitor and client and to indemnify him against any costs he might have to pay to the plaintiffs. Principle of *Lockhart v. Reilly* (25 L. J. Ch. 697) and *Turner, In re*; *Barker v. Ivinney* (66 L. J. Ch. 282; [1897] 1 Ch. 536), applied. *Linsley, In re*; *Cattley v. West*, 73 L. J. Ch. 841; [1904] 2 Ch. 785; 53 W. R. 172—Warrington, J.

Disallowance—Real Estate—Payment of Voluntary School Rate—"Fair and reasonable" Payment.—A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably and in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly and reasonably necessary under the circumstances of the estate, it may be allowed. *How v. Winterton (Earl)*, 51 W. R. 262—Kekewich, J.

Maintenance of Cestuis que Trust by Trustee—Verbal Arrangement—Onus of Proof.—In 1875 the defendant married a widow with four children, two sons and two daughters. She was possessed of property producing an income of between 2,000*l.* and 3,000*l.* per annum. She died in 1888, having by her will appointed the defendant sole executor and trustee, and bequeathed the residue of her estate upon trust in equal fourth shares, one being for each of the three younger children of her first marriage—namely, E. and W., the daughters, and C., one of the sons—and the other fourth for the defendant for life, with remainder to the only child of the marriage of the defendant with the testatrix. At the time of the death of the testatrix, her daughters E. and W. were of the ages of twenty-six and twenty-four respectively. The testatrix contemplated that they would

after her death continue to reside with the defendant, which, in fact, they did—*E.* until her marriage in July, 1899, and *W.* until the defendant himself married again in May, 1901. *E.* and *W.* brought an action against the defendant claiming an account of the income to which they were entitled under the will of the testatrix from the date of the testatrix's death. The defendant stated that shortly after the testatrix's death he made a verbal arrangement with *E.* and *W.* that in consideration of their contributing or permitting him to retain the whole of the income of their shares of the trust estate, he should bear the cost of their maintenance as members of his household, and pay or provide the money for the payment of their personal expenditure, including any cash that they might require:—*Held*, that the onus lay upon the defendant to make out that he brought home to the minds of the daughters that they were to pay for their maintenance; and that he had failed to discharge it. *Cottrell's Estate, In re; Joyce v. Cottrell* (41 L. J. Ch. 70; L. R. 12 Eq. 566), considered and applied. *Moulton, In re; Grahame v. Moulton*, 94 L. T. 454; 22 T. L. R. 380—C.A.

Action for Account of Income—Form of Order—Statute of Limitations.—Form of order in an action for accounts against trustees who were protected by section 8 of the Trustee Act, 1888, from rendering accounts for more than six years from the date of the commencement of the action. *Davies, In re; Ellis v. Roberts*, 67 L. J. Ch. 507; [1898] 2 Ch. 142; 79 L. T. 344—Kekewich, J.

—Creditor's Deed—Discretion to Make Order.—In an action against a trustee under a creditor's deed for an account on footing of wilful default which was not established, the Court, exercising its discretion under Order LV. rule 10, declined to make an administration order, but gave judgment for payment by the trustee in respect of certain moneys improperly dealt with. *Campbell v. Gillespie*, 69 L. J. Ch. 223; [1900] 1 Ch. 225; 81 L. T. 514; 48 W. R. 151—Cozens-Hardy, J.

(b) Breach of Trust.

Loan by Trustee to Himself—Realisation of Security—Loss—Apportionment.—Where a trustee has sold Consols and invested the proceeds, in breach of trust, upon an improper security, the amount of which when realised is insufficient to replace the capital and pay the arrears of interest, the tenant for life (or his estate) must, upon an apportionment of the sum realised between capital and income, bring into account all sums received by him in respect of income on the improper investment beyond what he would have received as dividend on the Consols. *Bird, In re; Evans, In re; Dodd v. Evans*, 70 L. J. Ch. 514; [1901] 1 Ch. 916; 84 L. T. 294; 49 W. R. 599—Farwell, J.

Client's Funds Mixed with those of Trustee or Agent—Right to Follow Money.—Where a trustee or agent, with or without authority, sells trust property and lodges the proceeds of sale in bank in his own name, the money so lodged can be followed and vindicated by the truster, provided it can be traced with reasonable certainty. This holds good not only as between

the truster and the trustee, but also as between the truster and the trustee's trustee in bankruptcy. The proceeds of the sale can be vindicated, although they may have been blended with moneys belonging to the trustee, and if, after the proceeds are so lodged and blended with the trustee's own funds, the trustee, for his own purposes, draws out part of the mixed funds, he will be held to have drawn out his own funds, and not those which represent the proceeds of the trust estate. *Jopp v. Johnston's Trustee*, 6 F. 1028—Ct. of Sess.

Receipt of Trust Fund—Knowledge—Husband and Wife—Breach of Trust—Statute of Limitations—Accounting Party—Interest.—The wife of *O.* was entitled under the will of her mother *M.* to a life interest for her separate use in a certain business and trade assets, with remainder on her death (in the events which happened) to the persons who would be beneficially entitled to her personal estate if she had died intestate and unmarried. The business and trade assets were vested in trustees under the will of *M.*, and with their consent *O.* carried on the business as manager for his wife. The wife died in 1890. From 1890 till his death in 1899 *O.* remained in possession, and dealt with the business and trade assets as if they were his own. He had full notice and knowledge of the trusts of the will of *M.* By his own will he left a legacy and a share of the residue of his estate to each of the persons who would have been sole next-of-kin of his wife, if she had died unmarried and intestate, coupled with a condition that each of them should execute a release of all claims he or she might have against the assets of *M.* under the provisions of her will:—*Held*, that *O.* having retained possession of the business and trade assets after his wife's death, with full knowledge of the trust attaching thereto, and having dealt with the property as if it were his own, his estate was liable to the estate of *M.* without regard to lapse of time or the Statute of Limitations. *Held* also, that in the exercise of the discretion of the Court, and in the circumstances, 4 per cent. per annum should be allowed as the rate of interest chargeable against *O.*'s estate from his wife's death till his own death in respect of the amount invested in or represented by the furniture on the business premises and the stock-in-trade and debts due to the business. *M'Ardle v. Ganghra*, [1903] 1 Ir. R. 106—M.R.

Payment to Wrong Person—Prior Charge—Fraud of Solicitor—Notice—Duty to Enquire.—On the distribution of a trust fund, the trustees' solicitor claimed to be absolutely entitled to a share of the fund under a deed of assignment which disclosed on the face of it a prior charge. The trustees, without enquiry, and without requiring the production of the assignment, paid the share to their solicitor, who shortly afterwards died insolvent:—*Held*, that the trustees could not shelter themselves behind the fraud of their agent, and therefore that they were liable to make good the prior charge. *Davis v. Hutchings*, 76 L. J. Ch. 272; [1907] 1 Ch. 356; 96 L. T. 293—Kekewich, J.

Relief—Judicial Trustees Act.—*Held*, also, that the trustees were not entitled to relief under the Judicial Trustees Act, 1896. *Id.* See RELIEF, col. 2607.

Payment of Annuities without Deduction of Income Tax—Breach of Trust—Limitation.]—A trustee paying annuities given by will out of income which has paid income tax before it came to his hands must deduct from each payment of annuity the tax thereon at the current rate, unless the will otherwise directs. Not to make such deduction is a breach of trust, and the trustee is liable to refund to the estate the sum thus overpaid; but section 8 of the Trustee Act, 1888, bars all claims against him beyond six years, except in the case of an annuity given to himself. *Sharp, In re; Rickett v. Rickett*, 75 L. J. Ch. 458; [1906] 1 Ch. 793; 95 L. T. 532; 22 T. L. R. 368—Swinfen Eady, J.

Trust for Accumulation—Balances Due from Trustee—Neglect to Invest—Wilful Default—Compound Interest.]—In an administration action, although no allegation of wilful default is made in the pleadings, trustees may be charged with compound interest on balances in their hands where they ought to have so dealt with the trust funds as to have received such interest—e.g. where there is a trust for accumulation. *Knott v. Cottee* (16 Beav. 77) followed. *Barclay, In re; Barclay v. Andrew*, 68 L. J. Ch. 383; [1899] 1 Ch. 674; 80 L. T. 702—Stirling, J.

Principles and authorities as to charging interest against trustees and executors considered. *Ib.*

Effect of Judgment by Consent.]—Where some of the plaintiffs are infants, judgment by consent for accounts and enquiries relating to the personal estate of the testator, not amounting to a compromise, will not preclude a claim for compound interest on further consideration. *Ib.*

Rate of Interest.]—The rate of interest to be charged is now 3, in place of 4, per cent. *Ib.*

Company in Liquidation—Improper Sale by Liquidator—Fraud—Sale Set Aside—Account—Interest on Rents and Profits.]—The terms upon which an improper sale by a trustee will be set aside are that the *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee, or, where the trustee has sold it with notice, by the party who purchased, the *cestui que trust* on the one hand repaying the price at which the trustee bought, with interest at 4 per cent., and the trustee or purchaser on the other accounting for the profits of the estate, but not with interest, and, if he was in actual possession, being charged with an occupation rent. Where, therefore, a sale was improperly made by a liquidator of a company, he standing in a fiduciary relation to the company, the Court set aside the sale and ordered the liquidator to account for the rents and profits received, but declined to allow the company interest on such rents and profits. *Macartney v. Blackwood* (1 Ridg., Lapp. & Sch. 602) discussed. *Silkstone and Haigh Moor Coal Co. v. Edey*, 69 L. J. Ch. 73; [1900] 1 Ch. 167; 48 W. R. 137—Stirling, J.

American Securities—One Trustee in England and One in America—Delivery of Securities by Former to Latter—Loss of Securities—Laches.]—

—By his will a testator, who died in 1862, left his residuary estate to G. W. T. and others upon trust for his daughter A. H. T. for life for her separate use, with remainder in effect as she should appoint. G. W. T., who survived the other trustees, died in 1879, having by his will appointed J. T. L. and W. H. S. executors thereof. J. T. L. resided in England, and W. H. S. in America. Part of the testator's estate consisted of American securities, which J. T. L. when in America delivered into the custody of W. H. S., who regularly paid the income thereof to A. H. T., then the wife of J. B. A. In 1883 new trustees of the testator's will were appointed in England. Mrs. A. died in 1892, having by her will given her property to her husband. They both recognised W. H. S. as the American trustee. W. H. S. was then pressed to transfer these securities to the new trustees here, which he refused to do, and it then transpired that he had recently made away with them and was insolvent. In an action by the new trustees and J. B. A. against J. T. L. and W. H. S. to render J. T. L. liable for the loss,—*Held*, first, that, as against the trustees, section 8 of the Trustee Act, 1888, was a good defence; secondly, that, as to J. B. A., inasmuch as he might at any time since 1883, when the securities were intact, have brought an action in the name of his wife for the purpose of transferring the securities to the new trustees, and neglected to do so, he was guilty of *laches*, and could not now recover against J. T. L. *Taylor, In re; Atkinson v. Lord*, 81 L. T. 812—Stirling, J.

Consent of Tenant for Life to Breach of Trust—Payment into Court at Suit of Remaindermen—Surplus after Replacing Capital—Bankruptcy of Tenant for Life—Right to Surplus Moneys.]—As a general rule a *cestui que trust* who consents to a breach of trust by a trustee cannot complain, as between himself and the trustee, of loss occasioned by that breach of trust. This rule is quite independent of, and is not affected by, section 45 of the Trustee Act, 1893, which empowers the Court to impound, by way of indemnity to the trustee, any interest in the trust estate of a *cestui que trust* at whose instigation or request, or with whose consent in writing, the trustee has committed a breach of trust; and the rule does not require the consent to the breach of trust to be in writing. *Fletcher v. Collis*, 74 L. J. Ch. 502; [1905] 2 Ch. 24; 92 L. T. 749; 53 W. R. 516—C.A.

A trustee, with the consent of the tenant for life, sold the trust funds, and gave the proceeds in his presence to his wife. The trust funds were lost through this breach of trust, and in an action by infant remaindermen an order was made in the nature of a compromise, by which the trustee was to pay into Court out of a pension and the proceeds of certain life policies the whole of the sum paid away to the wife of the tenant for life, with interest. The order directed that these moneys should be applied in the first instance in satisfaction of the capital of the trust funds, and then of interest thereon on application for the purpose. The tenant for life at the date of this order was bankrupt, and his trustee in bankruptcy declined to consent to the order, which was made without prejudice to his rights. The trustee of the settlement was now dead, and the moneys

in Court exceeded the capital of the trust funds. The surplus of such moneys, after replacing the capital, was claimed by the personal representative of the deceased trustee on the one hand, and by the trustee in bankruptcy of the tenant for life on the other hand:—*Held*, that the trustee in bankruptcy stood in no better position than the tenant for life; that the tenant for life could not have called on the deceased trustee to make good his life interest, and that his trustee in bankruptcy had therefore no right to any of the surplus moneys as against the personal representative of the deceased trustee. *Ib.*

Following Trust Moneys—Banking Account.]—When the private money of a trustee and that which he holds in a fiduciary capacity have been mixed in the same banking account, from which various payments have been from time to time made, then, in order to determine to whom any remaining balance, on any investment paid for out of the account, ought to belong, the trustee must be debited with all sums that have been withdrawn and irrecoverably applied to his own use, and the trust money be debited with any sums taken out and properly invested; and the order of priority in which the withdrawals and investments have been made is immaterial. *Oatway, In re; Hertlet v. Oatway*, 72 L. J. Ch. 575; [1903] 2 Ch. 356; 88 L. T. 622—Joyce, J.

Joint and Several Liability—Compromise with one Trustee—Release—Insolvency of Co-Trustee's Estate—Right to Prove for Whole Debt.]—Where an action has been brought by plaintiffs as beneficiaries under a settlement to enforce liability against trustees for a breach of trust, and a sum has been certified to be due from the insolvent estate of a deceased trustee, and from the other two trustees, the plaintiffs will be entitled to prove against the insolvent estate for the full amount of the sum certified to be due. The liability of all the trustees being joint and several, until the plaintiffs have received 20s. in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment by way of compromise in respect of his several liability. *Edwards v. Hood-Barrs*, 74 L. J. Ch. 167; [1905] 1 Ch. 20; 91 L. T. 766; 21 T. L. R. 89—Kekewich, J.

Liability of Retired Trustees for Breach of New Trustees.]—In order to make retiring trustees liable for a breach of trust committed by their successors, it must be clearly shewn that the very breach of trust which was in fact committed was contemplated by the former trustees when the retirement took place, and that they were guilty as accessories before the fact to such breach of trust. It is not sufficient to prove that they rendered easy or even intended a breach of trust, if the breach of trust so intended was not in fact committed. *Head v. Gould*, 67 L. J. Ch. 480; [1898] 2 Ch. 250; 73 L. T. 739; 46 W. R. 597—Kekewich, J.

Fund carried to a Separate Account—Charge Thereon—Priority.]—On general principles a defaulting trustee must make good his default before he is entitled to take any part of the trust estate for his own benefit, and his assignee cannot stand in a better position; but the possi-

bility that such a claim may be made does not of itself disable a trustee during the whole continuance of his trusteeship from making a good title to a *bona fide* purchaser of a separate portion of the estate which the testator has given to him. And therefore his general liability to make defaults good will not be enforced against funds so far administered as to be carried to a separate account, by order of the Court, and specifically assigned for value by a person entitled according to the terms of that account; but the assignee will have priority over the *cestuis que trust*. *Eyton, In re* (45 Ch. D. 458), approved and followed. *Jacobs v. Rylands* (L. R. 17 Eq. 341) distinguished. *Edgar v. Plomley*, 69 L. J. P.C. 95; [1900] A.C. 481; 82 L. T. 573; 49 W. R. 142—P.C.

Action for Breach of Trust—Partial Administration—Executors of one Trustee the only Defendants—Necessary Parties—Representatives of Surviving Trustee or New Trustees.]—Where a beneficiary under a marriage settlement brought an action for breach of trust against the executors of one trustee, who was not the surviving trustee of the settlement, and claimed a declaration that the executors were liable to make good the breach of trust and an order for the investment of a sum to answer the loss to the trust estate, THE COURT directed the case to stand over in order that the representatives of the other and surviving trustee might be added as defendants, or, if there were no such representatives, that new trustees might be appointed and joined as defendants. *Jordan, In re; Hayward v. Hamilton*, 73 L. J. Ch. 128; [1904] 1 Ch. 260; 90 L. T. 223; 52 W. R. 150—Byrne, J.

Misappropriation by Trustee—Restoration of Capital with Interest—Excess of Interest.]—*See* TENANT FOR LIFE AND REMAINDERMAN, col. 2515.

Trustee's Estate Insolvent—Administratrix—Right of Retainer.]—*See* EXECUTOR AND ADMINISTRATOR, col. 851.

(c) Negligence of Trustee.

Fund Misappropriated by Law Agent—Liability of Trustees.]—Trustees allowed their law agent to receive a portion of the trust fund in July, 1887. On December 19 following the law agent, at a meeting of the trustees, stated that he had not been able to find an investment, but the money was on deposit receipt. On being produced a day or two afterwards the deposit receipt was found to be in the law agent's name, and to bear date December 20, 1887. The trustees requested that it should be deposited in the trustees' names. Enquiries were repeatedly made and a letter written to the law agent demanding the alteration, but the trustees were told that the law agent had met with a serious accident. On January 19 the trustees learnt that the agent was in embarrassed circumstances. A new agent was employed, but it was discovered that the fund had been realised by the former agent on January 18. He subsequently became bankrupt. The trust disposition and settlement contained a clause that the trustees were not to be liable for any agent who in transacting the business of the trust should receive any part of the estate:—

Held (LORD MORRIS dissenting), that the trustees were not exempted from liability by the immunity clause, and must replace the fund with interest. *Wyman v. Paterson*, 69 L. J. P.C. 32; [1900] A.C. 271; 82 L. T. 473—H.L. (Sc.)

Per LORD DAVEY.—The immunity clause only applies to the intromissions of a factor or agent within the legitimate scope of his agency, which does not authorise him to retain the money in his own control. *Ib.*

Per LORD MACNAGHTEN.—The proviso to section 2, sub-section 2 of the Trustee Act, 1888, reproduced in section 17 of the Trustee Act, 1893, that a trustee is to enjoy no exemption from liability if he allows money to remain longer than is necessary in the hands of a banker or solicitor is declaratory of the law of England, and must by analogy be treated as applicable in the case of Scottish trustees. *Ib.*

(d) *Trustee Buying for Himself.*

Transfer to Trustee of Executory Contract of Sale to a Stranger—Release by Beneficiaries.—It is well-settled law that a trustee for sale cannot purchase the trust property, and a title based on such a conveyance cannot be forced on a subsequent purchaser. The defect will not be cured by proof that the trustee so purchasing was transferee of an executory contract by which a stranger to the trust had agreed to buy the property, or by a release which fails explicitly to disclose the true state of facts. The burden of proof lies on the purchasing trustee that the parties to the conveyance to him were at arm's length, had the fullest information on all material facts and adopted the transaction. *Williams v. Scott*, 69 L. J. P.C. 77; [1900] A.C. 499; 82 L. T. 727; 49 W. R. 33—P.C.

(e) *Profit out of Trust.*

Remuneration Received by Trustees as Directors of a Company—Capital or Income—Tenant for Life and Remaindermen.—Where trustees hold shares belonging to the trust, and they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remaindermen as an accretion to their shares. *Noble v. Cass* (2 Sim. 343) distinguished. *Francis, In re; Barrett v. Fisher*, 74 L. J. Ch. 198; 92 L. T. 77—Kekewich, J.

(f) *Representation as to Incumbrances.*

Mortgage—Trustee—Prior Incumbrances—Statement by Trustee—Statement Obtained through Suppression of Material Facts.—During negotiations for a loan on a beneficiary's interest in a trust fund, the plaintiffs were informed by the solicitors to the trustees that they never advised trustees to sign statements to the effect that the beneficiary had not incumbered his

interest. Withholding this fact from one of the trustees, the plaintiffs obtained such a statement from him. He signed it under the impression, induced by the plaintiffs, that what he was doing was with the approval of the solicitors to the trust. After completion, a prior valid mortgage, which had been forgotten, was discovered. In an action against the trustee to make good their loss, the plaintiffs claimed that he was estopped by the representation contained in his signed statement from alleging any prior incumbrance:—*Held*, that the plaintiffs could not set up as an estoppel a statement obtained in such circumstances. *Porter v. Moore*, 73 L. J. Ch. 729; [1904] 2 Ch. 367; 91 L. T. 484; 52 W. R. 619—Swinfen Eady, J.

(g) *Co-Trustee.*

Fraud of—Inscribed Stock—"Stock receipt"—Negligence—Liability.—One of two co-trustees, who was also a stockbroker, had in his hands a certain sum of money which it was intended to invest in inscribed West Australian stock. In due course he shewed his co-trustee the usual bought-note for this stock, and also the usual "stock receipt" signed by the vendor and by the bank clerk at the time of the purchase. The co-trustee did not attend at the time of the purchase, nor did he afterwards make enquiries at the bank as to whether the stock had actually been transferred into the names of himself and of the broker-trustee. It appeared, however, from the evidence that it was not the usual practice among business men either thus to attend at the time of the transfer or to institute such subsequent enquiries; but that they were content to rest upon the evidence of the "stock receipt," though this was not a document of title. It was finally discovered that the "stock receipt" was a forgery, that no such purchase of West Australian stock had ever been made, and that the broker-trustee had embezzled the money:—*Held*, that the co-trustee was not liable for the loss of the trust money resulting from the fraud of the broker-trustee, as he had taken all the precautions that were usually taken in such a case by an ordinary prudent man of business in the conduct of his own affairs. *Shepherd v. Harris*, 74 L. J. Ch. 574; [1905] 2 Ch. 310; 93 L. T. 45; 53 W. R. 570; 21 T. L. R. 597—Farwell, J.

Principal Debtor—Surety—Indemnities—Release of Debt.—Where the life tenant (a married woman) of the income from investments of a settled fund of 30,000*l.*, having a power of appointment by will over the capital and income of the same, requested the trustees to sell so much as would realise the sum of 10,000*l.*, which she was desirous of handing to her husband, himself one of the trustees, and where, all parties understanding that the said sale and payment were breaches of trust, the other trustee only consented on the life tenant and the co-trustee agreeing to enter into a contract to indemnify him against all claims, and where the said sum was not repaid to the life tenant prior to her death, nor to her estate since her death upon the demand of the other trustee,—*Held*, that the husband of the life tenant was the principal debtor to his wife's estate, and that she was surety. *Held, further*,

that upon the true construction of the will of the life tenant, the 10,000*l.* passed to the husband. *Baird, In re; Baird v. Staveley Hill*, 47 W. R. 277—Kekewich, J.

(h) *Statute of Limitations.*

Trustee Ceasing to be Executor—Breach of Trust—Account—Real Property Limitation Act.]

—A testator directed three persons, whom he appointed his executors and trustees, to set apart a sum to provide an annuity for his wife, and subject thereto to divide his residuary estate and the capital set apart to provide the annuity equally between A and the three executors and trustees. The share of A to be held in trust for her and her children. On the death of the widow of the testator in 1873, the executors and trustees divided the property into four parts, paying one fourth to A absolutely, and the other three fourths to themselves. A died in 1892, and the fourth part to which her children became entitled was not then forthcoming, and in 1900 one of her daughters brought an action against the executors and trustees for an account and payment of what was due to her as one of the children of A:—*Held*, that the defendants had ceased to be executors and had become trustees in 1873, and that therefore section 8 of the Real Property Limitation Act, 1874, did not apply to the claim, but it came within section 8 of the Trustee Act, 1888, and the trustees not having retained or converted the property to their own use were protected by that section. *Timmis, In re; Nixon v. Smith*, 71 L. J. Ch. 118; [1902] 1 Ch. 176; 85 L. T. 672; 50 W. R. 164—Kekewich, J. *And see* LIMITATIONS, STATUTES OF, col. 1279.

(i) *Relief.*

Relief under Judicial Trustees Act—“Honestly and reasonably.”—A trustee to be entitled to relief under section 3 of the Judicial Trustees Act, 1896, must act both honestly and reasonably; the mere fact that he acted honestly is not sufficient. *Barker, In re; Ravenshaw v. Barker*, 77 L. T. 712; 46 W. R. 296—North, J.

“Honestly and reasonably.”—An action was brought to make trustees responsible for selling settled leaseholds, whereby the income of the plaintiff, who was entitled to a moiety of the rents during her life, was diminished. The trustees had no power to sell the leaseholds, but sold them under the erroneous view, sanctioned by their solicitors, that they had such a power. The trustees did not take counsel's opinion or apply to the Court for directions, and before discovering their mistake they had entered into contracts which would have made an application to the Court useless. The sale would have been a proper one in other respects if the trustees had in fact possessed a power of sale:—*Held*, that the trustees had acted “honestly and reasonably,” and must be relieved from personal liability. *Perrins v. Bellamy*, 68 L. J. Ch. 397; [1899] 1 Ch. 797; 80 L. T. 478; 47 W. R. 417—U.A.

Fraud of Solicitor's Clerk—Conduct of Trust Business—Cheque Book left with Solicitors.—A lady who succeeded to the office of trustee

on the death of her husband, and lived at a distance from London, employed the solicitors to the trust, as her agents, to do the business for her. The solicitors had the custody of the cheque book, and drew cheques when required, which they sent to the lady to sign with a letter of instructions. A clerk to the solicitors, who was well known to the lady, obtained her signature to cheques to the amount of 129*l.* upon a forged letter of instructions purporting to come from the solicitors, requesting her to sign them, and to initial the alteration in two of the cheques from “order” to “bearer.” The clerk cashed the cheques and absconded:—*Held*, that under all the circumstances, the lady had not acted otherwise than reasonably, and could not be held liable to make good the loss to the estate. *Smith, In re; Smith v. Thompson*, 71 L. J. Ch. 411; 86 L. T. 401—Kekewich, J.

Excessive Advance on Mortgage.]—The trustees of a settlement invested the sum of 4,500*l.*, forming part of the funds subject to the settlement, by way of mortgage. When the mortgage was taken no actual valuation of the property comprised in the security was made, but the greater part of the property (which was adjacent to the remainder) had been bought at public auction in the previous year by the mortgagor at a rate which would have given to the property comprised in the security the value of 7,167*l.* The true value of the property at the time of the mortgage was, however, 6,394*l.*, so that the sum actually advanced by the trustees exceeded the two-thirds value by 237*l.* 6*s.* 8*d.* The trustees acted under the advice of the solicitors to the trust. In an action against the surviving trustee for the payment of this sum of 237*l.* 6*s.* 8*d.* and interest thereon, the trustee sought relief under section 3 of the Judicial Trustees Act, 1896. The Court found that the trustee had acted honestly and not unreasonably, but refused to excuse him altogether; and directed him to make good the sum of 237*l.* 6*s.* 8*d.*, no order being made as to the costs of the action. *Waite v. Parkinson*, 85 L. T. 456—Joyce, J.

Sale of Leaseholds—No Power of Sale—Power to Excuse.]—An action was brought to make trustees responsible for selling settled leaseholds whereby the income of the plaintiff who was entitled to a moiety of the rents and profits in specie during her life, was diminished. The trustees had no power to sell the leaseholds, but sold them under the erroneous view that they had such a power, and the sale would have been a proper one in other respects if the trustees had in fact possessed a power of sale. THE COURT, under the Judicial Trustees Act, 1896, s. 3, holding that the trustees had acted “honestly and reasonably, and ought fairly to be excused for the breach of trust,” relieved them wholly from personal liability, and directed the plaintiffs to pay the costs of the action. Scope and meaning of section 3 of the Judicial Trustees Act, 1896, considered. *Perrins v. Bellamy*, 67 L. J. Ch. 649; [1898] 2 Ch. 521; 79 L. T. 109; 46 W. R. 632—Kekewich, J.

Power to Invest on Real Securities in England, Wales, or Ireland—Puisne Mortgage in Ireland—Irish Law—Breach of Trust—Liability of Trustee—Acting “honestly and reason-

ably"—No Independent Advice.]—The trustees of a marriage settlement were authorised to invest the trust funds in certain stocks or on real securities in England, Wales, or Ireland. Without the consent of one of the *cestuis que trust*, the trustees invested the trust funds on the security of a puisne mortgage of land in Ireland which ranked fifth in a series of incumbrances on the mortgaged property. In making the investment the trustees accepted the valuation of the property which had been made by the mortgagor's valuer, and they were not independently advised as to the propriety of the investment. The funds having been lost,—*Held*, that the trustees were liable for the loss, as, although by Irish law there is less risk in taking a puisne mortgage in Ireland than is involved in taking the like security in England, owing to the operation of the Irish registration system and the fact that in Ireland tacking and foreclosure are unknown, the investment in question was not one which prudent trustees ought to make. *Held*, also, that, although the trustees had acted "honestly," they had not acted "reasonably," and were therefore not entitled to relief under section 3 of the Judicial Trustees Act, 1896. *Chapman v. Browne*, 71 L. J. Ch. 465; [1902] 1 Ch. 785; 86 L. T. 744—C.A.

—Erroneous Advice of Solicitor Acted upon —Trustee Company not Gratuitous Trustees.]—Under the Victorian Trusts Act, 1901, s. 3 (corresponding with the English Act 59 & 60 Vict. c. 35), a trustee may be relieved from liability for breach of trust if he has acted honestly and reasonably, and ought fairly to be excused:—*Held*, that, by the true construction of this section, a trustee does not entitle himself to relief by proving that he has acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust. *National Trustees Co. of Australasia v. General Finance Co.*, 74 L. J. P.C. 73; [1905] A.C. 373; 92 L. T. 736; 54 W. R. 1; 21 T. L. R. 522—P.C.

J. F., being entitled to the whole of his deceased wife's proportion of a fund of which the appellants became trustees, assigned the same to the respondents. Under the erroneous advice of their solicitors, in accordance with an Act which was not passed till after the wife's death, the appellants paid two-thirds of the fund to the wife's children and one-third into Court under the Act for relief of trustees without question by the respondents, who accepted the appellants' statement as to their rights without verification. In a suit by the respondents to recover the said two-thirds,—*Held*, First, that the payment thereof to the children was a breach of trust, and that it was no defence that it had been made upon erroneous advice of the solicitors. (*Doyle v. Blake*, 2 Sch. & Lef. 231, approved.) Secondly, that the respondents having accepted and acted upon the appellants' statement as to their rights was no evidence of acquiescence. Thirdly, that, although the appellants had acted honestly and reasonably, they had shewn no title to be excused. They had made no attempt to replace the fund in whole or in part nor explained the reason for their abstention. They were not gratuitous trustees, and could not throw upon the respondents, who were not in fault, the loss of a fund

which they had misapplied in the course of their business. *Ib.*

Administration Action — Devastavit — Misappropriation by Solicitors—Executors' Liability —Relief.]—The defendants, who were executors, employed a firm of solicitors of high repute to act for them in an action for the administration of their testator's estate. In reliance upon the express statements of one of the partners that his firm had exhausted all the moneys of the estate in their hands, and required further sums for administration purposes, the defendants, from time to time, made payments of large amount without investigating the firm's accounts. The solicitors were thereby enabled to misappropriate a considerable sum which was ultimately lost to the estate by the firm's bankruptcy. The beneficiary sought to charge the defendants with the loss:—*Held*, that in the circumstances the defendants were entitled to the benefit of section 3 of the Judicial Trustees Act, 1896, and ought to be excused from personal liability. *Bacon v. Bacon* (5 Ves. 331) applied. *De Clifford (Lord)*, *In re*; *De Clifford (Lord) v. Quilter*, 69 L. J. Ch. 828; [1900] 2 Ch. 707; 83 L. T. 160—Farwell, J.

Will—Doubtful Construction—Application for Directions.]—Executors and trustees who have left outstanding a debt forming part of the estate of their testator, and have thereby lost part of the sum due, will be relieved under section 3 of the Judicial Trustees Act, 1896, from the consequences of their action, where the construction of the will under which they are acting is doubtful, and they have thought that on a reasonable interpretation of it, it was not their duty to call in the debt. *Grindey, In re*; *Clews v. Grindey*, 67 L. J. Ch. 624; [1898] 2 Ch. 593; 79 L. T. 105; 47 W. R. 53—C.A.

Where the estate and the amount in question are small, it may be reasonable that the trustees should not apply to the Court for directions in regard to the administration of the trust. *Ib.*

(j) Indemnity.

Trustees Carrying on Testator's Business—Debts Properly Incurred—Defaulting Trustee—Right of Innocent Trustees to Indemnity—Creditors of Business—Subrogation.]—Where trustees, under powers in that behalf, have carried on their testator's business after his death and employed his trust estate therein, and one of them has made default for which he alone is liable, the creditors of the business will not, on account of such default, be precluded from their right to rank against the testator's estate by subrogation to the right of the innocent trustee to be indemnified in respect of debts properly incurred by the trustees in carrying on the business. The principle of *Dowse v. Gorton* (60 L. J. Ch. 745; [1891] A.C. 190) and *Johnson, In re*; *Shearman v. Robinson* (49 L. J. Ch. 745; 15 Ch. D. 548), applied. *Frith, In re*; *Newton v. Rolfe*, 71 L. J. Ch. 199; [1902] 1 Ch. 842; 86 L. T. 212—Kekewich, J.

Same Person both Trustee and Beneficiary—Overpayment to Co-beneficiaries—Underpayment to Himself—Absence of Mistake—Right of Adjustment.]—A trustee, in administering an estate

bequeathed to his brothers and himself for their respective lives, during a period of seventeen years made payments of income to the beneficiaries in irregular sums not corresponding with their respective shares, with the result that at his death he had overpaid his brothers and underpaid himself. The payments were not paid by mistake, and his brothers' attention was not called to the fact that they were being overpaid:—*Held*, that his estate was not entitled to be repaid the amount overpaid. *Horne, In re; Wilson v. Cox-Sinclair*, 74 L. J. Ch. 25; [1905] 1 Ch. 76; 92 L. T. 263; 53 W. R. 317—Warrington, J.

Tort of Trustee—Liability of Trust Estate for—Trustee's Right of Indemnity—Subrogation.]—Where damages have been recovered against a trustee in respect of a tort committed in the ordinary management of the trust estate, the person recovering can avail himself of the trustee's right of indemnity, and proceed directly against the trust estate. *Raybould, In re; Raybould v. Turner*, 69 L. J. Ch. 249; [1900] 1 Ch. 199; 82 L. T. 46; 48 W. R. 301—Byrne, J.

Indemnity from Co-Trustee.]—A trustee who is an active participator in a breach of trust, and is not proved to have participated merely in consequence of the advice and control of a co-trustee, who is a solicitor, cannot obtain indemnity for the consequences of the breach of trust from the co-trustee. *Head v. Gould*, 47 L. J. Ch. 480; [1898] 2 Ch. 250; 78 L. T. 739; 46 W. R. 597—Kekewich, J.

7. APPOINTMENT OF NEW TRUSTEES.

Power of Appointing—Executors of Last Surviving Trustees—Appointment of One of Themselves—Validity.]—There is no rule of law which prohibits the donee of a power of appointing new trustees from appointing himself, but such an appointment should only be made where the circumstances are very exceptional. Where, therefore, a testator by will empowered his trustees, or the executors or administrators of the last acting trustee, "to appoint a new trustee or trustees," it was held that the four executors of the last surviving trustee, not being excluded by the language of the power from the class of persons who could be appointed new trustees, it was competent to them in the special circumstances of the case to appoint one of their number with others a new trustee of the will. *Skeats, In re; Skeats v. Evans* (58 L. J. Ch. 656; 42 Ch. D. 522), and *Newen, In re; Newen v. Barnes* (63 L. J. Ch. 763; [1894] 2 Ch. 297), explained. *Montefiore v. Guedalla* (No. 2), 73 L. J. Ch. 13; [1903] 2 Ch. 723; 89 L. T. 472; 52 W. R. 151—Buckley, J.

Appointment of Limited Company as Joint Trustee—Validity.]—A limited company may be a trustee, and may hold trust property in joint tenancy with a natural person as co-trustee. Where a settlement contains a power for the appointment of a new trustee, the donee of the power is entitled to appoint a limited company as such trustee jointly with a continuing trustee, in the absence of indications in the settlement of a contrary intention. *Thompson's Settlement Trusts, In re; Thompson*

v. Alexander, 74 L. J. Ch. 133; [1905] 1 Ch. 229; 91 L. T. 835; 21 T. L. R. 86—Swinfen Eady, J.

Personal Representative of Last Surviving Trustee Appointing Himself.]—The power of appointing new trustees given by section 10, sub-section 1 of the Trustee Act, 1893, does not enable a donee of the power to appoint himself a trustee, as the words "another person or other persons" mean some person or persons other than the person appointing. *Montefiore v. Guedalla* (No. 2) (73 L. J. Ch. 13; [1903] 2 Ch. 723) explained and applied. *Sampson, In re; Sampson v. Sampson*, 75 L. J. Ch. 302; [1906] 1 Ch. 435; 94 L. T. 241; 54 W. R. 342—Kekewich, J.

Last Surviving Trustee—Personal Representative—Executor not Proving.]—The last surviving trustee of a testator, H. R. B., who died in 1877, appointed three executors by his will. One proved, and two neither proved nor renounced. In 1894 the proving executor alone purported to appoint new trustees of the will of H. R. B. during the life of the non-proving executors. The will of H. R. B. contained a clause which effected an incorporation of the provisions of 23 & 24 Vict. c. 145 (commonly called Lord Cranworth's Act):—*Held*, that the appointment was good, because—first, section 71 of the Conveyancing and Law of Property Act, 1881, keeps alive the powers of Lord Cranworth's Act in the case of previous instruments with which that Act was incorporated, and section 27 of Lord Cranworth's Act provides that "acting" personal representatives may appoint; and secondly, the non-proving executors having in fact died without proving, representation to their testator under the Court of Probate Act, 1858, s. 16, went and devolved as if they had never been appointed executors. *Boucherett, In re; Barne v. Erskine*, 77 L. J. Ch. 205; [1908] 1 Ch. 180; 93 L. T. 32—Joyce, J.

Quære, whether the words "personal representatives" in the Conveyancing and Law of Property Act, 1881, s. 31, and the Trustee Act, 1893, s. 10, include executors who have neither proved nor renounced. *Ib.*

Powers Vested in Two Trustees to be Exercised by One.]—A testator devised and bequeathed his real and personal estate to his wife and eldest son on trust for sale, but with unlimited powers of postponing sale and of management meantime, and of paying legacies before the time specified in the will, and appointed his wife and eldest son executrix and executor. By a subsequent clause in the will the testator declared that so long as his son should be a trustee of his will all the powers vested in his trustees should be exercised by his son solely as if he were sole trustee, with complete power of management, and of selling and buying and varying investments without the concurrence of or reference to his co-trustees:—*Held*, that the effect of the clause was to vest in the son during his life the powers conferred on the trustees in the earlier clauses of the will as if he were sole trustee, so as to bind the widow to carry out his decisions arrived at in good faith, and that the clause was not inconsistent with the rest of the will, nor invalid nor void. *Arnott v. Arnott*, [1899] 1 Ir. R. 201—M.R.

Existing Trustees—Vesting Order.]—The jurisdiction of the Court to make a vesting order under sections 26 and 35 of the Trustee Act, 1893, embraces a case where the trustees in whom the property is to be vested have been already appointed. *Kenny's Trusts, In re*, [1906] 1 Ir. R. 531—M.R.

Validity—Trustee Remaining Abroad for More than Twelve Months—Short Visit to England during that Period.]—Where a trustee who went abroad in April, 1899, paid a visit to England in November, 1899, for about a week, during which visit he attended to the trust matters, and his co-trustee in June, 1900, purported to appoint a new trustee in his place under the power contained in section 10 of the Trustee Act, 1893, it was held that the original trustee had not remained "out of the United Kingdom for more than twelve months," and that consequently the appointment of the new trustee was invalid. *Walker, In re; Summers v. Barrow*, 70 L. J. Ch. 229; [1901] 1 Ch. 259; 49 W. R. 167—Farwell, J.

Lunatic not so Found—Consols—Vesting Order—Jurisdiction.]—*Semble*, the High Court has no jurisdiction under the Trustee Act, 1893, to make a vesting order in the case of a lunatic trustee. *M., In re*, 68 L. J. Ch. 86; [1899] 1 Ch. 79; 79 L. T. 459; 47 W. R. 267—Stirling, J.

Where Consols were standing in the name of the surviving trustee of a settlement who was a lunatic not so found by inquisition, the Court declined to make a vesting order, but appointed new trustees. *Ib.*

Judicial Trustee—Person not Named in Summons—Jurisdiction.]—On an application to appoint a named person or the official solicitor as judicial trustee, if the Court is not satisfied of the fitness of the named person there is jurisdiction to appoint a third person suggested by the retiring judicial trustee. *Douglas v. Bolam*, 70 L. J. Ch. 1; [1900] 2 Ch. 749; 83 L. T. 448; 49 W. R. 163—C.A.

—Appointment by Court.]—The appointment of a judicial trustee under the Judicial Trustees Act, 1896, is entirely a matter within the discretion of the Court; and the Court refused to appoint a judicial trustee of a will at the instance of the residuary legatee in remainder against the wish of the tenant for life and sole executrix, who was seventy-two years of age and against whom no misconduct was alleged; but, the case being a proper one for the Court to appoint a trustee, directed an appointment to be made in the usual way under the Trustee Act, 1893. *Ratcliffe, In re*, 67 L. J. Ch. 562; [1898] 2 Ch. 352; 78 L. T. 834—Kekewich, J.

Circumstances under which a judicial trustee will be appointed, considered. *Ib.*

Under the Judicial Trustees Act, 1896, the Court has power to remove an executor and appoint a judicial trustee in his place. *Ib.*

Equitable Limitations—Appointment by Will—Two Sets of Trustees.]—See *Adams' Trustees and Frost's Contract, In re*, 76 L. J. Ch. 408; [1907] 1 Ch. 695.

Removal of—Originating Summons.]—See PRACTICE, cols. 1910-1.

Vesting Order—Sale of Assets—Dissolution of Company.]—See COMPANY, col. 483.

8. RETIREMENT OF TRUSTEE.

Power of Court to Permit Retirement without Substitution—Administration.]—The Court possesses no jurisdiction under section 25 or any other section of the Trustee Act, 1893, to allow a trustee to retire from his trust without appointing a new trustee in his place. *Aston, In re* (23 Ch. D. 217), followed. *Chetwynd's Settlement, In re*, 71 L. J. Ch. 352; [1902] 1 Ch. 692; 86 L. T. 216; 50 W. R. 361—Farwell, J.

The Court, however, possesses in administrative proceedings an inherent jurisdiction to allow a trustee to retire without appointing any new trustee in his place, and will exercise it if the desire to retire is reasonable, and there are not special circumstances in the case that render such retirement inadvisable. *Courtenay v. Courtenay* (3 Jo. & Lat. 519) explained and followed. *Ib.*

9. PAYMENT INTO AND OUT OF COURT.

Payment into Court of Legacy—Discretion of Trustee.]—A testator directed his executors and trustees to invest a sum of 1,100l. and apply the income in payment to his son A. of a weekly sum for maintenance, with a half-yearly allowance for clothes, until they should be of opinion that it would be prudent to pay him the principal, with a gift over in the event of A. dying before receiving the principal. The income of the 1,100l. was applied as directed by the executor who proved the will, and after his death by his executors, who afterwards paid the principal into Court under the Trustee Act, 1893. A. applied for payment out:—*Held*, that the payment into Court deprived the executors of the executor of any discretion they had as to payment of the principal. A. having consented to the settlement of the fund for the benefit of his wife and children, the fund was ordered to be paid out to the trustees of a proper settlement, when appointed. *Murphy's Trusts, In re*, [1900] 1 Ir. R. 145—M.R.

Payment out of Court—Presumption of Death—Security to Refund.]—Where an application is made for the payment out of Court of funds by persons claiming as upon the presumption of death by reason of seven years' absence of the person to whose credit the funds stand, and the Court is satisfied with the evidence, it is not in accordance with modern practice for the Court to require security to refund before making the order for payment out. *B.'s Trusts, In re*, 53 W. R. 491—Warrington, J.

10. REMUNERATION.

Charge for Services—Will—Construction.]—A testator directed that "any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual pro-

professional or other charges for any business done by him or his firm in relation to the management and administration of my estate . . . whether in the ordinary course of his profession or business or not and although not of a nature strictly requiring the employment of a solicitor or other professional person":—*Held*, that, under this clause, a trustee could not charge for his time and trouble except in the course, whether ordinary or not, of his profession or business. *Fish, In re; Bennett v. Bennett* (62 L. J. Ch. 977; [1893] 2 Ch. 413), distinguished. *Clarkson v. Robinson*, 69 L. J. Ch. 859; [1900] 2 Ch. 722; 83 L. T. 164; 48 W. R. 698—Buckley, J.

11. COSTS.

Costs of Action—"Honestly."—The trustee of a deed of dissolution of a building society was ordered to pay the plaintiff's costs of an action for an account, where, through his negligence and complete reliance on his co-trustee (who had absconded), defalcation to the extent of some 400l. had taken place, which the trustee had himself made good. *Second East Dulwich 745th Starr Bowkett Building Society, In re*, 68 L. J. Ch. 196; 79 L. T. 726; 47 W. R. 408—Kekewich, J.

A trustee who does nothing, accepts without enquiry what is said by his co-trustee, and is satisfied with any explanation given by him, does not act "honestly" within the meaning of the Judicial Trustees Act, 1896, s. 3. *Ib.*

Action to Set Aside Settlement.—The Court has a discretion, at any rate where the order is made setting aside as against creditors only a settlement within the scope of 13 Eliz. c. 5, to allow the trustees their costs of defending the action to set aside the settlement out of the trust funds. *Merry v. Pownall* (67 L. J. Ch. 162; [1898] 1 Ch. 306) followed. *Elsey v. Cox* (26 Beav. 95) distinguished. *Ideal Bedding Co. v. Holland*, 76 L. J. Ch. 441; [1907] 2 Ch. 157; 96 L. T. 774; 14 Manson, 113; 23 T. L. R. 467—Kekewich, J.

Solicitor-Trustee—Costs—Right to Charge for Non-professional Services—"All professional and other charges for his time and trouble"—**Taxation.**—A testator directed that one of his executors and trustees, who was a solicitor, should be the solicitor to the trust, and should be allowed "all professional and other charges for his time and trouble notwithstanding his being such executor and trustee":—*Held*, that the solicitor-trustee was not entitled to charge for work done capable of being done by a trustee personally, and not requiring the employment of a solicitor. *Ames, In re; Ames v. Taylor* (25 Ch. D. 72), and *Fish, In re; Bennett v. Bennett* (62 L. J. Ch. 977; [1893] 2 Ch. 413), distinguished. *Chalinder & Herrington, In re*; 76 L. J. Ch. 71; [1907] 1 Ch. 58; 96 L. T. 196; 23 T. L. R. 71—Warrington, J.

Administration Action—Number of Counsel—Taxation.—*See COSTS*, col. 582.

Appeals—Costs of Trustees in.—*See APPEAL*.

Generally—Rights and Liability of Trustees for Costs.—*See COSTS*.

Management of Infant's Land.—*See INFANT*, col. 1007.

Taxation of.—*See Miles, In re*, 72 L. J. Ch. 704; [1903] 2 Ch. 518, *ante*, SOLICITOR, col. 2471.

12. OTHER MATTERS.

Administratrix of Sole Trustee—Insolvent Estate—Right of Retainer—Exercise for Benefit of Trust Estate.—*See Bennett, In re; Ward v. Bennett, ante*, EXECUTOR, col. 851.

Attachment of Trustee.—*See ATTACHMENT*, col. 63.

Beneficiary of Unsound Mind—Payment into Court—Maintenance.—*See LUNATIC*, col. 1441.

Friendly Society—Power to Wind up Society when Continuance of Trust Impracticable.—*See col. 837, FRIENDLY SOCIETY*.

Joint Advance by Trustee and Solicitors.—*See Stokes v. Prance*, 67 L. J. Ch. 69; [1898] 1 Ch. 212, *ante*, SOLICITOR, col. 2451.

Lunatic Trustee.—*See LUNATIC*, cols. 1440, 1444.

—**Criminal.**—*See LUNATIC*, col. 1440.

Notice to Legatee—Gift over to Executor not Mentioned.—*See Lewis, In re; Lewis v. Lewis*, 73 L. J. Ch. 948; [1904] 2 Ch. 656—C.A., *ante*, EXECUTOR, col. 832.

Settled Land Acts—Appointment of, under.—*See SETTLED LAND*, col. 2245.

Solicitor-Trustee.—*See SOLICITOR*, col. 2458.

Unpaid Vendor—Duties of Trustee.—*See VENDOR AND PURCHASER*, cols. 2659–2660.

UMPIRE.

See ARBITRATION, col. 41.

UNCONSCIONABLE BARGAIN.

See col. 876.

UNDUE INFLUENCE.

(*See also col. 875.*)

Unfair Transaction—Beneficiaries Ignorant of their Rights induced by Relatives to give Promissory Notes.—Beneficiaries under a settlement were induced by relatives, by whom they had been brought up, to sign promissory notes given by the relatives to a creditor, and under pressure of legal proceedings to assign their interest in the settled lands, which were in the possession of the relatives, to enable them to mortgage the lands to the creditor. The beneficiaries were only just of age, ignorant of their rights, and without any effective legal advice:—*Held*, that the transaction was procured by

undue influence, and was unfair, and that the assignment and mortgage should be set aside. *O'Connor v. Foley*, [1905] 1 Ir. R. 1—M.R.

Mother and Daughter—Attainment of Age by Latter—Dealing with Daughter's Property—Absence of Professional Advice.—M. died intestate, being possessed of real estate and personalty, including leaseholds, leaving a widow and one daughter under age. The widow took out administration, and deposited the lease of the leaseholds with a bank as security for an overdraft and for money advanced on bills. The bank had full knowledge of the insolvent condition of the widow's affairs and of the daughter's age and circumstances. A few days before the daughter came of age the bank, deeming the security insufficient, applied peremptorily to the mother for payment. At an interview with the managing director, shortly after the daughter came of age, the mother offered to secure payment of the overdraft by a joint promissory note of herself and her daughter. The daughter, who was present, being asked to join, expressed her willingness by saying "Yes." Some time afterwards the bank again pressed the mother for payment, but consented to allow a short extension of the time for payment if the mother and daughter signed a joint promissory note, payable on demand, for the entire debt. Two promissory notes for the amount were prepared by the bank and signed by the mother and daughter. The local manager stated in evidence that on the occasion of the signing of the notes he explained to the daughter that she would be liable for the whole amount, and that, in the event of the failure to pay the debt on the part of her mother the bank would look to her; and that the daughter replied that she understood all that. She had not, on this or any other occasion, independent advice:—*Held*, that the bank could not in these circumstances recover against the daughter. *M'Mackin v. Hibernian Bank*, [1905] 1 Ir. R. 296—Barton, J.

Solicitor and Client—Confidential Relationship—Gift and Sale to Solicitor—Validity—Competent Independent Advice.—In dealing with a case of a gift by a client to his solicitor the Court starts with a presumption of undue influence on the part of the donee continuing so long as the relation of solicitor and client, or the influence attributable thereto, continues. The presumption is not irrebuttable, but the onus is on the solicitor of shewing that the gift was uninfluenced by his position of solicitor. The fact that the donor had the competent independent advice of a different solicitor is material as tending to shew that the influence had ceased. But the new solicitor called in must not only satisfy himself that the donor knew what he was doing, and did it of his own will: he must also inform himself of the donor's financial position, and the circumstances under which the transaction was taking place, and satisfy himself that the gift was proper for the donor to make under all the circumstances of the case; otherwise he will not be in a position to give competent independent advice. *Wright v. Carter*, 72 L. J. Ch. 138; [1903] 1 Ch. 27; 87 L. T. 624; 51 W. R. 196—C.A.

The fact that the donee remains the solicitor of the donor in matters other than the transac-

tion in question suggests the inference that his influence had not ceased as regards the particular matter. *Ib.*

The law laid down in *Hatch v. Hatch* (9 Ves. 292), *Holman v. Loynes* (23 L. J. Ch. 529; 4 De G. M. & G. 270), and *Powell v. Powell* (69 L. J. Ch. 164, 166; [1900] 1 Ch. 243, 247) applied. *Ib.*

Benefits conferred by a deed benefiting the solicitor upon other persons, but not induced by the same motives as the gift to the solicitor, or derived in any way from any undue influence on his part, the consideration in the two cases being separable, can stand, although the deed should be set aside as regards the gifts to the solicitor. *Ib.*

In a transaction of sale from a client to his solicitor the onus is on the solicitor to shew that the client knew what he was doing, that he was properly advised, and that a fair price was given. *Ib.*

Per STIRLING, L.J.—The advice to the client should be competent independent advice. *Per* VAUGHAN WILLIAMS, L.J.—*Quære*, whether in every case of a purchase by a solicitor from his client competent independent advice is necessary, as distinguished from the advice of the purchasing-solicitor. A purchase transaction might be so manifestly fair that independent advice would not be considered necessary. The rule laid down in *Tomson v. Judge* (24 L. J. Ch. 785; 3 Drew. 306) applied. *Ib.* And see col. 875.

Money-lender's Transactions.]—See FRAUD, col. 877.

UNDUE PREFERENCE.

See CARRIER and RAILWAY.

UNIVERSITY.

Estates.]—61 & 62 Vict. c. 55 is the *Universities and College Estates Act*, 1898.

Leeds.]—4 Edw. 7 c. 12 is the *Leeds University Act*, 1904.

Liverpool.]—4 Edw. 7 c. 11 is the *University of Liverpool Act*, 1904.

London.]—61 & 62 Vict. c. 62 is the *University of London Act*, 1898.

— 62 & 63 Vict. c. 24 is the *University of London Act*, 1899.

Wales.]—2 Edw. 7 c. 14 is the *University of Wales Act*, 1902.

UNSOUND FOOD.

See LOCAL GOVERNMENT, col. 1332.

VACCINATION.

STATUTES.

61 & 62 Vict. c. 49 is the *Vaccination Act*, 1898.

7 Edw. 7 c. 31 is the *Vaccination Act*, 1907.

Neglect to Procure—Proceedings before Justices—Time.—The Vaccination Order, 1898, does not amount to fresh legislation, nor alter the procedure or the statutory conditions necessary to constitute an offence under sections 16 and 29 of the Vaccination Act, 1867, as amended by section 1, sub-section 1 of the Vaccination Act, 1898, and a prosecution commenced on July 12, 1900, for neglect to procure vaccination of a child born on December 30, 1898, is out of time. *Langridge v. Hobbs*, 70 L. J. K.B. 862; [1901] 1 K.B. 497; 84 L. T. 319; 19 Cox C.C. 671—D.

Notice to Parent.—Where the notice required by section 31 of the Vaccination Act, 1867, has been served upon a parent in respect of a child born in 1897, and not successfully vaccinated, it is unnecessary that the notice prescribed by section 1, sub-section 3 of the Vaccination Act, 1898, should also be served as a condition precedent to an application under section 31 of the Act of 1867. *Pym v. Wilsher*, 70 L. J. K.B. 1031; [1901] 2 K.B. 806; 85 L. T. 49; 49 W. R. 654; 65 J. P. 755; 20 Cox C.C. 16—D.

Child not Vaccinated when Six Months Old—Subsequent Medical Certificate.—A child aged eleven months not having been vaccinated, a summons was issued against the father. On the day before the summons was heard the appellant obtained a doctor's certificate that, owing to a complaint that the child was suffering from, it would be unsafe to vaccinate:—*Held*, that the certificate was no defence. *Hinds v. Elsam*, 88 L. T. 867; 67 J. P. 328; 20 Cox C.C. 490—D.

Order Signed but not Sealed—Validity of Subsequent Order.—An order was made by Justices under the Vaccination Act, 1867, requiring the appellant to have his child vaccinated within four weeks. This order, which was made on May 7, 1902, was signed but not sealed as required by section 31 of the Act. In proceedings for failure to obey the order objection was taken that it was not sealed, whereupon another order was made on June 25, 1902, duly signed and sealed by the two Justices who made the order of May 7, requiring the appellant to have his child vaccinated within four weeks from the date of this order:—*Held*, that the order of June 25 was invalid, and accordingly there was no order for the disobedience of which the appellant could be convicted. *Nutter v. Moorhouse*, 68 J. P. 134; 2 L. G. R. 1204—D.

Order to Cause Child to be Vaccinated—Non-compliance with Order—Evidence for Prosecution.—Upon an information under section 31 of the Vaccination Act, 1867, charging the defendant with omitting to comply with an order of Justices to cause his child to be vac-

inated, proof that no certificate has been received by the vaccination officer that the child has been successfully vaccinated, or that it is unfit to be vaccinated, or is insusceptible of successful vaccination, constitutes *prima facie* evidence that the child has not been vaccinated in conformity with the order. *Over v. Harwood*, 69 L. J. Q.B. 272; [1900] 1 Q.B. 803; 48 W. R. 608; 64 J. P. 326—D.

Proceedings under Section 29—No Further Notice—Proceedings under Section 31—Application to Child between Six and Eighteen Months Old.—After proper notice given to the appellant, a summons was taken out under section 29 of the Act of 1867, but this summons was dismissed. Without any further notice a summons was issued under section 31. No notice had been served by the public vaccinator under section 1, sub-section 3 of the Act of 1898, but he had visited the appellant's house to vaccinate the child, which was between six and eighteen months old:—*Held*, that an order under section 31 was rightly made. *Bowden v. Toll*, 85 L. T. 486; 50 W. R. 208; 66 J. P. 53; 20 Cox C.C. 62—D.

Prosecution of Offender—Right of Vaccination Officer to Prosecute—Direction of Guardians not to Prosecute.—A vaccination officer is empowered without directions general or special from the guardians in that behalf, and notwithstanding their directions to the contrary, to institute proceedings under section 29 of the Vaccination Act, 1867, as amended by the operation of section 1 of the Vaccination Act, 1898, against a parent neglecting without reasonable excuse to cause his child to be vaccinated. *Moore v. Keyte*, 71 L. J. K.B. 454; [1902] 1 K.B. 768; 86 L. T. 532; 50 W. R. 457; 66 J. P. 499—D.

Visit of Public Vaccinator, whether Condition Precedent.—It is not a condition precedent to a prosecution under section 29 of the Vaccination Act, 1867, as amended by the operation of section 1 of the Vaccination Act, 1898, that, pursuant to sub-section 3 of the latter section, the public vaccinator should have visited the home of the child and offered to vaccinate it. *Id.*

Conscientious Belief that Vaccination Prejudicial to Child's Health—Failure to Obtain Certificate—"Trifling" Offence—Jurisdiction of Court.—The fact that the parent of a child has repeatedly, within four months of the child's birth, sought without success to obtain a Justices' certificate of his conscientious belief that vaccination would be prejudicial to its health, is not sufficient to justify a Court of summary jurisdiction in dismissing an information preferred against the parent in respect of the non-vaccination of the child, as being for a "trifling" offence within the meaning of section 16 of the Summary Jurisdiction Act, 1879. *Nisbet v. Lloyd*, 2 L. G. R. 1277; 68 J. P. 396—D.

Exemption Certificate.—Where a magistrate to whom an application had been made for a certificate of exemption under section 2 of the Vaccination Act, 1898, filed an affidavit (in answer to a rule calling upon him to shew cause why he should not hear and determine

an application for such a certificate) in which he stated that he had heard the application and had refused same on the ground that he was not satisfied that the applicant believed that vaccination would be prejudicial to the health of his child, the Court discharged the rule as the applicant had not satisfied the magistrate of his belief. *Reg. v. Welby; Bird, ex parte*, 63 J. P. 86—D.

— **Refusal—Non-production of Birth Certificate of Child.**—Upon an application for a certificate of exemption, under section 2, subsection 1 of the Vaccination Act, 1898, Justices have power to require the production of the birth certificate of the child in respect of whom the application is made, unless there is some reason why it cannot be produced. *Reg. v. Lowndes*, 68 L. J. Q.B. 318; [1893] 1 Q.B. 577; 80 L. T. 532; 47 W. R. 315; 63 J. P. 344—D.

Expenses of "necessary legal assistance."—Article 29 (1) of the Vaccination Order, 1898, made in pursuance of the Vaccination Acts, 1867 to 1898, leaves it to the vaccination officer to decide whether legal assistance is necessary in any proceeding instituted by him under the Acts, and where in the *bona fide* exercise of his discretion the vaccination officer engages legal assistance in such proceedings, the Court will not readily interfere with his decision, but will allow him the costs of same, when taxed, against the guardians. *Hitchcock v. Wandsworth and Clapham Guardians*, 63 J. P. 348; 2 L. G. R. 1260; 20 T. L. R. 458—Channell, J.

— **Refusal of Guardians to Pay Costs of Solicitor Employed by Vaccination Officer.**—Where guardians refused to pay the costs of a solicitor employed by their vaccination officer, alleging that his employment was not necessary, and that the charges were unreasonable, the Court ordered that a writ of *mandamus* should issue commanding the guardians "to pay to their vaccination officer the reasonable costs of obtaining necessary legal assistance in connection with the institution and conduct of proceedings taken by him for enforcing the provisions of the Vaccination Acts, 1867 and 1898," leaving the question as to the reasonableness, &c., of the particular bill of costs to be dealt with on the return by the guardians. *Rea v. Wellenborough Union*, 68 J. P. 179—D.

Appointment of Officer.—See MANDAMUS, col. 1447.

VAGRANT.

Statute.—60 & 61 Vict. c. 39 is the *Vagrancy Act*, 1898.

Idle and Disorderly Person—Disease Due to Wilful Intemperance—Sufferer Removed by Order to Workhouse Infirmary—Chargeability to Union—Neglect to Maintain Himself.—An attack of delirium tremens produced by the wilful intemperance of the sufferer, which renders him removable by order to a workhouse infirmary and consequently chargeable to the union, is not, upon his recovery, a ground for his conviction as an idle and disorderly person under section 3 of the Vagrancy Act, 1824. *St. Saviour's Union v. Burbridge*, 69 L. J. Q.B. 886; [1900]

2 Q.B. 695; 83 L. T. 317; 43 W. R. 685; 64 J. P. 582, 725; 19 Cox C.C. 573—D.

Refusal of Work Offered at Labour Colony—Vagrancy Act.—Upon the prosecution of an able-bodied pauper, under section 3 of the Vagrancy Act, 1824, as a person able wholly or in part to maintain himself and neglecting or refusing so to do, because he has refused work offered outside the workhouse for which he would receive board, lodging, and a small weekly wage, the Court must consider the conditions upon which such work has been offered, and whether "the pauper's refusal to accept it was or was not reasonable." *Poplar Union v. Martin* (No. 1), 91 L. T. 550; 2 L. G. R. 1012; 68 J. P. 526; 20 Cox C.C. 742; 20 T. L. R. 659—D. And see POOR LAW, cols. 1833, 1838.

Fortune-Telling—Intent to Deceive and Impose—Rogue and Vagabond.—The words "pretending or professing to tell fortunes" in section 4 of the Vagrancy Act, 1824, import an intent to deceive; and where Justices are satisfied that fortune-telling has been practised with intent to deceive and impose, a record of conviction that the defendant "did unlawfully pretend to tell fortunes contrary to the form of the statute," &c., is good, and need not aver that the defendant unlawfully pretended to tell fortunes "with intent to deceive and impose" on her Majesty's subjects. *Reg. v. Entwistle*, 68 L. J. Q.B. 580; [1899] 1 Q.B. 846; 80 L. T. 657; 63 J. P. 423; 19 Cox C.C. 317—D.

Betting with Tokens.—See GAMING, col. 899.

VENDOR AND PURCHASER.

1. *Statute*, 2623.
2. *The Contract*, 2623.
3. *Particulars and Conditions of Sale*, 2629.
4. *Deposit*, 2636.
5. *Title*, 2636.
 - (a) *Power to Sell*, 2636.
 - (b) *Length of Title*, 2637.
 - (c) *Abstract of*, 2638.
 - (d) *Requisitions*, 2640.
 - (e) *Easements*, 2641.
 - (f) *Incumbrances*, 2642.
 - (g) *Implied Covenants for Title*, 2643.
 - (h) *Condition as to "Error or Misstatement,"* 2644.
 - (i) *Leaseholds*, 2645.
 - (j) *Tenancies*, 2646.
 - (k) *Other Matters*, 2647.
6. *Sale under Direction of Court*, 2650.
7. *Summons under Vendor and Purchaser Act*, 2650.
8. *Completion*, 2651.
9. *Conveyance*, 2653.
10. *Title-deeds*, 2657.
11. *Vendor's Lien*, 2657.

12. *Compensation*, 2660.
13. *Covenants*, 2662.
 - (a) *Generally*, 2662.
 - (b) *Restrictive*, 2664.
14. *Rescission*, 2672.
15. *Specific Performance*, 2675.
16. *Other Matters*, 2677.

1. STATUTE.

60 & 61 Vict. c. 65 is the *Land Transfer Act*, 1897.

2. THE CONTRACT.

Contract to Give "First refusal" of Land—Outside Purchaser—Satisfaction of Contract—Definite Offer at Proposed Purchase-Price—Interest in Land—Breach of Original Contract—Injunction.]—An agreement by an owner of land to give to another person the "first refusal" of the land in certain events either means that he must on the happening of the events give the other person the opportunity of refusing a fair and reasonable offer, or that he must give the other person the opportunity of refusing the land at a price acceptable to the owner offered by some third person. The owner does not, on either view, comply with the condition if he offers the land to the first person at a price higher than he would accept from other would-be buyers in the event of the refusal of the first person to buy at that price. *Manchester Ship Canal Co. v. Manchester Race-course Co.*, 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418—C.A.

Sale by Tender—"Highest net money tender"—Tender with Reference to other Possible Tender.]—The liquidator of the defendant company invited sealed tenders for the purchase of certain property of the company, and stated "the highest net money tender I receive, . . . that tender I will at once accept." B. offered 31,100l., and the plaintiffs offered "such a sum as will exceed by 200l. the amount to-day offered by the other proposing purchaser":—*Held*, that the plaintiffs' offer did not answer the description of "the highest net money tender." *South Hetton Coal Co. v. Haswell, Shotton, and Easington Coal and Coke Co.*, 67 L. J. Ch. 238; [1898] 1 Ch. 465; 78 L. T. 366; 46 W. R. 355—C.A.

Sale by Order of Court.]—By an agreement dated December 15, 1900, the vendor agreed to sell to the purchaser certain hereditaments for 5,125l. Clause 6 of the contract was as follows: "All facts or matters appearing to be proved or certified by a chief clerk or master attached to the chambers of the said Judge, or to be stated or implied in any judgment or order in the action in which the sale is made, are to be deemed thereby sufficiently and conclusively evidenced, and the purchaser is to assume that all necessary and proper consents preliminary to a sale have been obtained, and is not to require the concurrence in the conveyance of any person beneficially interested whose rights appear to be bound by the judgment or order under which the sale is made." One of the abstracted deeds recited that D. and

S. had become entitled in equity to the premises. On this the purchaser made this requisition: "The title of D. and S. to the hereditaments voluntarily conveyed to them must be abstracted and produced. The recital that they had become entitled in equity is insufficient." The vendor declined to do this. The Court had made an order directing the property to be sold, and the mortgagees who held the legal estate were prepared to concur in the conveyance. The purchaser now asked for a declaration that the answer was insufficient:—*Held*, that, having regard to the contract, the purchaser got a good title, as she got the legal estate from the mortgagees, and the order for sale bound all parties having a beneficial interest. *Whitham, In re; Whitham v. Davies*, 84 L. T. 585; 49 W. R. 597—Cozens-Hardy, J. *And see col. 2650.*

"Frontages of 30 ft. each"—"Lots as shown on plan"—Lots Shewn as being of Equal Widths—Plan for Delineation only—Vendor not to Account for Discrepancies in Quantities—Lots not Marked out at Sale—Total Actual Frontage Exceeding 30 feet to a Lot—Right to Conveyance of Proportion of Total Frontage.]—Particulars of sale comprised lot 1, pasture land as shewn on plan, and lots 2 to 8, seven lots as shewn on plan, all having frontages of 30 feet each to the road. T. agreed to purchase a piece of land, lots 2 to 8, and to complete the purchase according to the conditions. None of the lots had been marked out at the date of the contract, but the plan was that of an oblong field abutting on the road (P. Lane) with eight oblong spaces of substantially equal widths marked off by straight lines parallel to each other and to the northern and southern boundary lines of the field, except that part of the northern boundary of the field and lot 1 inclined to the south-west shewing a narrower frontage where that lot abutted on P. Lane than the frontages of the other seven lots. Each lot was marked with its number and "30 ft.," and a note on the plan stated that it was for the purpose of delineation only. Condition 6 stated that the property should be taken to be correctly described and that the vendor should not be required to account for any discrepancies in the quantities. The total frontage of the field upon P. Lane was in fact more than eight frontages of 30 feet, and the vendor was willing to convey a frontage of 210 feet as stumped out by his agent in respect of the seven lots bought by T., but the purchaser claimed that as shewn on the plan he was entitled to seven-eighths of the entire frontage:—*Held*, that seven lots "as shown on plan" when read in conjunction with the sixth condition meant that the purchaser must take the lots as he found them whether having frontages more or less than 30 feet, and the lines of the plan must be taken to be correct; the purchaser therefore being entitled to a conveyance of that proportion of the land which the seven lots bore to the property described in the plan. *Freeman and Taylor's Contract, In re*, 97 L. T. 39—Kekewich, J.

Building Scheme—Plan—Implied Representation—Power to Vary—Vacant Space Used as Road—Subsequent Building on Road—Dedication to Public—Cul-de-sac.]—The plaintiff purchased a plot of land which was part of an estate laid out under a building scheme. Upon the plan annexed to the conveyance the ad-

joining plots were shewn as a vacant space, such space being used as a road, though only as a *cul-de-sac*. The conveyance was made subject to a power to vary the plan and conditions. In an action by the plaintiff to restrain the defendant from building on the vacant space in contravention of the building scheme,—*Held*, that the plan did not amount to a binding representation that the vacant space would always remain so; that the power to vary applied to this vacant space, and that it had not been dedicated to the public. *Whitehouse v. Hugh*, 75 L. J. Ch. 677; [1906] 2 Ch. 283; 95 L. T. 175; 22 T. L. R. 679—C.A. Affirming, 54 W. R. 294—Kekewich, J.

— **Successive Sales—Rights against Purchasers at Subsequent Sales—Variations in Forms of Conveyance—Notice.**—Where an estate is sold in parcels at successive sales and subject to restrictive stipulations contained in a building scheme, a purchaser at a prior sale cannot enforce against a purchaser at a subsequent sale stipulations in respect of property subsequently sold which were not formulated or promulgated at the date of the contract under which he claims. A purchaser with notice of a building scheme is bound by restrictions of which he has notice, and accidental departures in the form of conveyance purporting to relieve him from the observance of the restrictions are ineffective, and, conversely, are no bar to his title to sue. *Rowell v. Satchell*, 73 L. J. Ch. 20; [1903] 2 Ch. 212; 89 L. T. 267—Swinfen Eady, J.

The mere fact that a solicitor for the vendor inserts restrictive covenants in the draft conveyance, not warranted by the terms of the contract, some of which are waived and some insisted upon, is not sufficient to put the purchaser or his solicitor upon enquiry or fix him with notice that there is a building scheme. *Ib.*

Corner Plot—Rounded Corner—Plan—Land Fronting Specified Number of Feet on Road A—Depth Specified on Road B—Method of Measurement.—By contract of February 21, 1905, W. agreed to sell to P. "land situate in and fronting 133 feet upon" W. Road, having a "depth next O. H. Grove of 124 feet," more particularly delineated, together with the abutments, boundaries, and dimensions thereof (be the last named little more or less), upon the plan thereto. The plan shewed a piece of land with a slightly rounded corner at the junction of W. Road and O. H. Grove with frontage lines, marked respectively 133 feet and 124 feet, produced in a straight line so as almost to meet at the corner:—*Held*, that the purchaser, according to the representations in the contract, was entitled to a conveyance of land having 257 feet frontage, measured round the bend of the corner of W. Road and O. H. Grove, the vendor not being entitled to have the lines of frontage produced in straight lines to their point of intersection outside the bend in measuring the 133 feet and 124 feet respectively. *Wellings and Parsons' Contract, In re*, 97 L. T. 165—Kekewich, J.

Sale by Purchaser under Original Contract subject "to the same terms as to title, &c." as in such Original Contract—Time Fixed for Completion—Interest.—In May, 1897, B. contracted

to sell to K. certain lands, the purchase to be completed on October 11, and failing completion on that date, interest to be paid by the purchaser at 5 per cent. on the balance of purchase-money then due. In June, 1897, K. contracted to sell the same premises to S., subject "to the same terms as to title, &c.," as in the original contract. S. eventually refused to complete until January. On a summons by K. asking for a declaration that October 11 was, by reference to the original contract, the time fixed for completion, and that the defendant might be ordered to pay interest from that date,—*Held*, that a clause of this kind which might possibly involve serious liability on the purchaser could not be read into the agreement of June, 1897, and that the contract was therefore an open one. But that, as interest was payable from the time when the purchaser could prudently have taken possession and the abstract was delivered on October 22, interest should run from November 1, 1897. *Keeble and Stillwell's Fletton Brick Co., In re*, 78 L. T. 383—Stirling, J.

Mortgage—Constructive Notice—Property in Occupation of Weekly Tenants—Enquiry of Tenants—Rents Paid to House Agent—Landlord's Title.—A tenant's occupation of property sold or mortgaged is notice to the purchaser or mortgagee of all that tenant's rights, but not of his lessor's title or rights. Actual knowledge, however, on the part of the purchaser or mortgagee that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor or mortgagor, is notice of such person's rights. *Hunt v. Luck*, 70 L. J. Ch. 30; [1901] 1 Ch. 45; 83 L. T. 479; 49 W. R. 155—Farwell, J.

The mere fact that the rents of property let to weekly or yearly tenants are known to be paid to a house agent is not so inconsistent with an apparently good paper title to the property in the vendor or mortgagor as to put the purchaser or mortgagee on enquiry, or fix him with notice of the rights of the person for whom the agent collects the rents. *Bailey v. Richardson* (9 Hare, 734) and *Barnhart v. Greenshields* (9 Moore, P.C. 18) followed. *Mumford v. Stolwasser* (43 L. J. Ch. 694; L. R. 18 Eq. 556) not followed. *Ib.*

Payment on Account of Purchase-Money—Payment of Balance by Instalments—Default—Repudiation—Specific Performance—Recovery of Money Paid—Damages.—By a contract for sale of land, the purchaser, having already paid to the vendor 40L. on account of the purchase-money of 150L., agreed to pay the balance by quarterly instalments of 9L. 3s. 4d., with interest at 8 per cent. on the unpaid instalments, with a provision for extending the time for payment at an increase of interest to be determined by both parties. By clause 8 the vendor, in the event of default in payment of the instalments, was to be at liberty to re-sell and retain out of the proceeds unpaid instalments, and was to pay the balance to the purchaser. The purchaser was let into possession according to the contract, and paid all the instalments except the last, when he disappeared for more than a year, and the vendor not being able to effect a sale let the property to a tenant. The purchaser re-appeared and offered to pay the last instal-

ment, and this being refused sued the vendor for specific performance or damages:—*Held*, that, though the plaintiff was not entitled to specific performance nor to recover the instalments on the ground of a total failure of consideration, he was entitled to damages for the vendor's non-performance of the contract, which on the facts of the case the Court considered had not been repudiated or abandoned by either party. *Cornwall v. Henson*, 69 L. J. Ch. 581; [1900] 2 Ch. 298; 82 L. T. 735; 49 W. R. 42—C.A.

Quere, whether clause 8 of the contract was an optional remedy, or whether it defined the vendor's only remedy in the events specified. *Ib.*

Lease—Building Plots—Plots to be Intersected by "intended road"—Words of Abuttal Amounting to implied Grant of Easement.—A lessor demised two plots of ground to a lessee. Lot A was described as bounded "on the east by an intended road to be thirty-eight feet wide intersecting said lot from lot B hereinafter demised." Lot B was described as bounded on the west "by said intended road 38 feet wide, intersecting said lot from lot A":—*Held*, that from the words of the lease describing with such particularity the abuttal of the two lots upon an intended intersecting road "to be" thirty-eight feet wide there was to be implied a grant of an easement of way to and from and across an intersecting space of that width, which imposed upon the lessor a binding obligation not to use the intersecting space for any purpose inconsistent with such grant. *Gogarty v. Hoskins*, [1906] 1 Ir. R. 173—Barton, J.

Sale of Lease—Underlease—Outstanding Day—Declaration of Trust.—By an indenture made in 1865 a lease was granted to J. G. P. for a term of ninety-nine years from March 25, 1865, at a rent of 3*l.* 16*s.* 4*d.* The lease became vested in H., who on August 6, 1885, granted S. H. an underlease for the whole of the term, less eleven days, at a rent of 12*l.* H. then mortgaged for the whole term, less one day, of which there was a declaration of trust, and on September 29, 1896, the mortgages sold to W. S. The vendors were the legal personal representatives of W. S., and the purchaser had entered into a contract to buy what was described in the particulars as "an improved leasehold ground rent of 8*l.* 8*s.* 8*d.* arising out of a ground rent for 12*l.* amply secured on property held on lease . . . having fifty-three years unexpired in March, and subject to an original ground rent of 3*l.* 16*s.* 4*d.*" The conditions provided that the title should commence with an indenture of underlease dated August 6, 1885, and that the purchaser should not question the validity of the underlease, but should assume a good title was vested in W. S. for the residue of the term. The purchaser contended that he was entitled to an assignment of the original lease, and that, as there was an outstanding day, he was entitled to a declaration that the vendor had not made out a good title, and to the return of his deposit. The vendor said that he had only contracted to sell the term for which the ground rent of 12*l.* was payable. The purchaser, moreover, had delivered no requisitions, and it was submitted

that the objection was out of time:—*Held*, first, that the objection was not out of time, as the objection was one of conveyance and not of title; secondly, that what was contracted to be sold was the improved ground rent for the whole term during which it was payable. *Seemle*, even if the contract had been to assign the whole of the original term, the vendor could have enforced the contract, as there was a declaration of trust of the last day of the term. *Scott and Fave's Contract, In re*, 86 L. T. 617—Swinfen Eady, J.

Unusual and Onerous Covenants—Duty of Vendor to Disclose—Constructive Notice—Production of Common Form Lease of Property of Same Estate.—At the commencement of negotiations for the assignment of a lease which was afterwards found to contain unusual and onerous covenants, the purchaser's solicitor called on the plaintiff's agent and asked to see the lease. The agent said that the lease could not be obtained for a few days, but that he would produce an identical lease on a printed form of adjoining property of the same estate. The solicitor replied that he had not time to examine it then. The vendor took no further steps to disclose the covenants, and the purchaser made no further enquiry as to them, and, having entered into a contract for the assignment of the lease in ignorance of the covenants, afterwards repudiated it:—*Held*, an action for damages for breach of the contract, that no reasonable opportunity of ascertaining the terms of the covenants had been given by the vendor to the purchaser, and that the purchaser was not affected by notice of the covenants. *Molynere v. Hawtrey*, 72 L. J. K.B. 873; [1903] 2 K.B. 487; 89 L. T. 350; 52 W. R. 23—C.A.

Leasehold Property—Order to Repair by Local Authority—"Charge or outgoing"—Incidence of Burden—Covenant to Repair.—A vendor and purchaser entered into an open contract for the sale of leasehold property, the lease of which contained a covenant on the part of the vendor to repair. At the date at which the purchaser was first in a position prudently to enter into possession the property was in a dilapidated condition, and an order to repair it as a dangerous structure had been made, though not yet served, by the local authority. The vendor produced the last receipt for ground-rent during the investigation of the title:—*Held*, that, in order to determine whether the expense of obeying the order to repair should be borne by vendor or purchaser, it was unnecessary to enquire in the present case at what exact date that expense became a charge or outgoing in connection with the property, for that the expense must be borne by the vendor by reason of his covenant to repair; and that he was not relieved from this burden by the production of the last receipt for ground-rent under the provisions of section 3, sub-section 4 of the Conveyancing and Law of Property Act, 1881, as in this case the "contrary appeared." *Phill v. Hutchens* (32 Beav. 615) and *Lawrie v. Iers* (51 L. J. Ch. 209; 7 App. Cas. 19) distinguished. *Higlett and Bird's Contract, In re*, 71 L. J. Ch. 508; [1902] 2 Ch. 214; 87 L. T. 159; 50 W. R. 424—Swinfen Eady, J.

Loss of Bargain—Damages—Leaseholds—As-

signment—Consent of Lessor—Duty of Vendor.]—The rule laid down in *Bain v. Fothergill* (43 L. J. Ex. 243; L. R. 7 H.L. 158), that damages for loss of bargain cannot be recovered on breach of a contract for sale of land, is based upon the uncertainty of making out a good title, and does not depend upon the absence of fraud. It applies to cases where a vendor is unable, without any default on his part, to make a good title, and does not apply to the case of a vendor who can make a good title, but will not, or will not do what he can do and ought to do in order to obtain one. *Day v. Singleton*, 68 L. J. Ch. 593; [1899] 2 Ch. 320; 81 L. T. 306; 48 W. R. 18—C.A.

The rule is an exception, and ought not to be extended to cases in which the reasons on which it is based do not apply; therefore, if a vendor of leaseholds assignable subject to the consent of his lessor does not endeavour to obtain that consent, the purchaser will be entitled to damages, although he would not have been so entitled if the vendor had asked for the consent and it had been refused. *Ib.*

Engell v. Fitch (38 L. J. Q.B. 304; L. R. 4 Q.B. 659) is not overruled by *Bain v. Fothergill* (*supra*). *Ib.*

Sale of Premises by Tenant to Landlord—Covenant to Insure—Damages.]—A, the lessor, contracted with B, the lessee, for the purchase of B's interest in certain premises. B insured the premises for about half their value. Before the completion of the contract the premises were damaged by fire to about the amount insured, which sum was paid by the insurance company. A brought his action for damages for breach of the covenant to insure in addition to the sum paid by the insurance company:—*Held*, that A was not entitled to any sum by way of damages beyond the insurance money paid by the company. *Newman v. Maxwell*, 80 L. T. 681—Kekewich, J.

Powers of Trustees to Sell—Leaseholds—Sale in Lots of Property under one Lease.]—*See TRUST AND TRUSTEE*, col. 2594.

Statute of Frauds.]—*See CONTRACT*, col. 506.

3. PARTICULARS AND CONDITIONS OF SALE.

Description of Property—"Eligible investment"—Disorderly House—Mutual Ignorance of Defect—Specific Performance.]—Where there has been a contract to purchase a house, stated to be an "eligible freehold property for investment," the description of which has been truly set out in the particulars of sale, the fact that, without the knowledge of either party, the house is being used as a disorderly house is no ground for refusing specific performance of the contract. *Dictum* of WIGRAM, V.C., in *Lucas v. James* (18 L. J. Ch. 329; 7 Hare, 410, 418), followed. *Hope v. Waiter*, 68 L. J. Ch. 359; [1899] 1 Ch. 879; 80 L. T. 355; 47 W. R. 479—Cotzens-Hardy, J.

Sale by Auction—Freehold or Leasehold—Correction of Particulars by Conditions—Title—Unexpired Term—Release of Rent—Enlargement of Term into Fee-simple—Contract—

Rescission.]—Particulars of sale by auction described the property as freehold. The conditions of sale stated that the property was formerly held with other property under a lease of 1672 for five hundred years at a yearly rent of 1s., that it was assigned in 1828 free from the rent, that the rent had never been paid by the vendor, and that the purchaser should assume the rent had been released. It was further stated that by a deed-poll of 1902 under the provisions of the Conveyancing and Law of Property Act, 1881, the property was expressed to be enlarged into a fee-simple, and that it should be assumed that the deed-poll was effective. The rent had not in fact been paid for at least fifty years. The purchaser alleged that he had signed the contract, after having read the particulars but not the conditions, and claimed rescission of the contract and repayment of the deposit on the ground that he had been misled into believing the property was freehold when in fact it was, as he alleged, leasehold:—*Held*, that the vendor, believing on reasonable grounds that the statement in the particulars that the property was freehold was true, although he might have a difficulty in proving the freehold tenure, was entitled by the conditions to impose on the purchaser the burden of assuming the facts as stated, and the purchaser was not entitled to rescission. *Sandbach and Edmondson, In re* (60 L. J. Ch. 60; [1891] 1 Ch. 99), applied. *Torrance v. Bolton* (42 L. J. Ch. 177; L. R. 8 Ch. 118) distinguished. *Blaiberg v. Keeves*, 75 L. J. Ch. 464; [1906] 2 Ch. 175; 95 L. T. 412; 54 W. R. 451—Warrington, J.

Boundary Wall—Mutual Gable—Half Cost of Erection.]—The proprietor of two adjoining building plots erected a house upon one of them, building the whole gable half upon one plot, and half upon the other plot. He afterwards conveyed the plot with the house upon it to A. The mutual gable, resting partly on the two plots, was described in the conveyance as a mutual gable. He subsequently sold the other plot, and the purchaser proceeded to erect a house upon it, making use of the mutual gable. In the letters of sale to A the vendor said: "The unused half of the gable and boundary walls is not included in the offer." In an action by A's successor against the purchaser of the second plot for half the cost of the mutual gable wall, the defendant relied upon the words of the letters as shewing that A had not acquired the claim for recompense for the unused half of the gable:—*Held*, that A's successor was entitled to claim from the purchaser of the second plot one-half of the value of the mutual gable, and that there was no inconsistency between the letters of sale and the words of the conveyance. *Baird v. Bell*, [1898] A.C. 420—H.L. (Sc.)

Building Estate—Registered Conditions—Modifications—Consent—Persons "principally interested"—Land Transfer Act.]—The conditions inserted in a certificate in respect of a title to land registered under the Land Transfer Act, 1875, are a public restriction upon the user of such land, and the persons "principally interested" who are entitled, under section 84 of the Act, to object to any modification of the conditions, and whose consents are therefore necessary, are all those persons

who have bought with notice of the conditions, and upon whom they are binding. *Ground-Rent Development Co. v. West*, 71 L. J. Ch. 354; [1902] 1 Ch. 674; 86 L. T. 403—Kekewich, J.

— **Restrictive Conditions.**—A local authority, having sold one of several lots under a general building scheme, under particulars describing the property as adapted for first-class shops or any business requiring roomy premises, and under conditions requiring the purchaser of each lot to build a shop and dwelling-house of not less than a particular value, will not be restrained by injunction from erecting on the unsold lots a fire-engine station of a value exceeding that stipulated in the conditions for the shops and dwelling-houses. *Holford v. Acton Urban Council*, 67 L. J. Ch. 636; [1898] 2 Ch. 240; 78 L. T. 829—Stirling, J.

Compensation, as to.—See COMPENSATION, col. 2660.

Conveyance—Condition as to Preparation of.—See CONVEYANCE, col. 2653.

Delay in Completion—Interest on Purchase-money—"Default"—Omission to Discover Defect in Title—Reasonable Care.—In order to decide whether there has been default on the part of a vendor, within a clause which provides that the purchaser shall pay interest on the purchase-money if completion is delayed "from any cause whatever other than the default of the vendor," the test to be applied is whether there has been a want of reasonable care and diligence on the part of the vendor. Therefore an omission by a vendor to discover and provide for a blot on his title which could only be detected by extreme vigilance is not such default. *Woods and Lewis's Contract, In re*, 67 L. J. Ch. 475; [1898] 2 Ch. 211; 78 L. T. 665; 46 W. R. 643—C.A.

— **Specific Performance—"Wilful default" of Vendor—Interest—Rents and Profits—Possession Retained by Vendor—Outgoings—Occupation Rent.**—By an agreement for the sale of real estate it was provided that the purchase should be completed on a fixed day, and that "if from any cause whatever, other than wilful default on the part of the vendors," the completion of the purchase was delayed beyond that day, the purchase-money should bear interest at 5 per cent. per annum till the day of actual payment. The draft conveyance, as prepared by the purchaser, contained an assignment of the benefit of certain covenants entered into with the vendors, to which the purchaser was entitled under the agreement. The vendors added words limiting the extent of this assignment, and threatened that if the purchaser did not approve they would cancel the contract and forfeit the deposit. The purchaser brought an action for specific performance. The defendants pleaded that the plaintiff was not ready to complete, as he was unable to pay the purchase-money; and it was not denied that he was unable to pay it out of his own money. The plaintiff obtained a declaration that the vendors were not entitled to the insertion of the words proposed, an order for specific performance of the contract, and for accounts and enquiries and the costs of the action. Pending the completion of the purchase, a tenant of one of the farms on the pro-

perty gave up his farm, and the vendors paid him a sum of money, the amount of the valuation due to him, and worked the farm themselves, and thereby incurred losses. The Judge allowed the vendors in the accounts interest on the purchase-money and the amount paid to the tenant for valuation, but not the farming losses. He also made them chargeable with the rents and profits actually received by them, but not with the occupation rent. On the question of payment of interest,—*Held*, by VAUGHAN WILLIAMS, L.J., that the vendors, in insisting under threat of cancelling the contract and forfeiting the deposit upon a form of conveyance to which they were not entitled, had neglected to conduct the sale to completion in the manner in which they ought reasonably to have done, and they were guilty of wilful default, and they ought not to be allowed any interest during the time occupied in bringing the action to completion; neither could they have interest during the time occupied by the enquiry upon claims made by them which they could not support. *Held*, also, that the *causa causans* of the delay was the conveyance not being in a proper form, not the inability of the purchaser to pay the purchase-money. *Held*, by STIRLING, L.J., that the form of the conveyance, as regards the covenants was of no importance to the vendors, and they had not acted reasonably, and were guilty of wilful default after the time when the purchaser had accepted the draft conveyance in a proper form; but the real cause of the delay was not the default of the vendors, but that the purchaser was not provided with the money to complete his purchase, and he could not be relieved from the payment of interest. *Held*, by COZENS-HARDY, L.J., that the view taken by the vendors as to the proper form of conveyance, though mistaken, was honest, and there had not been any such wilful default on their part as to exempt the purchaser from the payment of interest, and he was liable to pay interest for the whole period until the actual completion of the sale. *Bennett v. Stone*, 72 L. J. Ch. 240; [1903] 1 Ch. 509; 88 L. T. 35; 51 W. R. 338—C.A.

Young and Harston's Contract, In re (31 Ch. D. 168), *Hetling and Merton's Contract, In re* (62 L. J. Ch. 783; [1893] 3 Ch. 269), *London Corporation and Tubbs's Contract, In re* (63 L. J. Ch. 580; [1894] 2 Ch. 524), and *Woods and Lewis's Contract, In re* (67 L. J. Ch. 475; [1898] 1 Ch. 433), discussed. *Id.*

— **Sale of Leaseholds—Agreement by Vendor to Discharge Outgoings up to Completion—Notice by Sanitary Authority to Repair—Expenses—Liability of Purchaser.**—Conditions of sale for the purchase of leaseholds provided that the purchase should be completed on August 11, 1898, and that a purchaser paying his purchase-money should as from that day be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings were (if necessary) to be apportioned, and such apportioned rents were to be paid on completion by each purchaser to the vendor. If the completion of the purchase was delayed beyond the before-mentioned day, the remainder of the purchase-money was to bear interest from that day to the day of actual payment thereof, "or at the option of the vendor he may receive

the rents and profits up to the day of the actual completion of the purchase." Owing to the purchaser's default the purchase was not completed on the date fixed, and the vendor remained in possession and receipt of the rents and profits. In November, 1898, notices were served upon the vendor under the Public Health (London) Act, 1891, to abate nuisances on the premises, which the vendor complied with, and expended a sum of 24*l.* in so doing. In an action for specific performance by the purchaser the vendor claimed to be entitled to payment by the purchaser of the 24*l.* as well as the balance of the purchase-money:—*Held*, that the purchaser was not entitled to specific performance, except upon the footing of paying to the vendor, in addition to the balance of the purchase-money, the 24*l.* *Barshit v. Tagg*, 69 L. J. Ch. 91; [1900] 1 Ch. 231; 81 L. T. 777; 48 W. R. 220—Cozens-Hardy, J.

Condition for Payment of Interest by "Purchaser in default"—Liability of Vendor in Default—Measure of Damages.—On a contract for the sale of real estate with possession, subject to a condition that if from any cause whatever the purchase is not completed on the date fixed for completion "the purchaser in default" is to pay interest from that date on the balance of the purchase-money (a deposit having been paid) until completion, and the purchase is not completed for upwards of four months from the fixed date, not in consequence of any defect in title or conveyancing difficulties, but entirely owing to the default of the vendor in not having taken reasonable care to fulfil his contract, the purchaser is not "in default" within the condition, and the vendor is not entitled to interest. *Denning v. Henderson* (17 L. J. Ch. 8; 1 De G. & Sm. 689) followed. *Jones v. Gardiner*, 71 L. J. Ch. 93; [1902] 1 Ch. 191; 86 L. T. 74; 50 W. R. 265—Byrne, J.

In such a case the vendor, although acting in good faith, is liable to the purchaser for such damages as may reasonably be said to have arisen from the delay and non-delivery of possession, or as may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract. *Engell v. Fitch* (38 L. J. Q.B. 304; L. R. 4 Q.B. 659) on this point approved and applied. *Jaques v. Millar* (47 L. J. Ch. 544; 6 Ch. D. 158) followed. *Ib.*

Easements—Limitation in Conveyance.—Property was put up for sale in lots, and it was stated in the conditions that it was sold "subject to all rights of way and water and other easements (if any)," but there was no other mention of easements. Lot 2 was sold, but lot 1 remained in the hands of the vendors:—*Held*, that the purchaser of lot 2 was not entitled to have the conveyance in such a form as would give him the benefit of the general words as to rights of way, &c., in section 6 of the Conveyancing and Law of Property Act, 1881, but the vendors were entitled to limit the generality of those words. *Hughes and Ashley, In re*, 69 L. J. Ch. 741; [1900] 2 Ch. 595; 83 L. T. 390; 49 W. R. 67—C.A. *And see* col. 2641.

Error or Omission Discovered in Particulars of Sale—Sewer under Property purchased—Compensation.—The conditions of sale relating to

a dwelling-house and grounds, not sold for building purposes, provided (*inter alia*) that any error or omission which might be discovered in the particulars of sale affecting the nature of the property should not annul the sale, but should be a matter for compensation; and that the property was sold subject to all rights of way or other easements. A deed of mutual covenants, subject "to which also the property was sold, precluded any building on the property. The purchaser discovered that there was a public sewer passing under the garden at the rear of and some distance from the house, and a manhole used for obtaining access to the sewer. The vendor was entirely ignorant at the time of the sale of the existence of such sewer. The sewer was vested in the local authority under the Public Health Act, 1875, and no buildings could be erected over it without the sanction of the local authority. The purchaser objected to complete, on the ground that the vendor was unable to make a title to the property:—*Held*, that the circumstances did not justify the Court in releasing the purchaser from his contract to take the property; that the existence of the sewer did not so alter the character of the piece of ground that the purchaser could say that he did not get what was intended to be sold; and that the case was a matter for compensation. *Brewer and Hankins's Contract, In re*, 80 L. T. 127—C.A.

Indemnity against Rent—Misleading Condition.—Certain premises, described as lot 2, were sold by public auction, under the direction of the Court. The particulars stated that lot 2 was held, with other premises, under lease of 1877, for a term of years, subject to rent, and further stated that the said lot 2 was sold "subject to the said rent, but is indemnified therefrom by an indenture, dated August 16, 1881, whereby the said lot was assigned to A. J." The 12th condition of sale was as follows: "Lot 2 was assigned by deed, dated 16 August, 1881, indemnified against the rent reserved by the said lease (of 1877), as in said deed mentioned, and the purchaser shall not require any further or other indemnity in respect of the same, and shall not require any information as to the person or persons, or premises liable to the said rent, or bound by the said indemnity." The indenture of assignment of 1881 assigned lot 2 to A. J. "indemnified from the rent, but subject to the covenants by the lessee and the conditions in the said lease." M. was declared the purchaser of lot 2. At the time of bidding he believed that the other premises demised by the lease of 1877 were bound to indemnify lot 2 against the rent reserved by the lease. The purchaser applied to be discharged from his contract on the ground that the provision as to indemnity contained in the deed of 1881 did not give him any such real or adequate indemnity against the rent as he was entitled to under his contract:—*Held*, that there was not an indemnity within the contract, and that the condition of sale was one which, taken in connection with the particulars, rendered the information given by the document insufficient and misleading, and that therefore the purchaser should be discharged from his contract. *Manifold v. Johnston*, [1902] 1 Ir. R. 7—M.R.

Inspection—Latent Defect—Building Estate—

Underground Culvert unknown to both Parties.]

—The purchaser contracted to purchase land for building purposes from trustees under conditions of sale which provided that, the property being open for inspection, the purchaser should be deemed to buy with full knowledge of the condition thereof, and that if any error should be found in the particulars the same should not annul the sale, nor should any compensation be allowed in respect thereof. After the date of the contract the purchaser discovered that there was an underground culvert for the passage of water from other lands running through the middle of the property, the existence of which was previously unknown either to the vendors or to the purchaser, who had himself inspected the property without discovering it:—*Held*, that the existence of the culvert was a substantial injury to a building estate, that the condition of sale only applied to such matters as might be discovered by the purchaser with reasonable care, and that on the facts there was a substantial misrepresentation as to the suitability of the property for building purposes, rendering the contract unenforceable according to the rule in *Flight v. Booth* (4 L. J. Q.P. 66; 1 Bing. N.C. 370). *Puckett and Smith's Contract, In re*, 71 L. J. Ch. 666; [1902] 2 Ch. 258; 87 L. T. 189; 50 W. R. 532—C.A.

Title—Conditions as to.]—See TITLE, *infra*.

Right to Rescind—Rescission by Letter without Prejudice—Succession Duty—Ground Rent—Prospective Duty on Reversion—Liability to Discharge.]

—A freehold ground rent, secured by a lease expiring in 1938, was sold, free from incumbrances, with a condition enabling the vendors to rescind if the purchaser should insist on any requisition with which they should be unwilling to comply on the ground of difficulty, delay, or expense, or other reasonable ground. The fee was vested in two vendors, as to two undivided thirds beneficially, and as to the remaining third in trust for their brother. Succession duty on the death of a tenant for life of the entirety had been paid on the ground rent only. The purchaser insisted that the vendors should commute and pay the further duty, amounting to a few shillings, which would be payable if any of the three brothers (who in 1938 would all be over ninety years of age) should be alive on the determination of the lease. The vendors refused, but by a letter expressed to be "without prejudice" they offered an indemnity, and gave notice in case of non-acceptance to annul the sale:—*Held*, that they could not rescind by a letter "without prejudice," that the purchaser was entitled to have the incumbrance discharged and was not bound to accept an indemnity, and that the terms of the condition did not entitle the vendors to rescind. *Weston and Thomas's Contract, In re*, 76 L. J. Ch. 179; [1907] 1 Ch. 244; 96 L. T. 324—Swinfen Eady, J.

—**Sale of Real Estate—Condition that Mortgagee shall Accept Purchaser as Mortgagor—Time Within which Condition to be Performed—Election by Purchaser to Treat Contract as Rescinded before Time for Completion of Condition arrived or Vendor has declared Inability to Perform—Recovery of Deposit.]**—The plaintiff agreed to purchase the lease of a public-house from the defendant, who had obtained a loan

upon mortgage of the lease, upon condition that the mortgagee would consent to continue the loan to the plaintiff. By the agreement a day was fixed for completion of the purchase, and it was stipulated that in case of default by the plaintiff the deposit paid by him on entering into the agreement should be forfeited. More than four weeks before the day fixed for completion the plaintiff and defendant had an interview with the mortgagee, who refused to allow the full amount of the loan to remain on mortgage. Thereupon the plaintiff declared the agreement at an end. Later on the same day the defendant saw the mortgagee, who consented to continue the loan to the plaintiff. The defendant informed the plaintiff of the mortgagee's consent, but the plaintiff insisted that the agreement was at an end. In an action by the plaintiff to recover the deposit,—*Held*, that in the absence of some agreement express or implied that the mortgagee's original refusal should be treated as final and conclusive, and there being nothing to justify the plaintiff in so treating it, the defendant had until the day fixed for completion to obtain the mortgagee's consent, so that the plaintiff was wrong in treating the agreement as at an end, and consequently the agreement had gone off through his default, and he was not entitled to recover the deposit. *Smith v. Butler*, 69 L. J. Q.B. 521; [1900] 1 Q.B. 694; 82 L. T. 281; 48 W. R. 583—C.A. And see RESCISSION, col. 2672.

4. DEPOSIT.**Auction—Highest Bidder—Cheque for Deposit—Refusal by Vendor to Accept Cheque and Sign Contract.]**

—A vendor who offers land for sale by public auction under conditions of sale providing that the highest bidder shall be the purchaser, and that he shall immediately pay a deposit and sign a contract for purchase, is liable in damages to a member of the public to whom the property has been knocked down as the highest bidder if he refuses to allow him to sign the contract. The vendor, however, is not bound to accept a cheque for the deposit, and may refuse to enter into the contract unless cash is paid. *Johnston v. Boyes*, 68 L. J. Ch. 425; [1899] 2 Ch. 73; 80 L. T. 488; 47 W. R. 517—Cozens-Hardy, J.

Lien—Rescission by Purchaser.]—A purchaser of land upon payment of a deposit acquires an equitable lien therefor upon the land, and that lien may be made available against a transferee (not being a purchaser for value without notice) from the vendor, as well where the purchaser puts an end to the contract without any default of the vendor in exercise of a right reserved to the purchaser, as where the vendor (or his transferee) is in default. *Whitbread v. Watt*, 71 L. J. Ch. 424; [1902] 1 Ch. 835; 86 L. T. 395; 50 W. R. 442—C.A.

5. TITLE.**(a) Power to Sell.**

Settlement—Real Estate—Power of Appointment—Direction to Trustees to "pay and transfer" the Property—Power of Sale—Appointment by Will—Sale by Trustees of Will—Title to

Legal Estate.]—Under a marriage settlement real estate was conveyed to trustees upon certain trusts during the lives of the husband and wife, and upon trust after the death of the survivor “to pay and transfer” the said hereditaments and premises to the issue of the marriage as the survivor of the husband and wife should by deed or will appoint. The settlement contained two powers of sale vested in the trustees, one during the lives of the husband and wife and the life of the survivor, and the other after the death of the survivor during the lifetime of any child of the marriage. The husband survived his wife, and by his will appointed the property the subject of the settlement to the use of trustees upon trust for sale and conversion, and then directed them to stand possessed of “the settled property” upon certain trusts for the issue of the marriage. The trustees of the will contracted to sell the property, and the purchaser objected that the proper persons to sell were the representatives of the last surviving trustee of the settlement:—*Held*, that, as the trustees of the settlement were thereby directed to “pay and transfer” the property as the survivor of the husband and wife should appoint, the trust for sale created by the will was expressly authorised by the terms of the power of appointment and overrode the powers of sale contained in the settlement, and could be exercised by the trustees of the will. *Kennworthy v. Bate* (6 Ves. 793) and *Redgate, In re; Marsh v. Redgate* (72 L. J. Ch. 204; [1903] 1 Ch. 356), considered. *Adams's Trustees' and Frost's Contract, In re*, 76 L. J. Ch. 408; [1907] 1 Ch. 695; 96 L. T. 838—Warrington, J.

Held, further, that it was the duty of the trustees for sale as vendors to deduce at their own expense the title to the legal estate which was vested in the trustees of the settlement. *Ib.*

(b) Length of.

Vendor to Shew Twelve Years' Undisturbed Possession—Prior Title not to be Objected to—Grant of Administration to Vendor—Return of Land as Assets.]—By conditions of sale the vendor was required to shew that he had been in undisturbed possession of the lands for upwards of twelve years, and prior to that period the title was not to be investigated, nor any objection made in reference to it. The vendor, after being in absolute possession for about eighteen years, took out letters of administration to his father, and returned the lands as part of his assets. The purchaser becoming aware of this refused to complete:—*Held*, that the taking out of letters of administration did not affect the title acquired under the Statute of Limitations, and that consequently a good title was shewn so far as was required by the conditions of sale. *McClure and Garrett's Contract, In re*, [1899] 1 Ir. R. 225—V.C.

Open Contract—Forty Years' Title—Waiver—Restrictive Covenants—Notice.]—On an open contract for the sale of freehold property the vendor supplied an abstract shewing a title for twelve years, and alleged that the purchasers had notice at the date of the contract of his inability to give an absolute title; he also set up a waiver by the purchasers of their right to

a full forty years' title by a letter written by the purchasers. Part of the property was subject to a restrictive covenant not to carry on any trade or business on the premises. When the purchasers made enquiries as to restrictive covenants, they were informed that such covenants did not affect the user of the property for business purposes:—*Held*, if it is shewn on the signing of a contract that a forty years' title was not able to be given, the purchasers cannot have it, but in this case the purchasers refused to take a shorter title, and, the contract being silent on that point, the purchasers were entitled to their full forty years' title. The whole correspondence shewed that the purchasers all along insisted on a forty years' title, and the letter referred to could not be held to be a waiver of itself. The restrictive covenants were perfectly good objections to the title, and notice of them had not been received by the purchasers, who were told there were no such restrictive covenants. *Judge and Sheridan's Contract, In re*, 96 L. T. 451—Joyce, J.

(c) Abstract of Title.

Time for Delivery of Abstract and Requisitions—“Immediately.”—Premises were sold subject to conditions of sale which provided—first, that the vendor should, immediately after the sale, furnish to the purchaser or his solicitor an abstract of title; and secondly, that the purchaser should make his objections and requisitions in respect of the title, and send the same to the office of the vendor's solicitor within four days from the delivery of the abstract, and in this respect time should be of the essence of the contract. The sale took place on December 30, 1907; the abstract was delivered on January 4, 1908, and the purchaser's requisitions were sent on January 13, 1908. The vendor's solicitor declined to answer the requisitions on the ground that they were late:—*Held*, that the abstract was not delivered “immediately,” and consequently not within the time specified in the conditions, and that therefore the purchaser was not bound by the condition requiring the requisitions to be furnished within four days from the delivery of the abstract. *Upperton v. Nicholson* (40 L. J. Ch. 401; L. R. 6 Ch. 436) followed. *Todd and McFadden's Contract, In re*, [1908] 1 Ir. R. 213—Kenny, J.

Verification of—Lost Deeds—Secondary Evidence.]—The mere fact that the title-deeds to property sold have been lost or mislaid does not release the purchaser from the performance of his contract; but he can be compelled to complete if he is furnished in proper time with satisfactory secondary evidence as to the contents of the lost documents, and as to their having been duly executed and properly stamped. *Halifax Commercial Banking Co. and Wood, In re*, 79 L. T. 536; 47 W. R. 194—C.A.

Recitals in Deeds Twenty Years Old—Forty Years' Title.]—A vendor who had entered into an open contract for the sale of property furnished the purchaser with an abstract of title commencing with a deed of June 2, 1882, whereby a mortgagor and mortgagee jointly

conveyed the property to the vendor's predecessor in title. This conveyance contained a recital of the mortgage of May 9, 1878, by the mortgagor to the mortgagee:—*Held*, that the vendor was not relieved by this recital in a deed more than twenty years old of his duty of deducing a forty years' title. *Wallis' and Grout's Contract, In re*, 75 L. J. Ch. 519; [1906] 2 Ch. 206; 94 L. T. 815; 54 W. R. 534; 22 T. L. R. 540—Swinfen Eady, J.

The schedule to the deed of June 2, 1882, shewed that there were deeds relating to the property subsequent to the mortgage of May 9, 1878, and prior to the conveyance of June 2, 1882, and the purchaser was entitled to see those deeds. That was sufficient to distinguish this case from *Bolton v. London School Board* (47 L. J. Ch. 461; 7 Ch. D. 766), where there was a recital of seisin and a deduction of title therefrom. In any case the decision in *Bolton v. London School Board* (*supra*) ought not to be followed. *Ib.*

Document Forming Part of Title—Duty to Deliver Abstract in Chief.—A vendor is bound at his own expense to deliver an abstract in chief of every material document of title after the date fixed for commencement of title. It is not sufficient to furnish an abstract of another deed containing a recital of such document. *Ebsworth and Tidy's Contract, In re* (58 L. J. Ch. 665; 42 Ch. D. 23), explained. *Stamford, Spalding, and Boston Banking Co. and Knight's Contract, In re*, 69 L. J. Ch. 127; [1900] 1 Ch. 287; 81 L. T. 708; 48 W. R. 244—North, J.

Document of Record in Foreign Country—Impossibility of Production—Scotch Will—Secondary Evidence—Admissibility.—A vendor is not bound to produce or to procure a covenant for the production of a document of record or of any document which cannot be produced, though he is bound to furnish sufficient evidence of its contents. *Halkett v. Dudley (Earl)*, 76 L. J. Ch. 330; [1907] 1 Ch. 590; 96 L. T. 539—Parker, J.

The Evidence Act, 1851, was intended to simplify the proof of foreign and colonial records, and did not abrogate the common law rule that appropriate secondary evidence may be given of documents of which primary evidence cannot be adduced. Therefore, though the Act does not extend to Scotland, a document of record in Scotland may be proved by secondary evidence, and the equivalent of the probate and a certified copy of the original are sufficient evidence for the vendor to furnish of a Scotch will. *Ib.*

Sale of Land by Auction—Agreement to Take a Free Conveyance—Misinterpretation by Vendor of Contract—Refusal to Deliver Abstract of Title—Wilful Neglect or Default.—On a sale of land by auction the particulars stated that "those purchasers who wished to avoid unnecessary expense and to accept conveyances prepared by the vendors' solicitors may have such conveyances free of expense (except stamp duty)," but the conditions of sale did not provide that purchasers who agreed to accept free conveyances should not be entitled to the delivery of abstracts of title or to investigate the title to the lots purchased by them. They,

however, contained the usual provision requiring the purchaser to pay interest on his unpaid purchase-money in case of non-completion on the appointed day, if not caused by wilful neglect or default of the vendors. A purchaser of several lots agreed in his contract to take a free conveyance, but requested delivery of an abstract to enable him to investigate the title, before completion. The vendors, however, refused to deliver the abstract until completion, on the ground that the purchaser by agreeing to accept a free conveyance had waived his right to delivery of an abstract and to investigate the title. Upon a summons under the Vendor and Purchaser Act, 1874, taken out by the purchaser,—*Held*, that the vendors were bound to deliver an abstract to the purchaser to enable him to investigate the title before completion, and that their refusal to do this, though owing to misinterpretation of the conditions of sale, constituted wilful neglect or default on their part, so as to free the purchaser from liability to pay interest on his unpaid purchase-money from the day fixed for completion. *Pelly and Jacob's Contract, In re*, 80 L. T. 45—North, J.

(d) Requisitions.

Threatened Litigation.—A purchaser having enquired whether the vendor or her solicitor was aware of any proceedings to set aside a deed on which the title depended, the reply was that no proceedings had been taken or threatened to set aside the deed. It appeared that, in a probate action to establish an alleged will of the grantor of the deed (which will purported to dispose of the subject-matter of the contract), the vendor, who was the defendant, on an application for security for costs, made an affidavit alleging that she had evidence shewing that the testator was mentally incapable at the date of the will. The plaintiff failed to give security for costs, and the action was stayed. After the contract the plaintiff employed another solicitor, who wrote to the purchaser's solicitor threatening to impeach the deed on the ground of fraud:—*Held*, that the requisitions had been sufficiently answered and a good title shewn in accordance with the particulars and conditions of sale. *Delany and Deegan's Contract, In re*, [1905] 1 Ir. R. 602—M.R.

Mortgagee Selling under Power of Sale—Specific Performance—Evidence—Admissibility.—A mortgagee, purporting to execute the power of sale conferred by section 19 of the Conveyancing Act, 1881, may be asked by the purchaser, upon examination in an action by such vendor for specific performance, whether he had, prior to such exercise, served on the mortgagor the notice required by section 20 demanding payment of the mortgage-money, for the purpose of shewing that the power of sale had not arisen and that the vendor cannot make a good title. *Dieker v. Angerstein* (45 L. J. Ch. 754; 3 Ch. D. 600) considered. *Life Interest &c. Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society*, 67 L. J. Ch. 548; [1898] 2 Ch. 230; 78 L. T. 708; 46 W. R. 668—Stirling, J.

A similar question is admissible upon requisitions by a purchaser. *Ib.*

Unwillingness to Comply—Reasonable Ground

— **Right to Rescind—Specific Performance.**—Where land is contracted to be sold under a condition that, if the purchaser should “make any objection or requisition either as to title” or otherwise which the vendor should be “unable or unwilling to remove or comply with,” the vendor shall be at liberty to annul the sale, and the vendor tenders his reasons for having rescinded the contract, the Court will, in an action for specific performance by the purchaser, consider whether there was any reasonable ground for the rescission or whether it was affected by the vendor in mere arbitrary exercise of his will. It is not sufficient that the vendor should have acted without caprice; he must also have acted reasonably. In the present case the Court held on the evidence that the vendor had not acted reasonably, and made an order for specific performance in favour of the purchaser. *Dames to Wood* (54 L. J. Ch. 771; 29 Ch. D. 626) considered and applied. *Quinion v. Horne*, 75 L. J. Ch. 293; [1906] 1 Ch. 596; 54 W. R. 344—Farwell, J.

(e) *Easements.*

Light—Implied Warranty—Newly Erected Buildings.—Upon the sale of land with newly erected buildings having windows overlooking an open space, there is no implied warranty that the vendor has not been a party to anything whereby the easement of light over the open space cannot be acquired upon the effluxion of the statutory period from the time when the houses were first erected. *Greenhalgh v. Brindley*, 70 L. J. Ch. 740; [1901] 2 Ch. 324; 84 L. T. 763; 49 W. R. 597—Farwell, J.

Restrictive Covenant — “Drain” — “Sewer” — Vesting in Local Authority.—A purchaser agreed to buy two freehold houses, “subject to right of light with owner of adjoining property being guaranteed.” The vendor had previously mutually covenanted with the owner of the adjoining house not to do anything to prejudice the right of light to the windows of each other’s premises:—*Held*, that this restrictive covenant was a defect in the title. *Held*, further, that a sewer under the property vested in the local authority under section 13 of the Public Health Act, 1875, notwithstanding section 19 of the Public Health Acts Amendment Act, 1890, and therefore that the vendor was unable to convey all that he had contracted to sell. *Pemsel v. Trucker*, 76 L. J. Ch. 621; [1907] 2 Ch. 191; 97 L. T. 86; 71 J. P. 547—Warrington, J.

Undisclosed—Underground Goit or Water-course—Constructive Notice—Rescission of Contract.—Where a contract for the sale of freehold land contains a provision that the land is sold subject to the conditions contained in or referred to by a specified deed, and reference to that deed would have disclosed the fact that the land was subject to certain restrictions contained in a second deed, a purchaser who before executing the contract has not inspected either the first or the second deed will not be granted relief on the ground that he had no notice, at the time when he entered into the contract, of the restrictions contained in the second deed. *Childe and Hodgson’s Contract, In re*, 54 W. R. 234—Warrington, J.

(f) *Incumbrances.*

Mortgage—Constructive Notice—Possession Contrary to Ostensible Title—Property in Occupation of Tenants—Enquiry of Tenants to whom Rents Paid—Duty of Purchaser or Mortgagee—Rents Paid to Estate Agent.—There is no obligation upon an intending purchaser or mortgagee of property, where the vendor or mortgagor is not in occupation, to enquire of the tenants to whom they pay their rents; and if he does not enquire, or if he enquires and is told that the rents are paid to an estate agent and makes no further enquiry, he will not be affected with notice of the fact that the rents are paid to a person whose receipt is inconsistent with the ostensible title of the vendor or mortgagor. *Hunt v. Luck*, 71 L. J. Ch. 239; [1902] 1 Ch. 428; 86 L. T. 68; 50 W. R. 291—G.A.

The fact of a tenancy only affects an intending purchaser or mortgagee with notice of the rights of the tenant, not with notice of the title of his lessor, and the only enquiries which the purchaser or mortgagee is bound to make of the tenant are as to his rights. *Dictum* of JESSEL, M.R., in *Mumford v. Stohwasser* (43 L. J. Ch. 694, 697; L. R. 18 Eq. 556, 562) disapproved. *Id.*

— **Payment Off—Reconveyance—Habendum unto and to the Use of Mortgagor “in fee”—No Words of Limitation—Legal Estate for Life.**—Upon payment off by the mortgagor of a mortgage debt created in 1895, the property which had constituted the security for the debt was conveyed by the mortgagees unto the mortgagor “to hold the same unto and to the use of” the mortgagor “in fee freed and discharged” from the mortgage debt secured by, and all claims and demands under, the mortgage deed:—*Held*, that to supply the word “simple” after “fee” from the obvious intention as appearing by other parts of the deed of reconveyance would not be a compliance with the terms of the Conveyancing and Law of Property Act, 1881, s. 51; that in the absence of the words “and his heirs,” as words of limitation in the *habendum*, the deed could not operate to pass the legal estate in fee-simple; and that therefore only a legal estate for life passed under the deed to the mortgagor, leaving the legal estate in remainder outstanding in the mortgagees. *Ethell and Mitchell & Butler’s Contract, In re*, 70 L. J. Ch. 498; [1901] 1 Ch. 945; 84 L. T. 459—Joyce, J.

— **Money Advanced on Joint Account—Disclosure of Trust—Requisition on Title—Devolution of Trust.**—Where upon a purchase of freeholds free from incumbrance the fact has been inadvertently disclosed upon requisitions that the money advanced upon a mortgage of the freeholds (which was to be paid off) was so advanced by two persons as trustees of a marriage settlement (neither of them being the original trustees), the purchaser of the property is entitled to require the vendor to prove the devolution of title of the trustees from the date of the settlement, so that a good discharge may be obtained on payment of the mortgage-money. *Harman and Uxbridge and Rickmansworth Railway, In re* (52 L. J. Ch. 808; 24 Ch. D. 720), distinguished. *Blaiberg*

and *Abrahams' Contract, In re*, 68 L. J. Ch. 578; [1899] 2 Ch. 340; 81 L. T. 75; 47 W. R. 634—Kekewich, J.

Priority—Equitable Charge and Deposit of Title-deeds—Sale by Mortgagor—Notice of Charge before Completion—Forged Receipt on Memorandum of Charge—Purchaser with Legal Estate and Title-deeds.]—The doctrine of purchase for value without notice does not apply where, prior to completion there has been notice of a charge and a fraudulent representation that the charge has been paid off. *Jared v. Clements*, 71 L. J. Ch. 752; [1902] 2 Ch. 399; 86 L. T. 887; 50 W. R. 611—Byrne, J.

Where, therefore, on a sale of leaseholds by a mortgagor the purchaser had before completion notice of the existence of an equitable charge, created by memorandum and deposit of title-deeds, on the property, and on completion the memorandum with a forged receipt thereon was handed over together with the title-deeds, the receipt having been forged by the equitable mortgagee's solicitor with whom the memorandum and deeds had been left for safe custody, and an assignment passing the legal estate in the property was at the same time delivered to the purchaser, and there had been no negligence on the part either of the mortgagee or of the purchaser, it was held that the purchaser, although he had the legal estate and possession of the title-deeds, was not entitled to hold the property free from the equitable mortgage, but that the equitable mortgagee could uphold his security. *Ib.*

Executors—Conveyance to Testamentary Devisees—Charge for Payment of Moneys which Executors are "liable to pay"—Unknown Liabilities—Statutory Advertisements.]—Where executors have issued statutory advertisements for creditors pursuant to the Law of Property Amendment Act, 1859, and have subsequently conveyed real estate to the testamentary devisees of their testator, with a declaration, in accordance with section 3 of the Land Transfer Act, 1897, that it was "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," such a charge will not render the land liable, in the hands of a purchaser from the devisees, for claims against the testator's estate which were unknown to the executors at the date when they so conveyed. *Cary and Lott's Contract, In re*, 70 L. J. Ch. 653; [1901] 2 Ch. 463; 84 L. T. 859; 49 W. R. 581—Kekewich, J.

Land Transfer Act.]—There is nothing in the Land Transfer Act, 1897, which creates a right in creditors to follow real assets in the hands of a purchaser. *Ib.*

(g) Implied Covenants for Title.

Beneficial Owner—Good Right to Convey—Undisclosed Easement—Breach of Covenant.]—Where a breach of a covenant for good right to convey, implied by virtue of a conveyance by the grantor as beneficial owner, is occasioned by the existence of a right of way over the property conveyed, such a breach is not a continuing breach, but occurs and is complete

upon the execution of the deed of conveyance in which the covenant is implied. *Turner v. Moon*, 70 L. J. Ch. 822; [1901] 2 Ch. 825; 85 L. T. 90—Joyce, J.

— Statute of Limitations.]—From the moment of the delivery of the deed of conveyance the Statute of Limitations in respect of the breach commences to run. *Ib.*

— Measure of Damages.]—The measure of damages for such a breach is the difference between the value of the property as purported to be conveyed and that which the grantor had power to convey. *Spoc v. Green* (43 L. J. Ex. 57; L. R. 9 Ex. 99) followed. *Ib.*

— Breach of Covenant—Easement—Knowledge of Purchaser—Claim for Interference with Easement—Arbitration—Action to Enforce Award—Costs—Repayment by Vendor—Solicitor and Client Costs—Interest—Indemnity.]—The defendant conveyed "as beneficial owner" to the plaintiffs certain plots of land forming part of a building estate, including part of the site of a road. The conveyance did not contain any express covenants for title or any qualifications of the implied covenants. The plaintiffs had notice at the date of the deed that the purchasers of other plots had rights of way over the road. As between the plaintiffs and the defendant the agreement was that the plaintiffs should take the land discharged from such rights. The plaintiffs constructed works upon the land purchased by them, and blocked up the road. In 1902 a previous purchaser of other plots claimed damages against the plaintiffs as compensation for the loss of his right of way over the road, and was awarded by an arbitrator 510*l.* and interest. The plaintiffs did not pay this sum, and the previous purchaser brought an action to enforce the award. The Court ordered the plaintiffs to pay the 510*l.* and interest, and the costs of the arbitration proceedings and the action. The plaintiffs, having paid these sums, sued the defendant on his implied covenants for title for repayment of the sums so paid and of their own costs of the arbitration proceedings and the action:—*Held*, that the plaintiffs were entitled to maintain the action, and that their right to do so was not affected by their knowledge of the rights of the previous purchaser. *Held*, therefore, that the defendant being under his implied covenants bound to indemnify the plaintiffs, he must repay them the 510*l.* and interest and the costs paid to the previous purchaser, and must also pay subsequent interest on the 510*l.* and the plaintiffs' costs of the arbitration proceedings as between solicitor and client, but that he was under no liability to repay them their costs of the action to enforce the award. *Turner v. Moon* (70 L. J. Ch. 822; [1901] 2 Ch. 825) followed. *Great Western Railway v. Fisher*, 74 L. J. Ch. 241; [1905] 1 Ch. 316; 92 L. T. 104; 53 W. R. 279—Buckley, J.

(h) Condition as to "Error or Misstatement."

Condition for Compensation for Misdescription.]

—A condition of sale for compensation, "if any error or misstatement shall appear to have been made in the particulars of sale or these conditions," does not apply to a defect in title.

Riches, In re (27 S. J. 313), followed. *Debenham v. Sawbridge*, 70 L. J. Ch. 525; [1901] 2 Ch. 98; 84 L. T. 519; 49 W. R. 502—Byrne, J.

Sale by Court—Mistake—Absence of Fraud—Rescission.—Of a sale by the Court a condition provided for compensation for “any error or misstatement” in the particulars or conditions. After conveyance it was discovered that the vendor had had no title to a portion of the property. All parties had acted *bona fide*, with reasonable ground for believing (subject to a possible doubt in the vendor’s mind) that the title was a good one:—*Held*, that the purchaser could obtain neither compensation under the condition, nor rescission on the ground of common mistake. *Ib.*

(i) Leaseholds.

Open Contract—County Council Notice to Repair—Charge—Outgoing—Breach of Covenant.—The law laid down in *Barnett v. Wheeler* (10 L. J. Ex. 102; 7 M. & W. 364)—namely, that in order to make a good title the vendor of leasehold property must, in the absence of some express condition, shew that the covenants under the lease have been performed down to the date of completion, even though the purchaser was aware of a breach of covenant at the date of the contract—is not affected by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 4, which makes the production of the receipt for the last payment of rent *prima facie* evidence of the performance of the covenants, except so far as that sub-section throws on the purchaser the burthen of proving an existing breach of covenant. *Higgett and Bird’s Contract, In re*, 72 L. J. Ch. 220; [1903] 1 Ch. 287; 87 L. T. 697; 51 W. R. 227—C.A.

A vendor and purchaser entered into an open contract for the sale of leasehold property the lease of which contained a covenant on the part of the vendor to repair. At the date at which the purchaser was first in a position prudently to enter into possession the property was in a dilapidated condition, and an order to repair it as a dangerous structure had been made, though not yet served, by the local authority. The vendor produced the last receipt for ground-rent during the investigation of the title:—*Held*, that in order to determine whether the expense of obeying the order to repair should be borne by vendor or purchaser it was unnecessary to enquire at what exact date that expense became a charge or outgoing in connection with the property, for according to *Barnett v. Wheeler* (*supra*) the expense must be borne by the vendor by reason of his covenant to repair, and he was not relieved from this burden by the production of the last receipt for ground-rent under section 3, sub-section 4 of the Conveyancing and Law of Property Act, 1881, as in this case the “contrary appeared.” *Ib.*

Per ROMER, L.J.—*Quære*, whether in all cases a purchaser could compel specific performance against the vendor on the footing of *Barnett v. Wheeler* (*supra*) where the dilapidated state of the property was known to both parties at the date of the contract. *Ib.*

Title to—Legal Estate Outstanding in Crown—

Requisitions out of Time.—An objection by a purchaser of leaseholds to complete on the ground that the legal estate is outstanding in the Crown is not an objection which goes to the root of title so as to enable the purchaser to make requisitions out of time. *Pryce Jones v. Williams*, 71 L. J. Ch. 762; [1902] 2 Ch. 517; 87 L. T. 260; 50 W. R. 586—Joyce, J.

Leaseholds Subject to Onerous and Unusual Covenants—Private Contract—Stipulation that “the vendor’s title is accepted by the purchasers”—**Duty of Vendor as to Disclosure—Objection to Title—Return of Deposit.**—On a sale of leasehold property, whether by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the lease under which the property is held, or at least to afford the purchaser an opportunity of inspecting the lease prior to the signing of the contract. Where the vendor has failed in his duty in this respect a stipulation in the contract that “the vendor’s title is accepted by the purchasers” will not preclude the purchasers from insisting that a good title has not been shewn and obtaining a return of their deposit, inasmuch as they have a right, when such a condition is inserted, to assume that the vendor has disclosed what it was his duty to disclose, and the condition must be read as precluding objection upon that footing. Principle of *Jenkins v. Hiles* (6 Ves. 646) applied. *Hargreaves and Thompson’s Contract, In re* (56 L. J. Ch. 199; 32 Ch. D. 454), followed. *Haedicke and Lipski’s Contract, In re*, 70 L. J. Ch. 811; [1901] 2 Ch. 666; 85 L. T. 402; 50 W. R. 20—Byrne, J.

Sale by Executor—Lapse of Time—Notice to Purchaser that there are no Debts of Testator.—A purchaser of leaseholds will not be forced to take a title from a vendor, who is claiming to sell as executrix of a testator, after being informed that there are no debts of the testator remaining unpaid, and where no evidence is produced of any other reason for selling. *Whistler and Richardson, In re* (56 L. J. Ch. 827; 35 Ch. D. 561), and *Venn and Furze’s Contract, In re* (63 L. J. Ch. 308; [1894] 2 Ch. 101), distinguished. *Verrell’s Contract, In re*, 72 L. J. Ch. 44; [1903] 1 Ch. 65; 87 L. T. 521; 51 W. R. 73—Kekewich, J.

Lease by Tenant for Life under Settled Land Act, 1882—Rent Reserved not best reasonably obtainable.—The title to leasehold property where the lease which purported to have been granted under the Settled Land Act, 1882, was voidable because it did not reserve the best rent, not forced upon a purchaser. *Handman and Wilcox, In re*, 71 L. J. Ch. 263; [1902] 1 Ch. 599.

Freer v. Hesse (22 L. J. Ch. 597, 599; 4 De G. M. & G. 495, 503) followed. *Mogridge v. Clapp* (61 L. J. Ch. 534, 538; [1892] 3 Ch. 382, 395) distinguished by VAUGHAN WILLIAMS, L.J. *Carter and Kenderdine’s Contract, In re* (66 L. J. Ch. 408; [1897] 1 Ch. 776), distinguished by COZENS-HARDY, L.J. *Ib.*

(i) Tenancies.

Constructive Notice of—Property in Occupation of Weekly Tenants—Enquiry of Tenants—

Rents Paid to House Agent—Landlord's Title.]—A tenant's occupation of property sold or mortgaged is notice to the purchaser or mortgagee of all that tenant's rights, but not of his lessor's title or rights. Actual knowledge, however, on the part of the purchaser or mortgagee that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor or mortgagor, is notice of such person's rights. *Hunt v. Luck*, 70 L. J. Ch. 30; [1901] 1 Ch. 45; 83 L. T. 479; 49 W. R. 155—Farwell, J.

The mere fact that the rents of property let to weekly or yearly tenants are known to be paid to a house agent is not so inconsistent with an apparently good paper title to the property in the vendor or mortgagor as to put the purchaser or mortgagee on enquiry, or fix him with notice of the rights of the person for whom the agent collects the rents. *Bailey v. Richardson* (9 Hare, 734) and *Barnhart v. Greenshields* (9 Moore P.C. 18) followed. *Mumford v. Stohwasser* (43 L. J. Ch. 694; L. R. 18 Eq. 556) not followed. *Ib.*

(k) *Other Matters.*

Trustee Purchasing for Himself—Transfer to Trustee of Executory Contract of Sale to a Stranger—Release by Beneficiaries.]—It is well-settled law that a trustee for sale cannot purchase the trust property, and a title based on such a conveyance cannot be forced on a subsequent purchaser. The defect will not be cured by proof that the trustee so purchasing was transferee of an executory contract by which a stranger to the trust had agreed to buy the property, or by a release which fails explicitly to disclose the true state of facts. The burden of proof lies on the purchasing trustee that the parties to the conveyance to him were at arm's length, had the fullest information on all material facts, and adopted the transaction. *Williams v. Scott*, 69 L. J. P.C. 77; [1900] A.C. 499; 82 L. T. 727; 49 W. R. 33—P.C.

Sale by Tenant for Life—Trustees for Purposes of the Settled Land Acts—Discharge for Purchase-money.]—Real estate was devised in strict settlement to legal uses to A for life, remainder to B for life, with remainder to his first and every other son in tail male; remainder to C for life, with remainder to his first and every other son in tail male, remainder to D for life, with remainder to his first and every other son in tail male, with remainders over. A, C, and D were dead. A, B, and D had all executed jointure deeds under powers contained in the will. The deed executed by A was in operation, and created an existing charge on the property. B, the tenant for life in possession, contracted to sell part of the property under the powers conferred on him by the Settled Land Act, 1882. There were existing trustees of the will for the purposes of the Act, but the purchaser took the objection that it was necessary that trustees for the purposes of the Act should be appointed of the will and the three jointure deeds, on the ground that the same formed together a compound settlement:—*Held*, that the will by itself constituted a settlement within section 2 of the Settled Land Act, 1882; that B

could under section 20 convey the land to the purchaser discharged from the jointures; and that the trustees appointed for the purposes of the settlement could give a good discharge for the purchase-money. — *Meade's Settled Estates, In re* ([1897] 1 Ir. R. 121) and *Tibbitts' Settled Estates, In re* (66 L. J. Ch. 660; [1897] 2 Ch. 149), distinguished. *Powys-Keck and Hart's Contract, In re*, 67 L. J. Ch. 331; [1898] 1 Ch. 617; 78 L. T. 287; 46 W. R. 389—Stirling, J.

Vendor Contracting as Trustee—No Power to Sell—Previous Authority from Beneficiaries.]—Real property settled by a will was sold by auction, the vendor being described as trustee of the will (which he was) and as selling under the trusts and powers vested in him thereunder, and the particulars stated that the tenant for life would join to release her life estate. The will contained no trust for sale or power of sale, but the trustee had, before the sale, been authorised in writing by all the beneficiaries to sell. On learning this, the purchaser, who had objected to the absence of power to sell, declined the title as not being that which he had contracted to buy:—*Held*, that the mention in the particulars of the tenant for life joining shewed that the trustee was not purporting to sell the whole fee alone, and that as the trustee at the date of sale had the authority of all the beneficiaries, and could compel them to join in conveying, he had made a good title according to the contract. *Bryant and Barningham's Contract, In re* (59 L. J. Ch. 636; 44 Ch. D. 218), and *Head's Trustees and Macdonald's Contract, In re* (59 L. J. Ch. 604; 45 Ch. D. 310), distinguished. *Baker and Selmon's Contract, In re*, 76 L. J. Ch. 235; [1907] 1 Ch. 238; 96 L. T. 110—Swinfen Eady, J.

Party-wall Notice and Award—Material Fact not Disclosed by Vendors—Repayment of Deposit and Expenses of Investigating Title.]—The vendor of real estate is under an obligation to disclose any material defect in the title or in the subject of the sale which is exclusively within his own knowledge, and one which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions. The existence of a party-wall notice under sections 90 and 91 of the London Building Act, 1894, and an award made thereunder relating to a house which is the subject of a sale, constitute material facts which should be disclosed by the vendor to an intending purchaser. *Carlisch v. Salt*, 75 L. J. Ch. 175; [1906] 1 Ch. 335; 94 L. T. 58; 54 W. R. 244—Joyce, J.

Condition Stating Defect of Title—Delegation of Trust.]—A condition of sale of leasehold premises stated that a testator, by his will, bequeathed the premises to his wife in trust for herself and her children, to be applied by her as she should deem most expedient, and that, to give effect to the trusts contained in the will, the widow, on her re-marriage, conveyed the premises to trustees, upon trust, by sale or mortgage, to raise 1,000*l.* for the benefit of the said children, and that, in pursuance of this trust for sale, the vendors were selling and would convey the premises as trustees, and not otherwise, and should not be bound to procure the concurrence of any other parties. The will contained no provision authorising this to be

done. The purchaser refused to complete, on the ground that a good title had not been shewn, as the widow had no power to delegate her trust. The vendors relied on the condition:—*Held*, that the widow committed a breach of trust by assigning the premises to trustees, and that the purchaser was not precluded by the condition from objecting to the title on this ground, inasmuch as he was entitled to assume that a power to do what was done by the widow would be shewn. *O'Flanagan and Ryan's Contract, In re*, [1905] 1 Ir. R. 280—M.R.

Perpetuity—Condition in Defeasance of Estate—Conveyance under Statute of Uses—Doubtful Title.—Prior to the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), land was conveyed to charitable uses by bargain and sale for a year, and release, the conveyance taking effect under the Statute of Uses. The release contained a proviso to the effect that if at any time the land conveyed or the income derived from the same should be employed or converted to or for any other use or uses, intents or purposes, than had been declared in the conveyance, the trust premises should revert to the right heirs of the grantor:—*Held*, that the proviso was a common-law condition, but, *semble*, void as infringing the rule against perpetuities. *Held also*, that the point was not so clear that a title depending on it could be forced on an unwilling purchaser from the trustees of the charity. *Hollis' Hospital Trustees and Hague, In re*, 68 L. J. Ch. 673; [1899] 2 Ch. 540; 81 L. T. 90; 47 W. R. 691—Byrne, J.

Equitable Interests—Lease—Mortgage by Sub-demise to Lessor—Conveyance of Fee-simple by Lessor to Lessee Subject to Lease—Subsequent Purported Mortgage in Fee by Lessor—Estate or Interest Passing.—H., the owner in fee-simple of certain houses, by certain indentures in 1893 demised each of the houses for the term of ninety-nine years to W. at the rents and subject to the covenants therein contained, and thereupon W. sub-demised the houses to H. for the respective terms of ninety-nine years, less the last day thereof, by way of mortgage. In the same year, by deed, in which it was recited that H. had agreed to sell the houses subject to the leases to W., H., for the consideration therein mentioned, conveyed the houses together with the rents reserved by the leases, and the benefit of the covenants therein contained, to W. in fee-simple subject to the leases and the terms of years thereby respectively created. By deed also in 1893 W., for the consideration therein mentioned, conveyed the houses, together with the rents reserved by the leases and the benefit of the covenants therein contained, to the plaintiffs in fee-simple subject to the leases and the terms of years thereby respectively created. In 1894 H. by deed purported to convey all the houses to the defendant in fee-simple by way of mortgage. The defendant had no notice of the title of the plaintiffs to the houses:—*Held* (assuming, but without so deciding, that there was a merger at law of the terms of years, and that the existence of an intention on the part of H. and W. would not be sufficient to prevent such a merger), that H. and W. dealt with one another on the footing that the leases were or were to be deemed to be in existence, and that it would be inequitable to treat them as at an end, and

that under the old law as it stood prior to the Judicature Act, 1873, H. had at the date of the mortgage to the defendant an equitable interest in the houses subject to the condition of accepting legal leases on the same terms as the old leases, and that under section 63 of the Conveyancing and Law of Property Act, 1881, such interest passed to the defendant by the mortgage subject to the like condition. *Brandon v. Brandon* (81 L. J. Ch. 47) discussed. *Thellusson v. Liddard*, 69 L. J. Ch. 673; [1900] 2 Ch. 635; 82 L. T. 753; 49 W. R. 10—Stirling, J.

Complicated and Ambiguous Facts susceptible of being Challenged.—A title depending upon the establishment of facts and dealings of a complicated and ambiguous nature, such as may reasonably be challenged with a practical chance of success, is not one which should be forced upon a purchaser. *Handman and Wilcox, In re* (71 L. J. Ch. 263; [1902] 1 Ch. 599), followed. *Douglas and Powell's Contract, In re*, 71 L. J. Ch. 850; [1902] 2 Ch. 296—Byrne, J.

6. SALE UNDER DIRECTION OF THE COURT.

Undisclosed Prior Title—Protection of Purchaser.—An order of the Court dealing with real property will by virtue of section 70, subsection 1 of the Conveyancing and Law of Property Act, 1881, protect a purchaser from any objection to his title on account of mere irregularity of procedure, but it will not confer a good title on the purchaser when the Court inadvertently deals with the property of one person under the supposition that it belongs to another, and without any notice to the true owner. *Hall Dare's Contract, In re* (51 L. J. Ch. 671; 21 Ch. D. 41), and *Mostyn v. Mostyn* (62 L. J. Ch. 959; [1893] 3 Ch. 376) distinguished. *Jones v. Barnett*, 69 L. J. Ch. 242; [1900] 1 Ch. 370; 82 L. T. 37; 48 W. R. 278—C.A. *And see* cols. 2623, 2645.

7. SUMMONS UNDER VENDOR AND PURCHASER ACT.

Object of Act.—Observations as to the scope of summonses under the Vendor and Purchaser Act, 1874. *Calcott and Elvin's Contract, In re*, 67 L. J. Ch. 327; 78 L. T. 417; 46 W. R. 457; 5 Manson, 116—Kekewich, J.

Section 9 of the Vendor and Purchaser Act, 1874, was intended to enable vendors and purchasers to determine distinct isolated points arising under a contract, and not the question whether the vendor had a good title in a general way. *Wallis and Barnard's Contract, In re*, 68 L. J. Ch. 753; [1899] 2 Ch. 515; 81 L. T. 382; 48 W. R. 57—Kekewich, J.

Fraud.—Questions of fraud cannot be entertained on a vendor and purchaser summons. *Delany and Deegan's Contract, In re*, [1905] 1 Ir. R. 602—M.R.

Forcing Title upon Purchaser—Probability of Title being Questioned—Vendor a Purchaser for Value without Notice.—The Court will not force upon a purchaser a title where there is a probability that it will be questioned, and its

validity, if questioned, may depend upon proof of the fact that the vendor was a purchaser for value without notice of the defect. *Handman and Wilcox, In re*, 71 L. J. Ch. 263; [1902] 1 Ch. 599; 86 L. T. 246—C.A.

S. COMPLETION.

Delay in—Vendor in Possession—Arrears of Rent Due before Date for Completion—Allocation of Rent Received—Interest.—A vendor who remains in possession after the date for completion and has elected to take interest on unpaid purchase-money in lieu of rents and profits, is in such a fiduciary relation towards the purchaser, as regards both the income and the corpus of the property, that he must hold upon trust for him the rents received since the day fixed for completion, and may not allocate them in satisfaction of arrears of rent previously owing to him. *Lysaght v. Edwards* (45 L. J. Ch. 554; 2 Ch. D. 499) applied. *Plews v. Samuel*, 73 L. J. Ch. 279; [1904] 1 Ch. 464; 90 L. T. 533; 52 W. R. 410—Kekewich, J.

— Specific Performance—“Wilful default” of Vendor—Interest—Rents and Profits—Possession Retained by Vendor—Outgoings—Loss from Farming—Allowance to Vendor—Occupation Rent.—By an agreement for the sale of real estate it was provided that the purchase should be completed on a fixed day, and that if from any cause whatever other than wilful default on the part of the vendors the completion of the purchase was delayed beyond that day the purchase-money should bear interest at 5 per cent. per annum till the actual day of payment. The draft conveyance prepared by the purchaser contained an assignment of the benefit of certain covenants on the part of one C. with the vendors to which the purchaser was entitled under the agreement. The vendors added words to the assignment restricting the benefit of these covenants. The purchaser objected to their insertion, and brought an action and obtained a declaration that the vendors were not entitled to the insertion of the words, and an order for specific performance of the contract and for the usual accounts and enquiries. Pending the completion of the purchase a tenant of one of the farms on the property sold determined his tenancy. The vendors thereupon paid him a sum in respect of his tenant right, and entered upon and worked the farm themselves, and in so doing incurred considerable loss. The vendors claimed to be allowed interest on the purchase-money and also the expenses incurred in working the farm, including the amount paid by them to the outgoing tenant:—*Held*, that the vendors, in insisting on the insertion of the restrictive words, had made an honest mistake and were not guilty of wilful default; that, even if they were guilty of wilful default, it was not the *causa causans* of the delay, and that there was nothing, therefore, to relieve the purchaser from paying interest on the purchase-money. *Held*, also, that the amount paid to the outgoing tenant in respect of his tenant right was properly allowed to the vendors, but that on an ordinary account of rents and profits the vendors could not be allowed the sums lost by them in carrying on the farm. *Held*, further, that on such an account the vendors were chargeable with the rents actually received by

them, but not with an occupation rent. *Bennett v. Stone*, 71 L. J. Ch. 60; [1902] 1 Ch. 226; 85 L. T. 753; 50 W. R. 118—Buckley, J.

The meaning of “wilful default” discussed. *Ib.* And see col. 2601.

— Interest on Purchase-money — “Wilful default” of Vendors.—By agreement for the sale of freehold premises to the Postmaster-General, it was provided that the purchase should be completed on August 1, 1904; that on completion the purchaser should be given clear possession; that the purchaser should pay the purchase-money on that date; and that if, from any cause other than the wilful default of the vendors, the purchase should not be completed on or before that date, the purchaser should pay interest on the purchase-money. The vendors were in a position, shortly after August 1, 1904, to give vacant possession of all the premises, save one holding, which they had assumed to have been held under a quarterly tenancy. On that assumption they had served a three months’ notice to quit for August 1; but in ejectment proceedings it was held that the tenancy was a yearly one, commencing on May 1, and that therefore the notice was insufficient. The premises consisted of a licensed public-house which had been held for more than thirty years at an annual rent, payable quarterly. The tenancy had commenced on May 1, 1871, but the vendors had no record or recollection of the exact terms of the letting. As a result, the vendors were not in a position to complete till June 29, 1905:—*Held*, that, in assuming the tenancy to be quarterly, and in fixing the date for completion on that assumption, the vendors had been guilty of wilful default, and that therefore they were not entitled to be paid interest on the purchase-money. *Postmaster-General and Colgan’s Contract, In re*, [1906] 1 Ir. R. 287—Barton, J. Affirmed, [1906] 1 Ir. R. 477—C.A.

Act of Bankruptcy by Vendor before Date of Completion—Right of Purchaser to Refuse to Complete—Recovery of Deposit Paid by Purchaser.—Although a contract for the sale of property, the same to be completed on a certain date, entered into without notice of an available act of bankruptcy by the vendor, is a protected transaction under section 49 of the Bankruptcy Act, 1893, yet such protection does not extend to a conveyance or payment made in pursuance of such contract with notice of an available act of bankruptcy committed after the contract has been entered into and before the date fixed for completion, and the purchaser is entitled to refuse to complete and to recover back a deposit paid on entering into the contract, because the vendor is not in a position at the latter date to give either a good conveyance or a valid receipt for the purchase-money. *Powell v. Marshall, Parkes & Co.*, 68 L. J. Q.B. 477; [1899] 1 Q.B. 710; 80 L. T. 509; 47 W. R. 419; 6 Manson, 157—C.A.

Title-deeds not in Vendor’s Possession—Right of Purchaser to Title-deeds.—The Conveyancing Act, 1881, s. 3, sub-s. 6, only concerns the expenses of “production and inspection” of documents, and does not affect the ordinary right of a purchaser to have title-deeds handed over on completion. *Johnson and Tustin, In re*

(54 L. J. Ch. 889; 30 Ch. D. 42), followed. *Duthy and Jesson's Contract, In re*, 67 L. J. Ch. 218; [1898] 1 Ch. 419; 78 L. T. 223; 46 W. R. 300—Romer, J.

By a contract of sale of freehold premises it was agreed that the purchaser should accept the best title that the vendors could give. It appeared that prior to the date of the commencement of the abstract of title there was a mortgage which it was stated had long since been paid off. The solicitors of the mortgagees declined to hand over the title-deeds to the purchaser:—*Held*, that in the absence of its being shewn that there was some difficulty as to title which prevented the vendors handing over the deeds, the purchaser was not bound to complete without the title-deeds. *Ib*.

Sale of Property Subject to Tenancies, and with Condition for Apportionment of Outgoings—Unstamped Agreement for Yearly Tenancy—Obligation on Vendor to Stamp it.—An agreement for the sale of freehold property provided that the property was sold subject to all tenancies, and also for apportionment of outgoings. Upon investigation of the title the purchaser discovered that an agreement with a yearly tenant of part of the property was unstamped, and required the vendor to stamp it before completion of the purchase. The vendor refused, and commenced proceedings for specific performance against the purchaser:—*Held*, that the purchaser was entitled to have the agreement stamped at the vendor's expense. *Coleman v. Coleman*, 79 L. T. 66—North, J.

Expenses Incurred for Paving Street—Notice to do Works—Default by Owner—Works Undertaken by Local Authority—Time when Expenses become a Charge on Premises—Outgoings.—Where default is made by an owner in complying with a notice under section 150 of the Public Health Act, 1875, to do certain paving works in respect of his property, and the local authority has undertaken the works, the expenses incurred by the local authority for such works first become, within the meaning of section 257 of the Act, a charge on the premises upon the completion of the works. *Allen and Driscoll's Contract, In re*, 73 L. J. Ch. 614; [1904] 2 Ch. 226; 91 L. T. 676; 52 W. R. 681; 68 J. P. 469; 2 L. G. R. 959; 20 T. L. R. 605—C.A.

Where, therefore, the owner has agreed to sell the property and to pay the outgoings up to the date of completion, and the local authority have not completed the paving works by that time the expenses of such works must be borne by the purchaser. *Stock v. Meakin* (69 L. J. Ch. 401; [1900] 1 Ch. 683) followed. *Ib*.

Interest on Purchase-money.—See *Fletcher v. Lancashire and Yorkshire Railway*, 71 L. J. Ch. 590; [1902] 1 Ch. 901.

9. CONVEYANCE.

Preparation of—Concurrence of Mortgagee—Costs.—A condition in a contract for sale of land that the assurance and every instrument

required for completing the vendor's title or for any other purpose is to be "prepared" by and at the expense of the purchaser is not sufficiently wide to throw the costs of perusing and executing the conveyance on behalf of a mortgagee who concurred in the conveyance on the purchaser. *Sander and Walford's Contract, In re*, 83 L. T. 316—Farwell, J.

Sale of Real Estate by Personal Representatives—Concurrence of Non-proving and Non-disclaiming Executor.—The expression "personal representatives" as used in the first four sections of the Land Transfer Act, 1897, means those who are named as executors in a will, whether they have actually obtained a grant of probate or not. Therefore in the case of a testator who has died after the commencement of the Act, the concurrence of all his executors, whether or not they have proved the will, is necessary to effect a valid conveyance of his real estate. *Pawley and London and Provincial Bank's Contract, In re*, 65 L. J. Ch. 6; [1900] 1 Ch. 58; 81 L. T. 507; 48 W. R. 107—Kekewich, J.

Executory Contract for Sale by Trustees—Contract for Re-purchase by One Trustee—Validity—Conveyance—Claim by Purchaser to have Trustee's Name Inserted as his Nominee.—Where trustees entered into a contract for sale of the trust property, and whilst the contract remained executory the purchaser entered into a contract for the re-sale of the property at the same price and on the same terms to one of the trustees, and claimed the right to have the name of such trustee inserted in the conveyance as his nominee, but the trustee declined to allow his name to be inserted and the purchaser refused to accept a conveyance from the trustee to himself, and thereupon the trustees brought an action for specific performance of the original contract, the only defence to which was a counterclaim by the purchaser for specific performance of the second contract or damages, it was held that the purchaser was bound to complete his contract, and that he was not entitled to specific performance of the sub-contract or damages. *Dictum* of MELLISH, L. J., in *Parker v. M'Kenna* (44 L. J. Ch. 425, 441; L. R. 10 Ch. 96, 125) applied. *Williams v. Scott* (69 L. J. P.C. 77; [1901] A.C. 499) applied. *Delves v. Gray*, 71 L. J. Ch. 808; [1902] 2 Ch. 606; 87 L. T. 425; 51 W. R. 56—Byrne, J.

Although, according to the general practice, a purchaser may in ordinary cases take a conveyance to a nominee for himself, there is no principle or authority which compels vendors to convey to one of their own number who declines to accept the nomination under circumstances which may expose them hereafter to the risk of the suggestion of being parties to a breach of trust. *Ib*.

Married Woman—Mortgagee—Sale of Estate—Concurrence of Husband.—A married woman, who has become the mortgagee of real property after the passing of the Married Women's Property Act, 1882, and to whom the money advanced belongs as her separate estate, is in no sense a trustee for the mortgagor until the principal, interest, and costs under the mortgage have been satisfied. Therefore, upon a

sale of the property by the mortgagor with the concurrence of the mortgagee, it is not necessary that her husband should also concur in the conveyance in order to give the purchaser a good title, or that the deed should be acknowledged by her under the Fines and Recoveries Act. *Harkness and Allsopp's Contract, In re* (65 L. J. Ch. 726; [1896] 2 Ch. 358), distinguished. *Brooke and Fremlin's Contract, In re*, 67 L. J. Ch. 272; [1898] 1 Ch. 647; 78 L. T. 416; 46 W. R. 442—Kekewich, J.

Exception to be Ascertained by Subsequent Election—Limitation of Estate to Commence in futuro—Invalidity of Exception.]—By a conveyance on sale certain freehold lands were conveyed unto and to the use of the purchaser in fee-simple, with the exceptions and reservations set forth in the first schedule to the conveyance. This schedule contained the following words: "Save and except and reserving unto the vendors a piece of land not less than forty feet in width," commencing at a specified point and terminating "at the nearest road to be made by the purchaser or his assigns on the estate so as to give access to such road" from other lands of the vendors. The purchaser afterwards constructed certain roads on the estate. In an action brought to determine whether a plot of land on which a road had been commenced but not completed was exempt from the conveyance, —*Held*, that the conveyance operated at common law, and not under the Statute of Uses, and that the exception was bad; but that even if the conveyance operated under the Statute of Uses it was equally bad as infringing the rule against perpetuities. *Savill v. Bethell*, 71 L. J. Ch. 652; [1902] 2 Ch. 523; 87 L. T. 191; 50 W. R. 580—C.A.

Question as to Validity of Contract—Determination of Conveyancing Question on Summons.]—Where an intending vendor and purchaser of real estate have dealt with one another on the footing of there being some contract between them, and have endeavoured to agree to the form of a conveyance, the Court ought not to refuse to deal with a summons taken out by one of them under the Vendor and Purchaser Act, 1874, for the determination of a question arising on the form of the conveyance, merely because the other party says that he may raise a serious question as to the validity of the contract which would prevent an order for specific performance being made against him. The Court can declare what form the conveyance should take if there is one. *Lander and Bagley's Contract, In re* (61 L. J. Ch. 707; [1892] 3 Ch. 41), approved. *Hughes and Ashley, In re*, 69 L. J. Ch. 741; [1900] 2 Ch. 595; 83 L. T. 890; 49 W. R. 67—C.A.

Maintaining Fences—Covenant—Form of Conveyance to Purchaser.]—The object of having a deed of conveyance is not merely to vest the property the subject of it in the purchaser, but to embody covenants as to what must be done under the contract of sale after completion of the purchase. Therefore, where a purchaser bought under a contract which made him liable to erect and for ever after maintain fences, as marked on the plan of property sold by public auction, the vendor was held entitled to have the obligations of the purchaser expressed in the conveyance to him of his lot. *Cooper and*

Crondace's Contract, In re, 90 L. T. 258; 52 W. R. 441—Kekewich, J.

Land Inclosed by Purchaser in Excess of Parcels—Mistake—Expenditure—Acquiescence—Compensation—Costs.]—A purchaser in 1895 took possession of land in excess of that purported to be conveyed to him, and inclosed the land with a wall. In 1899 the vendors brought an action for declaration of title:—*Held*, that the defendant was bound to give up so much of the land as did not pass by his conveyance; he was not entitled to compensation for his expenditure thereon; there was a duty on the part of the vendors under the conditions of sale to stump out the plots, which in this case they had not done, therefore there would be no order as to costs. *Marriott v. Reid*, 82 L. T. 369; 64 J. P. 376—Kekewich, J.

Misdescription of Purchaser—Evidence of Identity.]—William Wray, in partnership with his two sons and another person, carried on business at Laurel House, North Hill, Highgate, under the style of "William Wray," without the addition of the words "& Co." or any other words. William Wray died in 1885, and his widow was admitted as a partner in his place and the business was carried on as before and under the same name. In 1890 the partners bought North Hill House, Highgate, as an investment, and paid for it out of partnership assets. The conveyance was made between the vendor of the one part and "William Wray of Laurel House, North Hill, Highgate," of the other part, and the property was conveyed to William Wray in fee-simple:—*Held*, that the legal estate passed by the conveyance to the four partners as joint tenants. *Maughan v. Sharpe* (84 L. J. O.P. 19; 17 C. B. (N.S.) 443) followed. *Wray v. Wray*, 74 L. J. Ch. 687; [1905] 2 Ch. 349; 93 L. T. 304; 54 W. R. 136—Warrington, J.

"Matter or thing relating or incidental to" Sale—Requisition as to Question of Conveyance.]—Under a condition enabling the vendor at a sale to annul the sale if any objection should be made "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which he is unable or unwilling to comply with, the vendor can rescind the contract on account of a requisition as to a matter of conveyance, as well as one as to a matter of title. *Deighton and Harris' Contract, In re*, 67 L. J. Ch. 240; [1898] 1 Ch. 458; 73 L. T. 430; 46 W. R. 341—C.A.

The vendor contracted to sell property for the remainder of a term of ninety-nine years, stating that he was a mortgagee selling under his power. It appeared that his title was under a mortgage by sub-demise only, the legal estate under which was outstanding in a mortgagee, who was said to have been paid off, and there were certain outstanding days vested in various parties. The purchaser required these persons to join in the assignment to get in these outstanding interests. The vendor could not obtain their concurrence without trouble and expense, and he gave notice to annul the sale under the condition:—*Held*, that the case came within the condition, and he was entitled to rescind. *Bowman v. Hyland* (47 L. J. Ch. 581; 8 Ch. D. 588) distinguished. *Ib.*

Right of Way—Reservation of “all rights of way hitherto exercised”.—Unity of Title—Way used by Tenant of One Property—Conveyance not Executed by Purchaser.]—The plaintiff purchased two farms, W. and C., which had been held in unity of title for thirty-five years, during which time there had been user, in favour of C., of a way over W. He sold W. The contract contained a reservation of “all rights of way hitherto exercised” over W. The conveyance contained a similar reservation, but was not executed by the purchaser. The purchaser entered into possession and executed a mortgage. The mortgage became vested in the defendant, who took possession. The plaintiff's tenant of C. having been interfered with by the defendant in the use of the way over W.,—*Held*, that the plaintiff was entitled to an injunction restraining the defendant from interfering with the user of the way over W. *May v. Belleville*, 74 L. J. Ch. 678; [1905] 2 Ch. 605; 93 L. T. 241; 54 W. R. 12—Buckley, J.

10. TITLE-DEEDS.

Right of Purchaser to Title-deeds.]—The Conveyancing Act, 1881, s. 2, sub-s. 6, only concerns the expenses of “production and inspection” of documents, and does not affect the ordinary right of a purchaser to have title-deeds handed over on completion. *Johnson and Tustin, In re* (54 L. J. Ch. 889; 30 Ch. D. 42), followed. *Duthy and Jesson's Contract, In re*, 67 L. J. Ch. 218; [1898] 1 Ch. 419; 73 L. T. 223; 46 W. R. 300—Romer, J.

By a contract of sale of freehold premises it was agreed that the purchaser should accept the best title that the vendors could give. It appeared that prior to the date of the commencement of the abstract of title there was a mortgage which it was stated had long since been paid off. The solicitors of the mortgagees declined to hand over the title-deeds to the purchaser:—*Held*, that in the absence of its being shewn that there was some difficulty as to title which prevented the vendors handing over the deeds, the purchaser was not bound to complete without the title-deeds. *Ib*.

Custody—Sale of Land—Retention by Vendor of Part of Estate—Extinguished Easement—Sale of Dominant Tenement—Retention of Servient Tenement.]—Where a person sells land, by his purchase of which an easement over land which he previously owned had become extinguished by unity of ownership, his retention of the servient tenement entitles him under the 5th rule of section 2 of the Vendor and Purchaser Act, 1874, to retain the title-deeds relating to the dominant tenement and to the easement, for they must be considered to relate to land which he retains. *Lehmann and Walker's Contract, In re*, 75 L. J. Ch. 768; [1906] 2 Ch. 640; 95 L. T. 259—Swinfen Eady, J.

11. VENDOR'S LIEN.

Personal Estate—Reversionary Property.]—The doctrine of the vendor's lien for unpaid purchase-money extends to pure personal estate.

Davies v. Thomas (69 L. J. Ch. 643, 645; [1900] 2 Ch. 462, 463) followed. *Stuckey, In re; Stuckey v. Kekewich*, 75 L. J. Ch. 58; [1906] 1 Ch. 67; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33—C.A.

Arrears of Interest—Statute of Limitations.]—The lien attaches not only to principal, but extends to interest from the time when the lien came into existence; and there is no Statute of Limitations applicable in such a case to restrict the right to recover interest, but the vendor can recover interest for the whole period from the date of the sale. *Rose v. Watson* (33 L. J. Ch. 385, 389; 10 H.L. C. 672, 683), *Hancock, In re; Hancock v. Berrey* (57 L. J. Ch. 793), and *Mellersh v. Brown* (60 L. J. Ch. 43, 44; 45 Ch. D. 225, 229) followed. *Ib*.

The plaintiff, who was entitled under certain settlements to various interests in certain property, including a reversionary interest in a legacy of 5,000*l.*, in 1873 mortgaged those interests. In 1874 his father discharged all his liabilities and took a transfer of the mortgages, and by a deed made between the plaintiff and his father it was declared that the property other than the 5,000*l.* legacy should stand charged with the money advanced by the father, the 5,000*l.* legacy being expressly released from the mortgaged securities. By deed of January 31, 1874, made between the plaintiff and his father, the plaintiff, in consideration of 1,500*l.* expressed to be paid to him by his father, assigned the reversionary legacy to his father absolutely. A receipt for the 1,500*l.* was indorsed on the deed, and signed and witnessed, but no money was actually paid to the plaintiff. The father was at this time sole trustee of the investments representing the reversionary legacy. He died in 1900. The plaintiff brought his action claiming that the deed of January 31, 1874, was intended to be a security only, but the Court did not take that view of the facts. Alternatively he claimed a lien on the investments representing the 5,000*l.* legacy for the 1,500*l.* purchase-money and interest from January 31, 1874:—*Held*, that the lien attached both as regards principal and interest, and there was no Statute of Limitations applicable; further, the father being sole trustee of the fund, the Court, if administering the fund, would have no difficulty in enforcing the rights of the unpaid vendor. The plaintiff was therefore entitled to enforce his lien on the fund representing the legacy for his purchase-money, with interest at 4 per cent. from the date of the purchase. *Ib*.

Contract Excluding Lien—Waiver.]—By agreement of June 17, 1899, between W. and M. and a syndicate, it was agreed that W. and M. should sell to the syndicate a brickfield for 13,000*l.*, of which 4,000*l.* was to be paid in cash and 9,000*l.* in shares of a company about to be formed. By agreement of June 23, 1899, between the syndicate and the company, the syndicate agreed to sell to the company the brickfield and premises for 25,000*l.*, of which 15,000*l.* was to be paid in cash and 10,000*l.* in shares. By subsequent agreements W. and M. agreed to take payment of the whole of their purchase-money in shares, and the syndicate agreed to take from the company 21,500*l.* in shares and

3,500*l.* in cash. The capital of the company was to consist of 30,000 ordinary shares of 1*l.* each and 1,000 5*l.* per cent. first mortgage debentures of 10*l.* each. The prospectus stated: "The debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the company." It also stated that the syndicate, who had agreed to defray all preliminary expenses, had fixed the price at 25,000*l.*, of which 15,000*l.* was to be payable in cash and the balance in shares, "leaving the entire debenture issue of 10,000*l.* available for working capital and new machinery." The brickfield and premises were assigned to the company by W. and M. on August 30, 1899, though the deed was not executed by the syndicate. The company paid to the syndicate 2,670*l.* on account of the 3,500*l.* (the portion of the purchase-money to be paid in cash), leaving a balance due of over 800*l.* A considerable amount was subscribed for debentures, but the company became abortive and was wound up:—*Held*, that the syndicate was not entitled to a lien for unpaid purchase-money in priority to the debenture-holders. *Durrow Brick Co., In re*, [1904] 1 I. R. 530—C.A.

Equitable Execution — Receiver — "Rents profits and moneys" — Debtor's Interest in Real Estate — Vendor and Purchaser — Contract for Sale — Payment of Deposit — Money Paid in Compromise of Action on Contract.—The purchaser of a freehold house and premises belonging to the defendant paid his deposit and entered into possession. He never completed, but refused to deliver up possession, and subsequently commenced an action against the vendor for return of the deposit, in which the vendor counterclaimed for specific performance. While this action was pending, R. recovered judgment for 55*l.* and costs (100*l.* 7*s.*) against the purchaser, and a receiver was appointed "upon first giving security" to receive the rents, profits, and moneys receivable in respect of the purchaser's interest in the house and premises. Notice of this order was given to the vendor. Afterwards the purchaser's action against the vendor was compromised, the purchaser delivering up possession of the premises on receiving 110*l.* from the vendor. R. then commenced this action for a declaration that he was entitled to a lien or charge on the premises for 155*l.* 7*s.* and for personal payment by the vendor. The receiver subsequently gave security:—*Held*, that the 110*l.* was not paid in respect of any interest which the purchaser had in the property, but as the price for getting him out of possession, and that the action failed. *Ridout v. Fowler*, 73 L. J. Ch. 579; [1904] 2 Ch. 93; 91 L. T. 509; 53 W. R. 42—C.A.

Leaseholds Bequeathed on Trust for Sale — Proceeds of Sale — Lunatic not so Found — Direction to get in Estate — Priorities.—The vendor of a share of the proceeds of sale of leasehold property bequeathed by will to trustees on trust for sale at a future date is entitled to a vendor's lien for unpaid purchase-money on the share of the proceeds of sale in the hands of the trustees. *Collins v. Collins* (31 Beav. 346) approved. *Davies v. Thomas*, 69 L. J. Ch. 643; [1900] 2 Ch. 462; 83 L. T. 11; 49 W. R. 68—C.A.

Per RIGBY, L.J.—The trustees of the will having notice that the purchase-money of the share remained unpaid, independently of the doctrine of a vendor's lien, ought not in the proper administration of the trust to pay the share of the proceeds of sale to the purchaser without first satisfying the vendor. *Ib.*

An order, made on an *ex parte* application under the Lunacy Act, 1890, s. 116, directing a person in the name and on behalf of a lunatic not so found to receive and give a discharge for his property, does not affect the legal or equitable rights of other parties against that property—as, for instance, a vendor's lien thereon for unpaid purchase-money. *Winkle, In re* (63 L. J. Ch. 541; [1894] 2 Ch. 519), explained. *Ib.*

Specific Performance—Contract to Purchase Land by Trustee of Settled Estates—Subrogation — Non-payment of Purchase-money — Entry of Successive Tenants for Life and Payment of Interest—Liability of Trust Estate to Vendor.—In 1873 B., who was the sole trustee of settled estates (comprising personal estate directed to be invested in purchase of land), contracted, with the consent of the tenant for life, to purchase the glebe lands of a vicarage, the purchase to be completed in 1874, with a usual clause for payment of interest till actual completion. The personal estate was then invested in a way which prevented its being available for payment of the purchase-money at the time fixed for completion. The purchase-money was never paid, but the successive tenants for life entered into possession of the land and paid interest. B. died in 1880, and his estate was fully administered after usual advertisements for creditors' claims. In 1882 the settled estates were disentailed and re-settled, and in 1889 the personal estate, liable to be invested in land, was distributed by the trustees of the re-settlement, who had no actual notice of the plaintiffs' claim. In 1896 the plaintiffs brought an action to which the vicar, the present tenants for life and in tail, the legal personal representative of B., and the present trustees were defendants, claiming specific performance and damages or a declaration of vendor's lien:—*Held*, that the contract made by B. was not enforceable against the persons who had become entitled to the settled property; that B., in entering into the contract under the circumstances, acquired no right of indemnity out of the settled property to which the vendors could succeed by way of subrogation; that the vendors had no case against the representatives of B. or against the present trustees personally, and that they were entitled to nothing more than a vendor's lien on the land sold. *Ecclesiastical Commissioners v. Pinney*, 69 L. J. Ch. 844; [1900] 2 Ch. 736; 83 L. T. 384; 49 W. R. 82—C.A.

12. COMPENSATION.

Errors of Description in Particulars—Subsequent Conveyance—Right of Purchaser to Maintain Action for Errors after Conveyance.—After a purchase of real property has been completed and a conveyance executed no action can, in the absence of fraud, be maintained by the purchaser against the vendor, in respect of errors of description in the particulars contained

in the contract of sale but not contained in the conveyance, as all such particulars are merged in and put an end to by the subsequent conveyance. The plaintiffs in their statement of claim alleged that, by an agreement in writing they agreed with the defendant to purchase from him an estate in fee-simple, and that by this agreement, which incorporated certain particulars of sale, the defendant contracted and warranted that the mansion-house was in first-class order as to drainage and otherwise; that subsequently the purchase was completed and the conveyance executed, and that they then discovered serious defects in the drainage which they had to remedy. In an action by the plaintiffs to recover damages in respect of the errors in the particulars of sale,—*Held*, that after conveyance such action could not be maintained. *Greswolde-Williams v. Barneyby*, 88 L. T. 708; 49 W. R. 208—Wills, J.

Particulars—Omission from—Notice from Local Authority to Execute Street Works—Non-disclosure—Outgoings.—Property in a town was put up for sale by auction subject to particulars and conditions of sale, one of which was to the effect that any error, misstatement, or omission in the particulars should not annul the sale, but compensation should be allowed. Prior to the date of the auction the vendor had received from the local authority notice to execute certain street works in respect of the property. The fact of this notice having been sent was not stated in the particulars, but it was admitted that the omission to disclose it was not from any fraudulent intention. The purchaser did not become aware of the notice until after he had signed the contract, and he claimed compensation under the condition:—*Held*, that he was not entitled to compensation, for a purchaser of such a property must be taken to have known that notice to execute street works might be served at any time, and to have bought subject to such a contingency, and the omission to disclose the notice could not have affected the value of the property. *Leyland and Taylor, In re*, 69 L. J. Ch. 764; [1900] 2 Ch. 625; 83 L. T. 380; 49 W. R. 17—C.A.

Condition Excluding Compensation—Misdescription—Rescission of Contract—Return of Deposit—Possessory Title.—Freehold property was put up by the defendants for sale by auction, and was described in the particulars of sale as containing 5 a. 0 r. 26 p., and bordering on a lake. One of the conditions of sale was as follows: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise . . . and if any error, misstatement or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." The plaintiff purchased the property and paid a deposit. Upon investigation of the title the defendants were only able to shew a good title to 4 a. 3 r. out of the 5 a. 0 r. 26 p. sold. As regarded a strip of land adjoining the lake, the defendants offered a possessory title of less than forty years. The plaintiff declined to complete, and brought an action for rescission of the contract and return of his deposit, and the defendants counterclaimed for specific performance:—*Held*, that so far as the strip of land adjoining the lake was concerned the

contract must be regarded as an open one, and the purchaser was therefore entitled to a forty years' title by possession; that the misstatement as to the acreage was of such a material character as to preclude the defendants from relying on condition 5 as a defence to the action; and that the plaintiff was therefore entitled to have his contract rescinded and his deposit returned. *Jacobs v. Revell*, 69 L. J. Ch. 879; [1900] 2 Ch. 588; 83 L. T. 629; 49 W. R. 109—Buckley, J.

Sale by Court—Damage to Property after Sale—Claim for Compensation after Conveyance.—A purchaser of house property which was sold by auction by order of the Court, and was in possession of a caretaker appointed by the receiver, complained in his requisitions on title of damage to the premises after the sale, and claimed compensation. He afterwards got possession, and accepted a conveyance on a subsequent date, but did not withdraw his claim for compensation:—*Held*, that, the acceptance of a conveyance was not in the circumstances a bar to the claim for compensation, and that as proper care had not been taken of the premises by the receiver between the date of the sale and the time when the purchaser took possession, the purchaser was entitled to compensation. *Connolly v. Keating* (No. 2), [1908] 1 Ir. R. 356—M.R.

Claim for Damages after Completion and Conveyance—Vendor to Complete House and Furnish Fixtures.—S. agreed to buy a house in the course of erection from C., who agreed to supply and fix certain drains, stoves, fixtures, &c., and complete the house in a proper and workmanlike manner:—*Held*, that, notwithstanding the completion of the conveyance of the house, S. could maintain an action against C. for failing to supply and fix certain articles, and for not completing the house in a proper and workmanlike manner. *Saunders v. Cockrill*, 87 L. T. 30—D.

Right of Purchaser to Maintain Action of Tort.—A purchaser of an interest in land cannot maintain an action for a wrong done in relation to the land prior to the date of the purchase, except where the wrong is a continuing one. *Dawson v. Great Northern and City Railway*, 73 L. J. K.B. 174; [1904] 1 K.B. 277; 90 L. T. 20; 68 J. P. 214; 20 T. L. R. 87—Wright, J. Reversed in part, 21 T. L. R. 114—C.A.

13. COVENANTS.

(a) Generally.

Assignment of Lease—Qualified Covenant against—Unreasonable Refusal to Consent to Assignment—Doubtful Title.—The vendor agreed to sell to a brewery company a leasehold public-house under an open contract. The lease contained a covenant against assignment without consent, but the consent was not to be "unreasonably withheld in the case of a respectable and responsible tenant." There was a proviso for re-entry in the event of breach of any of the covenants in the lease. The lessor refused his consent to the assignment, stating that his "chief reason" was that he desired to

keep the house as a "free house." The vendor refused to give any indemnity to the purchasers against any litigation:—*Held*, that the title was not one which could, under the circumstances, be forced upon an unwilling purchaser. *Marshall and Salt's Contract, In re*, 69 L. J. Ch. 542; [1900] 2 Ch. 202; 83 L. T. 147; 48 W. R. 508—Byrne, J.

Breach of Implied Covenant for Title—Assignment Carrying out Contract of Sale—"Estate, term, and interest"—"Beneficial owner."—A vendor, who was entitled under an agreement to a lease of the lands therein described and coloured red on the plan annexed thereto contracted to sell and subsequently as "beneficial owner" assigned to the purchaser all his "estate, term, and interest" under the agreement of and in the land coloured red on the said plan annexed thereto. After completion it was discovered that previously to the contract for sale a small portion of the land coloured red had with the privity of the vendor been demised to a third party, and that consequently the vendor could not make a title to such portion:—*Held*, in an action by the purchaser for damages for breach of the vendor's implied covenants for title, that there had been a breach by the vendor of such covenants, and that he was liable for damages in respect thereof. *May v. Platt*, 69 L. J. Ch. 357; [1900] 1 Ch. 616; 83 L. T. 123; 48 W. R. 617—Farwell, J.

Action for Damages—Evidence—Purchaser's Knowledge of Defect—Mistake—Counterclaim—Rectification.—In such an action the vendor is not entitled to adduce evidence to prove that the purchaser at the date of the contract knew of the diminution of the land, nor can the vendor, if counterclaiming for rectification, adduce evidence to prove mistake. Rectification in such circumstances would be in reality a transgression of the well-settled practice that a plaintiff seeking specific performance cannot have specific performance with a parol variation. *Ib.* And see cols. 2643-4.

Freeholds—Long and Continuous User—Acquiescence—Waiver—Release.—The long and continuous user of freehold premises in a manner wholly inconsistent with the tenor and purpose of a restrictive covenant subject to which the premises were originally conveyed, is tantamount to the waiver or release of such covenant, and the Court will not uphold the objection of a purchaser who in ignorance of the restriction has contracted to buy the premises for a purpose involving a continuance of the breach, and who in consequence of the subsequent discovery of the restriction refuses to complete. *Gibson v. Doeg* (27 L. J. Ex. 37; 2 H. & N. 615) and *Summerson, In re*; *Dawrie v. Summerson* (69 L. J. Ch. 57n.), followed. *Hepworth v. Pickles*, 69 L. J. Ch. 55; [1900] 1 Ch. 108; 81 L. T. 818; 48 W. R. 184—Farwell, J.

Covenant by Purchaser not to Erect Overlooking Buildings—Buildings Five Yards off—"Adjoining."—Premises may be "adjoining" though they are not contiguous. In a conveyance on sale of a portion of plaintiffs' land to the defendant, the purchaser covenanted that he would not "in the erection of buildings adjoining the hereditaments of the vendors"

permit the insertion of any "lights" overlooking such premises. The defendant constructed a number of houses whose gardens or backyards reached within five or six yards of the plaintiffs' land, and contained windows overlooking the same:—*Held*, that the houses "adjoined" the plaintiffs' land within the meaning of the covenant, and that the defendant had committed a breach thereof. *Ind, Coope & Co. v. Hamblin*, 81 L. T. 779; 48 W. R. 238—Buckley, J.

(b) Restrictive.

Possessory Title—Constructive Notice—Purchaser.—The benefit of a restrictive covenant affecting the user of land is a paramount right in the nature of a negative easement binding the land in equity; and a squatter who acquires a title to the land under the Real Property Limitation Acts acquires his title subject to the covenant, even though he may have no actual notice of it. *Nisbet and Potts' Contract, In re*, 75 L. J. Ch. 238; [1906] 1 Ch. 386; 94 L. T. 297; 54 W. R. 286; 22 T. L. R. 233—C.A.

A person who buys land from a successful squatter, and is content to take the squatter's title, depending upon the Real Property Limitation Acts, without insisting upon a forty years' title, is affected with notice of covenants restricting the user of the land of which he would have become acquainted if he had made reasonable enquiry into the title prior to the squatter's. The principles laid down in *London and South Western Railway v. Gomm* (51 L. J. Ch. 530, 532; 20 Ch. D. 562, 582) and *Cox and Neve's Contract, In re* ([1891] 2 Ch. 109, 117), applied. *Ib.*

Devolution of Benefit—Covenant Running with Land—"One messuage or dwelling-house"—"Private residence"—Residential Flats.—Where on a sale the benefit of a covenant restricting the use of the purchaser's land is clearly annexed to all or any part of land retained by the vendor, it passes by assignment of that land or any part thereof, and may be said to run with it, as well in contemplation of equity as of law, without proof of any special bargain or representation on the assignment, and even though the assignee is ignorant of the existence of the covenant. In such a case it runs not because the conscience of either party is affected, but because the assignee has acquired something which adhered in or was annexed to the land. *Rogers v. Hosegood*, 69 L. J. Ch. 652; [1900] 2 Ch. 388; 83 L. T. 186; 48 W. R. 659—C.A.

As in contemplation of equity a mortgagor is the true owner of the land, the benefit of such a covenant will run with the land in equity where it is made with a mortgagor alone, notwithstanding the rule at law according to which a mortgagor for this purpose was treated as a stranger to the land—*Webb v. Russell* (3 Term Rep. 393). *Ib.*

The erection on a plot of land of a block of residential flats, having a common public entrance-hall, corridors, lifts, and staircases, is a breach of a covenant to erect "no more than one messuage or dwelling-house" thereon.

It is likewise a breach of a covenant that every house to be erected thereon shall be "adapted for and used as and for a private residence only." *Ib.*

Not Contained in Contract—Form of Conveyance.]—Under a contract with a purchaser for the sale of land in fee-simple free from incumbrances, with the exception of one specified restrictive covenant, the vendor is not entitled to insert in the conveyance a further restrictive covenant on the ground that he has entered into a prior contract with another which would render him liable to an action unless the further restrictive covenant was inserted, though the prior contract might be a good defence to an action for specific performance. *Wallis and Barnard's Contract, In re*, 68 L. J. Ch. 753; [1899] 2 Ch. 515; 81 L. T. 382; 48 W. R. 57—Kekewich, J.

"Beerhouse or shop"—No Land Retained by Vendor—Right of Administrator to Enforce—Personal Contract—"Actio personalis moritur cum persona."]—In a conveyance of land to a company in fee-simple the company covenanted for themselves, their successors and assigns, with the vendor, his heirs, executors, and administrators, that they would not build on a certain part of the land conveyed "any beer house or shop or any hotel of less annual value than 50l." The vendor, who had no other land in the neighbourhood, died, having devised and bequeathed all his property to the plaintiff, who was his administratrix. The defendant, who was an assign of the land in question from the company with notice of the restrictive covenant, proposed to build two shops thereon, and the plaintiff brought an action to restrain the building as being in contravention of the covenant:—*Held*, first, that upon its true construction the covenant only applied to a beer-shop, and not to an ordinary shop; and secondly, that the covenant was a personal one, which could not be enforced in equity against an assign of the purchaser by the representative of a vendor who had no interest in any adjoining land which would be damaged by breach of the covenant. *Tulk v. Moxhay* (18 L. J. Ch. 83; 2 Ph. 774) distinguished. *Formby v. Barker*, 72 L. J. Ch. 716; [1903] 2 Ch. 539; 89 L. T. 249; 51 W. R. 646—C.A.

Building Scheme—Auction Sale—Prior Purchaser—Benefit of Covenants—Assigns of Vendor.]

—A vendor, the owner in fee of an estate, conveyed part of it to D., who, for himself, his executors, administrators, and assigns, entered into certain restrictive covenants with the vendor, his heirs and assigns. About the same time the vendor conveyed two other portions of the estate to two other purchasers, subject to restrictive covenants similar to D.'s covenants. The vendor subsequently sold the remainder of the estate in lots by auction subject to restrictive stipulations binding on each purchaser similar to D.'s covenants. The auction sale plan shewed the whole estate sold and unsold. Action by the assigns of purchasers at the auction sale to enforce against a lessee of an assign of D. the covenants entered into by D. with the vendor. The benefit of these covenants had never been expressly assigned to the purchasers at the auction sale:—*Held*, that there was a general building scheme affecting

the whole estate; that D. was not bound by it for want of reciprocity; but that the plan and particulars of the auction sale raised an irresistible inference that the vendor intended the purchasers at that sale to have the benefit of D.'s covenants, so that the purchasers at that sale could enforce D.'s covenants as assigns of the vendor. *Nalder & Collyer's Brewery Co. v. Harman*, 83 L. T. 257—C.A. Affirming, 64 J. P. 358—Kekewich, J.

Building Scheme—Mutual Covenants—Waiver—Highway—Cul-de-sac—Dedication to the Public.]—A corporation having acquired land to widen a street sold surplus land by auction under conditions requiring the purchasers to observe the by-laws as to building. The corporation reserved the right to waive or alter any stipulations as to any land not sold at the sale or, with the consent of the purchaser, as to any land so sold. The corporation consented to alter the plans of a purchaser so that the air-space required by the by-laws was provided out of a square, and not out of land sold at the sale. The square was a *cul-de-sac*, but not separated by any bar from the highway. It had never been paved or repaired by the local authority:—*Held*, that there was under the circumstances no building scheme which the corporation was not at liberty to alter, and that, although a *cul-de-sac* may be a highway, no dedication of the square to the public had been proved, and that the user proved was only that of private rights of way to the houses in the square. *Att.-Gen. v. Richmond Corporation*, 89 L. T. 700; 68 J. P. 73; 2 L. G. R. 628; 20 T. L. R. 131—Swinfen Eady, J.

—Right to Injunction—Change in Character of Neighbourhood.]—The Court will not generally infer that a building scheme was intended, where the contract leaves undefined the property to be bound by the conditions which are to apply, and does not bind the vendor to observe the conditions in the meantime as to property remaining unsold, especially where the vendor has the right to modify the conditions as to the unsold part. *Osborne v. Bradley*, 73 L. J. Ch. 49; [1903] 2 Ch. 446; 89 L. T. 11—Farwell, J.

Where a restrictive covenant is entered into for the benefit of the covenantee personally, and not to secure the amenities of his property or as part of a building scheme, the plaintiff will not lose his right to enforce the covenant by injunction, on the ground that there has been a change in the character of the neighbourhood, unless he himself has been guilty of some act or omission raising a personal equity against him. *Ib.*

—Notice of Restrictive Covenants—Trivial Breach by Plaintiff—No Bar to Action.]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, and what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain the defendant from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a

building-line. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within four feet of a boundary-fence:—*Held*, that the defendant was affected with notice of the building stipulations, for that there was nothing in this case to take it out of the general rule that notice of a deed is notice of its contents. *Held*, further, that the plaintiff had only committed a trivial breach of a trivial covenant, and that such a breach did not disentitle the plaintiff from having the building stipulations strictly enforced. *Hooper v. Bromet*, 89 L. T. 37—*Farwell, J.*

— **Several Sub-Leases made Subject to Covenants in Head-Lease—Acquisition of Reversion by Lessee—Implied Obligation on Lessee towards Sub-Lessees to Observe Restrictive Covenants—Building Scheme.**—By lease made in 1854 R. devised two adjoining parcels of land to W. T. for a term of 1,000 years at a yearly rent, and subject, among others, to covenants on the part of the lessee—(a) to expend a sum of 500*l.* at least in erecting a private dwelling-house on one parcel of the demised premises; (b) not to use any house on either parcel except as a private dwelling-house, or as a “tea” house, without the consent in writing of the lessor; (c) that each private dwelling-house to be occupied on the smaller parcel must, except with the lessor’s consent, have cost at least 400*l.*; (d) that in the event of the lessee erecting on the larger parcel a house of public entertainment, the same should be shut in by planting from the view of the adjoining premises; and (e) that each house intended to be erected on the larger parcel should be of the annual value of 25*l.* at least. At different dates during the next ten years W. T. made nine different sub-leases, eight of which were stated expressly to be subject to the covenants and restrictions contained in the head-lease. Three of these sub-leases contained covenants by the sub-lessees for the expenditure of money in building and restricting the user of the houses on the premises; but these covenants were not identical with, nor in some cases even consistent with, the covenants by the lessee in the head-lease. Others of the sub-leases contained no provisions as to building or restrictive covenants on the user. Having made these sub-leases, W. T. built a villa on the remaining portion of the demised premises retained in his hands. The portions of the premises comprised in the sub-leases which contained no restrictive covenants became vested in the plaintiff, and the residuo of the premises comprised in the head-lease, as well as the estate and interest of W. T. under the head-lease, became vested in the defendants, who also acquired the reversion in fee-simple expectant on the determination of the head-lease. The defendants, after becoming so entitled, built upon the larger portion of the land demised in 1854 seven shops and several cottages not of the annual value of 25*l.* each:—*Held*, that there was no express or implied obligation to observe the covenants in the head-lease which the plaintiff—as entitled to the land comprised in the sub-leases which she had acquired—could enforce against the defendants, and that she was not entitled to obtain an injunction

restraining the defendants from building and using the premises in a manner different from that allowed by the head-lease. *Graham v. Craig*, [1902] 1 Ir. R. 264—C.A.

— **Successive Sales—Rights against Purchasers at Subsequent Sales—Variations in Forms of Conveyance—Notice.**—Where an estate is sold in parcels at successive sales and subject to restrictive stipulations contained in a building scheme, a purchaser at a prior sale cannot enforce against a purchaser at a subsequent sale stipulations in respect of property subsequently sold which were not formulated or promulgated at the date of the contract under which he claims. A purchaser with notice of a building scheme is bound by restrictions of which he has notice, and accidental departures in the form of conveyance purporting to relieve him from the observance of the restrictions are ineffective, and, conversely, are no bar to his title to sue. *Rowell v. Satchell*, 73 L. J. Ch. 20; [1903] 2 Ch. 212; 89 L. T. 267—*Swinfen Eady, J.*

The mere fact that a solicitor for the vendor inserts restrictive covenants in the draft conveyance, not warranted by the terms of the contract, some of which are waived and some insisted upon, is not sufficient to put the purchaser or his solicitor upon enquiry or fix him with notice that there is a building scheme. *Ib.*

Building Estate—“House”—Block of Flats.—A covenant entered into by the several purchasers of plots of ground on the sale of a building estate, that not more than one “house” should be erected on any one plot, is not infringed by the erection on one of the plots of a building containing separate sets of flats on each floor. *Kimber v. Admans*, 69 L. J. Ch. 296; [1900] 1 Ch. 412; 82 L. T. 136; 48 W. R. 322—C.A.

Not to Erect Buildings other than Private Houses.—Parts of certain lands belonging to the plaintiffs were sold by them in fee-simple subject to covenants that the grantees should erect on them no building other than private dwelling-houses, and should not carry on upon them any noisy trade. These covenants were intended for the benefit of the land remaining the property of the plaintiffs. Under the powers conferred by the Lands Clauses Act, 1845, and a private Act, the defendants took over the parts of the land sold by, but took none of the land still remaining the property of, the plaintiffs. The defendants erected on the ground taken over a railway embankment and a railway line, over which it ran trains:—*Held*, that the erection of the embankment and the laying of the line was a breach of the covenant not to erect buildings other than private dwelling-houses, and that the running of trains was a breach of the covenant not to carry on a noisy trade. *Long Eaton Recreation Grounds Co. v. Midland Railway*, 71 L. J. R.B. 74; 85 L. T. 278; 50 W. R. 120—*Lawrance, J.* See s.c. in C.A., ante, LANDS CLAUSES ACT, col. 1266.

“Not more than one house” to be Erected—Double Tenement House—Structural Separation.—The purchaser of a plot of land subject to a restriction that not more than one house should

be erected thereon commenced to erect a double tenement house on the plot, one tenement being on the ground floor and the other on the floor above. There was no internal communication between the tenements, each having its own front door in a common entrance archway:—*Held*, that the building constituted two distinct houses structurally separated in all respects, and was a breach of the restriction. *Ilford Park Estates v. Jacobs*, 72 L. J. Ch. 699; [1903] 2 Ch. 522; 89 L. T. 295—Swinfen Eady, J.

Buildings on Land "adjoining vendors' land."]

—In a conveyance on sale of a portion of plaintiffs' land to the defendant, the purchaser covenanted that he would not "in the erection of buildings adjoining the hereditaments of the vendors" permit the insertion of any "lights" overlooking such premises. The defendant constructed a number of houses, the backs of which were twenty feet from the boundary fence separating the two properties. Their gardens or yards reached this fence, and there were windows in the houses which overlooked the plaintiffs' land:—*Held*, that the houses did not "adjoin" the plaintiffs' land within the meaning of the covenant. *Ind, Coope & Co. v. Hamblin*, 84 L. T. 168—C.A. *Reversing*, 48 W. R. 238—Buckley, J.

To Use House as "private residence"—Housing

Governesses and Pupils of School.]—Receiving as lodgers the governesses and pupils of a neighbouring school,—*Held*, a breach of a covenant to use a house for no other purpose than a "private residence." *Hobson v. Tulloch*, 67 L. J. Ch. 205; [1898] 1 Ch. 424; 78 L. T. 224; 46 W. R. 331—Romer, J.

Building Hotel, Tavern, &c.]—In 1886 certain land was sold and conveyed subject to a covenant to observe the following stipulation: "Except on lots marked 'tavern lots,' no hotel, tavern, public-house, beer-house, shop, or other building for the sale of wines, spirits, ale, or stout, or any spirituous, malt, or excisable liquor of any kind, shall be built upon any lot now offered for sale; and on no lot shall any manufacture be carried on unless with the consent of the vendor, who shall be at liberty to grant a licence for the same." In January, 1897, the lessees from the purchaser of two of the lots, which were not marked "tavern lots," with full notice of the covenant, erected a restaurant on the lots. This restaurant was opened to the public on March 25, 1897, but without any wine, spirit, or beer licence. In August, 1897, a licence to sell wines and spirits was obtained. Thereupon the vendor, together with the purchaser of another lot, on which it was intended to erect a public-house, brought an action against the lessees, and then moved for an interlocutory injunction to restrain them from using their restaurant for any of the purposes mentioned in the stipulation:—*Held*, that the true meaning of the covenant was that no hotel, tavern, &c., should "be" upon any lot except marked "tavern lot"; that it would not be possible to tell whether or not a house when it was in the course of building was intended for a hotel, tavern, &c.; but that the user of the house would have to be looked to before declaring that the covenant had been infringed. *Held, therefore*, that the plaintiffs were entitled

to the injunction claimed. *Webb v. Fagotti*, 79 L. T. 683—C.A.

"Noise or nuisance"—School.]—A covenant running with the land, after prohibiting the exercise of various specified trades of an offensive character, continued: "Or any trade or business or occupation whatsoever whereby any unwholesome or offensive or disagreeable matter, deposit, or fluid, or any injurious or offensive or disagreeable noise or nuisance, shall or may be collected, occasioned, caused, or made":—*Held*, that on the true construction of the covenant, a boys' school carried on in the ordinary way would constitute a breach, as the concluding words could not be held limited to trades or businesses *ejusdem generis* as those specified. *Tod-Heatley v. Benham* (58 L. J. Ch. 83; 40 Ch. D. 80) followed. *Wauton v. Coppard*, 68 L. J. Ch. 8; [1899] 1 Ch. 92; 79 L. T. 467; 47 W. R. 72—Romer, J.

Onerous and Unusual Covenants in Lease—Sale by Auction—Non-disclosure by Vendor—Constructive Notice—Duty to Enquire—Rescission of Contract.]

—It is established by the decision in *Reeve v. Berridge* (57 L. J. Q.B. 265; 20 Q.B. D. 523) that it is *prima facie* the duty of the vendor on a sale of property to disclose all that is necessary to protect himself, and not the duty of the purchaser to make enquiry before entering into a contract; and that is so whether the sale is by public auction or private contract. *White and Smith's Contract, In re*, 65 L. J. Ch. 481; [1896] 1 Ch. 637—Stirling, J.

Notice—Purchaser for Value—Possessory

Title.]—Freehold land held by virtue of a statutory title based on adverse possession for twelve years is not thereby freed from restrictive negative covenants. Such covenants are analogous to an equitable charge, and the land can only be freed from them—(1) by shewing abandonment, or (2) by the plea of purchaser of the legal estate for value without notice, the person advancing such plea being bound to shew that he accepted nothing less than a full title for forty years, and that this title did not disclose the restrictions in question. *Nesbitt and Potts' Contract, In re*, 74 L. J. Ch. 310; [1905] 1 Ch. 391; 92 L. T. 448; 53 W. R. 297; 21 T. L. R. 261—Farwell, J.

Devolution of Benefit—Intention—Covenant Running with the Land.]

—Where part of a freehold estate, not subject to a common building scheme, has been conveyed to a purchaser who has entered into restrictive covenants with the vendors to the intent that the same might bind the land conveyed, and might enure to the benefit of the vendors, their heirs and assigns, and others claiming through them all or any part of the remainder of the estate retained by the vendors, the benefit of such covenants will run at law with every part of the land so retained, and the devisees of a subsequent purchaser of part thereof will be entitled to enforce the covenants against the former purchaser's assignee who has bought with notice of the covenants. *Rogers v. Hosegood*, 69 L. J. Ch. 59; 81 L. T. 515—Farwell, J.

• Every covenant, the benefit of which runs with the land at law, must originally have been entered into with a covenantee who at the time had an interest in the land to which the cove-

nant refers, and must touch or concern that land. But it is a question of intention in each case, to be determined on the construction of the particular document and with due regard to the nature of the covenant and the surrounding circumstances, whether the benefit of a covenant, which possesses the above-mentioned characteristics, does in fact run with the land at law. *Ib.*

Building—User—Private Dwelling-house only—Residential Flats.]—The erection of a block of residential flats on a plot of land is a breach of a covenant to erect no more than one messuage or dwelling-house thereon. *Ib.*

Real Estate—Personal Liability of Vendor—Form of Indemnity to be given by Purchaser.]—On a conveyance of real estate subject to restrictive covenants, the purchaser in covenanting with the vendor to perform and observe the covenants is entitled to have the covenant prefaced by words shewing that it is by way of indemnity only. Form of prefatory words approved by the Court. *Poole and Clark's Contract, In re*, 73 L. J. Ch. 612; [1904] 2 Ch. 173; 91 L. T. 275; 53 W. R. 122; 20 T. L. R. 604—C.A.

Per CURIAM.—The usual covenant by the assignee on the assignment of leasehold property to perform and observe the covenants contained in the lease, would be construed as if it contained similar prefatory words. *Ib.*

Loss of Deeds—Defective Copy—Indemnity—Deed Found—Breach of Covenant contained in Lost Deed—Liability under Indemnity for Damages and Costs.]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, and what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain the purchaser from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building-line in the deed of 1854. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within four feet of a boundary fence. At the trial of the action it was held that the defendant was affected with notice of the building stipulation, and that the plaintiff had only committed a trivial breach of a trivial covenant, and that such a breach did not disentitle the plaintiff from having the building stipulations strictly enforced, and judgment was given for the plaintiff with costs, the defendant being directed to remove certain buildings erected by him on the land. The third party to the action had sold the property to the defendant, and upon such sale had written a letter agreeing to indemnify the defendant, as purchaser, against all "costs, damages, and expenses" which the defendant might suffer or incur "by reason of the building stipulations and conditions being other than those set out in the copy":—*Held*, that the third party was liable to pay the defendant the difference in the value of the plot in consequence of the amount of land

available for building under the provisions of the deed of 1854 being less than under the supposed copy; and also of the defence that the plaintiff was disentitled to sue in consequence of his having broken one of the covenants. *Held*, also, that the defendant, having had actual notice of the provisions of the deed of 1854 before he commenced to build, the third party was not liable for the cost of building or removing the buildings. *Held*, also, that the defendant was not entitled to recover from the third party the costs of the plaintiff incurred in the action and paid by the defendant, or the defendant's own costs so far as they related to the following defence set up by the defendant—namely, a denial that the provisions of the deed of 1854 applied to the plot purchased by him or that he had notice of such provisions; that the liquidator of the company formerly owning the land to which the deed of 1854 applied had, under a power given by that deed to the "vendors, their heirs or assigns," by an agreement in writing, approved of by the Court, released or waived the covenant which it was alleged had been broken; that no building scheme was contained in the deed of 1854, and if there was it had come to an end by mutual consent of the various purchasers of the land comprised in it. *Hooper v. Bromet*, 90 L. T. 234—C.A.

14. RESCISSION.

Right of Purchaser to Repudiate Contract—Repudiation after Decree of Specific Performance.]

—The right of a purchaser to repudiate the contract on account of a defect in title which the vendor cannot remove is merely an equitable right arising out of want of mutuality and affecting the equitable remedy by way of specific performance, and is distinct from the legal right of rescission. The right of repudiation must be exercised as soon as the defect is ascertained; and if, after ascertaining it, the purchaser continues to treat the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose, and must give the vendor a reasonable time to cure the defect. Further, after a decree of specific performance a defendant purchaser cannot repudiate the title or the contract without the leave of the Court. If he discovers a defect of title which might, but for the decree, give rise to a right of repudiation he must move to be discharged from the contract, and he is not entitled to be discharged as a matter of course. The vendor may perfect his title at any time before certificate, while the purchaser is not confined to objections taken by him before or at the hearing, and in each case the Court will consider the circumstances and grant or refuse the relief as may appear to be equitable. *Halkett v. Dudley (Earl)*, 76 L. J. Ch. 330; [1907] 1 Ch. 590; 96 L. T. 539—Parker, J.

Common Mistake.]—A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease, granted by the predecessor in title of the tenant for life, of which all parties were ignorant:—*Held*, that this did not furnish any ground for rescission. *But held*, that the re-purchase of the public-house by the trustees out of capital

moneys in their hands might be sanctioned. *Tyrell, In re*; *Tyrell v. Woodhouse*, 82 L. T. 675; 64 J. P. 665—Cozens-Hardy, J. *And see* col. 521.

Misdescription — “Building site” — **Excavations Filled in with Refuse Matter—Necessity for Removing Same before Erection of Buildings Allowed.**—[Certain land was offered for sale as “The capital freehold building site . . . in the midst of a capital letting class of property. . . . Ripe for immediate development.” It appeared that the land some years previously had been excavated, that water had collected in the holes so made, that the pond thus formed had become very offensive owing to the decayed animal and vegetable matter it contained, and that eventually the holes were filled up by cart-loads of rubbish being deposited therein. Under the London County Council by-laws such land could not be used for building purposes unless and until such refuse matter had been excavated, which would have involved great expense:—*Held*, that there had been such a misdescription as entitled the purchaser to a rescission of his contract. *Baker v. Moss*, 66 J. P. 360—Joyce, J.

— **Action to Recover Deposit—Notice by Vendor to Rescind after Action Brought.**—[There is no general rule as to the period when, after litigation has been begun by a purchaser for a return of his deposit, the vendor becomes disentitled to give notice to rescind under a condition entitling him so to do “if any objection or requisition not precluded by the conditions shall be insisted upon which the vendor shall be unable or unwilling to remove or comply with.” *Isaacs v. Towell*, 67 L. J. Ch. 508; [1898] 2 Ch. 285; 78 L. T. 619—Byrne, J.

A vendor who was acting *bona fide* and had not taken any step which amounted to a waiver of his right to rescind,—*Held*, entitled to rescind the contract for sale after the commencement of an action by the purchaser, although the condition for rescission did not contain the words “notwithstanding any intermediate litigation.” *Ib.*

— **Sale under Direction of Court—Discharge of Purchaser—Rescission—Costs Recoverable by Purchaser.**—[Where a purchaser who has contracted to buy property sold under the direction of the Court is entitled to be discharged from his contract on the ground of misrepresentation, he is entitled to be paid out of the funds in Court, not only his costs of investigation of title, but also the costs, charges, and expenses occasioned by his bidding for and being allowed to be the purchaser of the property. *Perkins v. Ede* (16 Beav. 268) and *Powell v. Powell* (44 L. J. Ch. 311; L. R. 19 Eq. 422) followed. *Bain v. Fothergill* (43 L. J. Ex. 243; L. R. 7 H.L. 158) distinguished. *Hollivell v. Seacombe*, 75 L. J. Ch. 289; [1906] 1 Ch. 426; 94 L. T. 186; 54 W. R. 355—Kekewich, J.

Licensed House—Conviction Recorded on Licence—Omission to Disclose.—[On a sale of a public-house, the non-disclosure by the vendor of the fact that one conviction has been indorsed on the licence is not a material omission, which entitles the purchaser to refuse to complete

the sale. *Ward and Jordan's Contract, In re*, [1902] 1 Ir. R. 73—M.R.

No Title to Part—Error in Particulars—Compensation.—[A condition in a contract for sale, giving the vendor the right to rescind in case the purchaser should insist on any objection or requisition “as to title or evidence of title” which the vendor should be unable or should decline to remove or comply with, does not admit of rescission where the vendor has no title to a part of the property. Principle of *Bowman v. Hyland* (47 L. J. Ch. 581; 8 Ch. D. 588) applied. *Mawson v. Fletcher* (40 L. J. Ch. 131; L. R. 6 Ch. 91) distinguished. *Jackson and Haden's Contract, In re*, 74 L. J. Ch. 389; [1905] 1 Ch. 603; 92 L. T. 591; 53 W. R. 428—Buckley, J.

A sale of freeholds, without reservation of mines and minerals (to which the vendor has no title) gives a right to compensation where the contract provides for compensation in case of error, misstatement, or omission in the particulars. *Ib.*

— The vendors, having as they knew no title to the minerals, sold a freehold villa residence under a contract which did not except the minerals, and the purchaser did not know that they were excepted. The contract by clause 13 provided that if the purchaser should insist on any objection to title which the vendors should be unable, or on the ground of expense decline to comply with, the vendors should be at liberty to rescind the contract; and by clause 14 that any misstatement or omission in the particulars should not annul the sale, but should be the subject of compensation. The purchaser having required the title to the minerals to be deduced, or in the alternative compensation, the vendors purported to rescind the contract under clause 13:—*Held*, that the vendors, having knowingly misdescribed the property, could not avail themselves of clause 13 so as to rescind the contract, and that the purchaser was entitled to complete, with compensation under clause 14. *Nelthorpe v. Holgate* (1 Coll. C.C. 203) approved. *Duddell v. Simpson* (36 L. J. Ch. 70; L. R. 2 Ch. 102) distinguished. *Jackson and Haden's Contract, In re*, 75 L. J. Ch. 226; [1906] 1 Ch. 412; 94 L. T. 418; 54 W. R. 434—C.A.

Decision of BUCKLEY, J. (*supra*) (74 L. J. Ch. 389; [1905] 1 Ch. 603), affirmed; but his observations as to the distinction between an existing and non-existing title for the purposes of clause 13 dissented from. *Per* COZENS-HARDY, L.J.—As a mere matter of construction the purchaser's objection was an “objection to title” within the terms of clause 13. *Ib.*

Notice to Rescind—Validity of Notice—Rescission.—[A contract was entered into at an auction on December 7, 1896, subject to particulars and conditions of sale. The property passed under the will of M. A. R. in 1856 to J. J. W. and another, as tenants in common, in equal moieties, and the difficulty arose as to the moiety which passed to J. J. W. He by his will gave his property to trustees upon trust for sale and payment of debts, &c., and then to lay aside 12,000*l.*, which was to be invested for the benefit of his daughters and their children, and subject thereto to hold the residue for his son.

J. J. W. died in 1876, and in 1880 two deeds were executed by which part of the property was mortgaged to the amount of 12,000*l.* to two persons who were not trustees of the will. Later one of these persons was appointed a trustee of the will. These two persons purported to sell the property. Objection was taken on the requisitions that they could not give a good title, and notice to rescind was given. On a summons taken out by the purchaser claiming rescission, — *Held*, that the defect could only be removed—(1) by procuring the trustees of the will to be parties; (2) by obtaining the sanction of the Court; and (3) by shewing that the 12,000*l.* had been properly invested; that as to (1) and (2), neither on the day of the notice to rescind, nor on that fixed for completion, were the vendors in a position to remove the defect; that as to (3), there was no evidence that the 12,000*l.* could be so invested; and that, in the absence of any such evidence, the notice to rescind must be deemed effectual. *Cooke and Holland's Contract, In re*, 78 L. T. 106—Stirling, J.

"Notwithstanding intermediate litigation"—Notice to Rescind Pending Proceedings—Costs.—Conditions of sale which give a vendor power to rescind the contract "if the purchaser shall insist on any requisition or objection which the vendor shall be unable or unwilling to remove or comply with . . . notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation proceeding or litigation"; and provided that he shall thereupon return to the purchaser his deposit, "but without any interest, costs of investigating the title, or other compensation or payment whatsoever," do not protect the vendor from the payment of costs of litigation; and if the vendor allows a summons, under the Vendor and Purchaser Act, 1874, to be proceeded with until the hearing and then gives notice to rescind, he will be ordered to pay the costs. *Spindler and Mear's Contract, In re*, 70 L. J. Ch. 429; [1901] 1 Ch. 908; 84 L. T. 295; 49 W. R. 410—Farwell, J.

Summons—Return of Deposit—Jurisdiction.—The Court has jurisdiction upon a vendor's summons under the Vendor and Purchaser Act, 1874, to make an order for rescission of the contract and return of the deposit. *Higgins v. Percival* (59 L. T. 213) followed. *Walker and Oakshott's Contract, In re*, 70 L. J. Ch. 666; [1901] 2 Ch. 383; 84 L. T. 809; 50 W. R. 41—Kekewich, J.

Assignment of Contract—Money paid by Purchaser to Assignee.—See ASSIGNMENT, col. 52.

15. SPECIFIC PERFORMANCE.

Mistake—Acreage of Land—Formal Contract—Condition Precedent—Repudiation of Contract by Vendor—Wilful Default—Interest—Form of Order.—An agreement for the sale of thirty-six acres of land, part of a larger amount belonging to the vendor, for the sum of 3,600*l.*, left the boundary of the land on one side, where there was no visible division between the land sold and the land retained, to be subsequently marked out by a fence; and concluded with the words "Subject to approval of conditions

and form of agreement by purchaser's solicitor." The vendor was mistaken as to the acreage of his land, and the portion he had intended to sell measured out at forty-two acres, which amount he required the purchaser to take at 100*l.* an acre. In an action by the purchaser to enforce the original agreement, which the vendor repudiated, — *Held*, that the purchaser was entitled to specific performance of the contract for the sale of thirty-six acres, as the mistake of the vendor did not go to the root of the matter so as to entitle him to rescission, and the execution of a more formal agreement was not made a condition precedent to a complete contract. *Held*, also, that by repudiating the contract the vendor had not been guilty of "wilful default" so as to disentitle him to interest payable under the contract until completion. *North v. Percival*, 67 L. J. Ch. 321; [1898] 2 Ch. 128; 78 L. T. 615; 46 W. R. 552—Kekewich, J.

Reversionary Interest—Deposit Paid—Bankruptcy of Vendor—Lapse of Time—Delay—Lien for Deposit.—In 1886 a contract was entered into for the sale of a reversionary interest in personalty free from incumbrances, and the purchaser thereupon paid a deposit. The contract was not completed by reason of the inability of the vendor to discharge the incumbrances. In 1887 the vendor became bankrupt. In 1895 the reversion fell into possession. In 1896 the purchaser for the first time took proceedings to enforce the contract: — *Held*, that the rule laid down in *Eads v. Williams* (24 L. J. Ch. 531; 4 De G. M. & G. 674), that the Court will not grant specific performance unless the parties seeking relief come promptly and as soon as the nature of the case will permit, applied, and that the purchaser was precluded by delay from enforcing the contract. *Levy v. Stogdon*, 67 L. J. Ch. 313; [1898] 1 Ch. 478; 78 L. T. 185—Stirling, J. Affirmed, 68 L. J. Ch. 19; [1899] 1 Ch. 5; 79 L. T. 364—C.A.

Held, also, that as there were no acts on the part of the purchaser which made his conduct amount to a repudiation of the contract, he was entitled to a lien on the subject-matter of the contract for his deposit. *Id.*

Contract Entered into with Agent—False Representation as to Principal.—If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that if he disclosed the true name the other party would not enter into the contract, the Court will not order specific performance of the contract. A. signed a contract for the sale of a house to B. Before signing, he asked, "Are you buying for C. or his nominees?" B. answered "No." He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He and they brought an action for specific performance: — *Held*, that the contract could not be specifically performed. *Archer v. Stone*, 78 L. T. 34—North, J.

In 1895 the defendants, who were trustees of a Congregational chapel, put up for sale by public auction a building which had formerly been used as their chapel. The conditions of sale imposed no restriction on the user of the building. After the sale C. made an offer for the building, but the defendants declined to

accept it on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, and the defendants objected to sell for that purpose. The committee then told the plaintiff, who was the manager of a mineral-water company, that if he could get the property they would buy it of him at 100% profit. The plaintiff's solicitors wrote to the defendants' agent, making an offer for the property "on behalf of our client, the manager of the E. Mineral Water Company." After some negotiations a contract was signed by the defendants for sale of the building to the plaintiff at 1,025*l.*, a price less than C.'s offer. No direct statement was made that the plaintiff was buying for the company, but it was admitted that the defendants, during the negotiations, believed that he was, and that the plaintiff knew it. The plaintiff signed the contract as principal without protest from the defendants' agent. The defendants refused to complete on the ground that the plaintiff was buying as agent for the Roman Catholic committee, to whom he knew they would not sell, and had obtained the contract by misrepresentation:—*Held*, on the evidence, that the plaintiff was not buying as agent for the Roman Catholic committee, but for himself, with a view to resell to them at a profit; that the misrepresentation as to the mineral-water company was immaterial, because the vendors did not care whether they sold to the company or the plaintiff, and as between them no consideration of the person with whom they were contracting entered as an element into the contract. *Nash v. Dix*, 78 L. T. 445—North, J.

Interest on Purchase-money.—In an action for specific performance interest on the purchase-money will be given from the date when the Master certifies that a good title was first shewn. *Halkett v. Dudley (Earl)*, 76 L. J. Ch. 330; [1907] 1 Ch. 590; 96 L. T. 539—Parker, J. *And see SPECIFIC PERFORMANCE.*

16. OTHER MATTERS.

Garden—User of—Grant to Lessees, &c.—*See DEED*, col. 682.

Medical Practice—Sale of.—*See COVENANT*, col. 618.

Minerals—Reservation of.—*See MINES*, col. 1684.

Street Expenses—Apportionment.—*See LOCAL GOVERNMENT.*

Trustees—Sale by.—*See TRUST AND TRUSTEE*, col. 2590.

VERDICT.

See PRACTICE, col. 1938.

VETERINARY SURGEON.

See MEDICINE AND MEDICAL PRACTITIONER, col. 1600.

VOLUNTARY CONVEY- ANCE.

See BANKRUPTCY, col. 127, and *FRAUD*, col. 873.

VOLUNTEER.

See ARMY AND NAVY.

VOTE.

See ELECTIONS, col. 780.

WAGER.

See GAMING.

WAIVER.

Unauthorised Acquiescence of Officials.—A province cannot be bound by the unauthorised acts of officers of departments. *Ontario Mining Co. v. Seybold*, 72 L. J. P.C. 5; [1903] A.C. 73; 87 L. T. 449—P.C.

Jurisdiction, of.—*See COUNTY COURT*, col. 600.

Lien, of.—*See SOLICITOR*, col. 2473.

Notice to Trustee, of—Effect of.—*See Macnaghten v. Paterson*, 76 L. J. P.C. 94; [1907] A.C. 483, *ante*, HUSBAND AND WIFE.

Option to Call for Debentures—Lapse of Time.—*See Pegge v. Neath District Tramway Co.*, 67 L. J. Ch. 17; [1898] 1 Ch. 188, *ante*, COMPANY, col. 414.

Restrictive Covenants, of.—*See VENDOR AND PURCHASER*, col. 2666.

Tort, of.—*See TROVER*, col. 2572.

Waiver Clause in Prospectus.—*See COMPANY*, col. 332.

WAR.

Contract by English Owners to Sell Ships to United States—Contract to be Void if United States became Belligerents—Outbreak of War—Action to Recover Deposit.—The defendants, on April 21, 1898, prior to the commencement of hostilities between that country and Spain, contracted to sell to the plaintiffs, the United States Government, two steamships "to be delivered as soon as possible." The plaintiffs paid a deposit which was subject to the following clause of the contract: "If from blockade or any other cause arising from the United States becoming belligerents and preventing delivery of either of the said steamers, this contract is to be null and void, but the vendor is to retain the deposit as and for liquidated damages." It was impossible for the defendants to have despatched the ships before the day (April 23) when the United States commenced hostilities

with Spain; but the publication of neutrality by the British Government was not published till April 26. In an action to recover the deposit,—*Held*, that the defendants' contention that they were "prevented" from making delivery by reason of section 8, sub-section 4 of the Foreign Enlistment Act, 1870, was a good defence to the action. *United States of America v. Pelly*, 47 W. R. 332—Bigham, J.

Underwriter's Liability.]—See INSURANCE, col. 1079.

And see col. 1085, and ARMY.

WARRANTY.

Condition of Drains—Written Agreement.]—See LANDLORD AND TENANT, col. 1212.

Of Seaworthiness.]—See SHIPPING, cols. 2313, 2366.

WASTE.

See LANDLORD AND TENANT, col. 1252; and COPYHOLDS, col. 545.

WATER.

1. *Statutes*, 2679.
2. *Undertaking*, 2679.
3. *Supply*, 2684.
4. *Rate*, 2691.
5. *River*, 2693.
6. *Riparian Proprietor*, 2700.
7. *Canal*, 2704.
8. *Subterranean Water*, 2707.

1. STATUTES.

Canals.]—61 & 62 Vict. c. 16 is the *Canal Protection (London) Act*, 1898.

Metropolis Water Acts.]—62 & 63 Vict. c. 7 is the *Metropolis Water Act*, 1899.

— 2 Edw. 7, c. 41 is the *Metropolis (Water) Act*, 1902.

2. UNDERTAKING.

Compensation—Injurious Affection—Authorised Working—"Supplying waterworks"—"Maintenance"—"Construction."]—By their special Act, which incorporated the Waterworks Clauses Act, 1847, the defendants were empowered to "make and maintain" certain waterworks, including a shaft or well and pumping station. By the authorized pumping operations, after the completion of the works, a bed of wet running silt which lay directly under and formed the support of the plaintiff's land was drawn away, and its abstraction caused a subsidence of the plaintiff's house. The plaintiff claimed compensation for injurious affection, and in the arbitration proceedings the umpire made an award in his favour. In an action on the award,—*Held*, that the plaintiff was entitled to compensation by sections 6 and 12 of

the Waterworks Clauses Act, 1847, as being a person injuriously affected by the supplying and the maintenance, if not also by the construction, of the waterworks. *Fletcher v. Birkenhead Corporation*, 76 L. J. K.B. 218; [1907] 1 K.B. 205; 96 L. T. 287; 71 J. P. 111; 5 L. G. R. 293; 23 T. L. R. 195—C.A.

Damage by Pumping—Abstraction of Running Water.]—The plaintiff was the owner of some land, the boundary of which was a brook. The defendants' predecessors in title erected a pumping station on land adjoining the plaintiff's, and by pumping lowered the level of the subsoil water, and in consequence of the withdrawal of support caused a diminution in the quantity of water in the brook passing the plaintiff's land; but no water from the brook was in fact pumped into the defendants' well. In an action brought for an injunction,—*Held*, that no action lay against the defendants for lowering the level of the subsoil water and thus causing a diminution of water in the brook. *Popplewell v. Hodgkinson* (38 L. J. Ex. 126; L. R. 4 Ex. 248) applied. *Grand Junction Canal v. Shugar* (L. R. 6 Ch. 483; 24 L. T. 402) distinguished. *English v. Metropolitan Water Board*, 76 L. J. K.B. 361; [1907] 1 K.B. 588; 96 L. T. 573; 71 J. P. 313; 5 L. G. R. 384; 23 T. L. R. 313—Lord Alverstone, C.J.

Reservoir—Land Taken for Construction of—Natural Adaptability of Land Taken.]—In estimating the value of land to be acquired by a water board under statutory powers for the purpose of constructing a reservoir, the natural adaptability of the land for the purpose of a reservoir is a proper matter for consideration as an element of value. In order to exclude such an element of value from being taken into consideration, it must be shewn on the facts that there is no reasonable possibility of a market for the land apart from the particular scheme under which it is taken. *Gough and Aspatia, Silloth, and District Joint Water Board, In re*, 73 L. J. K.B. 228; [1904] 1 K.B. 417—C.A.

Minerals under Adjoining Land—Notice to Mine-owner to Leave Minerals Unworked—Subsequent Rise in Value of Minerals—Compensation—Basis of Assessment.]—Under the Waterworks Clauses Act, 1847, where notice is served by a water company on a mine-owner to leave a portion of his mines unworked, full compensation is to be made and all expenses and losses to be recouped to the mine-owner. Where, therefore, there has been a rise in the value of the minerals subsequent to the notice, and it is shewn that but for the notice the mine-owner would have obtained the benefit of the rise in value, consideration must be had in the assessment of compensation of such rise in value. *Bullfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Co.*, 72 L. J. K.B. 805; [1903] A.C. 426; 89 L. T. 280; 52 W. R. 193—H.L. (E.)

Minerals under Water-pipe Track—Notice to Abstain from Working—Counter-notice—Compensation.]—Where the owners of minerals under or adjacent to waterworks have given notices under section 22 of the Waterworks Clauses Act, 1847, that they propose to work these minerals, and the undertakers have served

a counter-notice on the owners that they are willing to pay compensation therefor, a contract is thereby concluded under which, on the one hand, the mineral owners are bound immediately to refrain from working the minerals, and, on the other, the undertakers are bound to pay compensation for the minerals as the same—failing agreement—shall be determined by arbitration. *Edinburgh and District Water Trustees v. Clippens Oil Co.*, 87 L. T. 275—H.L. (Sc.)

Statutory Notice by Undertakers of Willingness to Pay Compensation—Reservation in Notice—Right of Undertakers to have Minerals Unworked independently of Statutory Provisions—Compensation.]—The owners of a mineral field through which two water-pipes belonging to the Edinburgh Water Trustees, called the Crawley pipe and the Moorfoot pipe respectively, were carried on the same pipe track, gave notice under section 22 of the Waterworks Clauses Act, 1847, which was applicable only to the Moorfoot pipe, to the water trustees of their intention to work the minerals under the pipe track. The water trustees thereupon served a counter-notice on the mineral owners intimating their willingness to pay compensation for the minerals “so far as you are entitled thereto,” and requiring the owners to leave them unworked, “declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us and of our right to support of the Crawley pipe passing through said mineral field.” In consequence of this notice the owners did not work the minerals, and the amount of compensation was fixed by arbitration under the statute. Thereafter it was decided in an action raised by the water trustees that they had a right independently of the provisions of the Waterworks Clauses Act to prevent the mineral owners from so working the minerals under and adjacent to the pipe track as to injure the Crawley pipe. The water trustees having refused to pay the compensation awarded by the arbitrator, on the ground that the right of support which they had for the Crawley pipe necessarily involved an abstention from working the minerals covered by the notice, and that there was nothing therefore to compensate the mineral owners for,—*Held*, that, having elected to put in force the remedy provided by the statute and to require the mineral owners to abstain from working, they were not entitled to avoid fulfilment of the statutory condition of paying the compensation fixed by the arbitrator. *Ib.* And see MINES.

Railway Passing under Street—Right of Water Commissioners to Break Open Roof of Tunnel—Tunnel.]—Public water commissioners had statutory authority to lay a line of water-pipes in a street underneath which, for a distance of 575 feet, a line of railway passed:—*Held*, that the commissioners were not entitled under section 28 or 29 of the Waterworks Clauses Act, 1847, to break open the brickwork forming the arch of the bridge or roof of the railway tunnel, and to lay therein an iron trough carrying their water-pipe. The word “tunnels” in section 28 of the Waterworks Clauses Act, 1847, means tunnels similar in character to sewers and drains, and does not apply to a

railway tunnel, and that in any event the right given by that section to interfere with sewers, drains, and tunnels does not warrant the permanent displacement or removal of any of these. *Caledonian Railway Co. v. Glasgow Corporation*, 3 F. 526—Ct. of Sess.

“Dividend”—Maximum Rate—Right to Make up Deficiency of Previous Dividends.]—The appellant company, incorporated in 1809, for many years paid dividends of less than 10 per cent. In 1864 it incorporated the Waterworks Clauses Act, 1847, section 75 of which enacts that the profits divisible in any year shall not exceed the prescribed yearly rate (10 per cent. where no other is fixed), unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate:—*Held*, that section 75 did not authorise the company to pay a larger dividend than 10 per cent. to make up the deficiencies of dividends which fell short of that rate before 1864, the date when it first incorporated the Waterworks Clauses Act, 1847. *Kent Waterworks Co. v. Lamplough*, 73 L. J. Ch. 96; [1904] A.C. 27; 89 L. T. 704; 52 W. R. 401; 2 L. G. R. 403; 68 J. P. 361; 20 T. L. R. 107—H.L. (E.)

New River—Dividends—Limitation to 10 per Cent.—Incorporation of Waterworks Clauses Act.]—The New River Co., by the New River Company's Act, 1852, which incorporates section 75 of the Waterworks Clauses Act, 1847, is prohibited from distributing amongst its shareholders dividends exceeding the rate of 10 per cent. per annum (EARL OF HALSBURY, L.C., dissenting). *Metropolitan Water Board v. New River Co.*, 20 T. L. R. 687—H.L. (E.)

Transfer of Undertaking to Water Board.]—The “undertaking” of the New River Co., including its landed property, is all one undertaking, and the rents and profits of the landed property are part of the profits of the undertaking within section 75 of the Waterworks Clauses Act, 1847. *Ib.*

Sinking Fund—Transfer of Obligations.]—The undertakings of the Metropolitan water companies on their transfer to the Metropolitan Water Board under the Metropolis Water Act, 1902, are to be valued as subject to and not as free from the obligations to contribute to the sinking fund created by the companies' special Acts. *Ib.*

Rebate by Water Company—Power of Water Board to Discontinue Rebate.]—A Metropolitan water company with whose Acts the Waterworks Clauses Act, 1847, was incorporated, had, for some years before the transfer of their undertaking to the Metropolitan Water Board, made a rebate from the water rates charged by them in consideration of the fact that their profits were such that, had they not made such rebate, an order for the reduction of their rates might have been made by quarter sessions on the application of water consumers under section 80 of the Act of 1847. The Water Board ceased to allow the rebate and the plaintiff council as water consumers in the company's district brought the present action for a declaration that they were entitled to a continuance of the rebate:—*Held*, that the Water Board were

not precluded by section 46 of the Metropolitan Water Act, 1902 (which provides that all scales of charges made by any Metropolitan water company shall continue in force with respect to the undertaking to which they related until repealed, altered, or superseded), from ceasing to allow the rebate. *Chiswick Urban Council v. Metropolitan Water Board*, 3 L. G. R. 917; 69 J. P. 457; 21 T. L. R. 620—Joyce, J.

Semble, that upon the transfer of the company's undertaking to the Water Board, the provisions of the Waterworks Clauses Act, 1847, with respect to the profits of the undertakers (sections 75 to 84) ceased to apply to the undertaking. *Ib.*

Chelsea — Profits of Company — Limitation — "Prescribed rate" — "Prescribed for that purpose in the special Act."—A waterworks company, under the authority of their special Act, which incorporated Part II. of the Companies Clauses Act, 1863, raised additional capital by the issue of preference stock at 5 and $4\frac{1}{2}$ per cent. No rate of dividend or interest for the stock was prescribed in the special Act, but by Part II. (s. 13) of the Companies Clauses Act, 1863, it is provided that where a company issue preference stock or shares under the authority of a special Act incorporating Part II. of the Companies Clauses Act, 1863, they may create and issue such stock or shares with any dividend or interest "not exceeding the rate prescribed in the special Act, and if no rate is prescribed then not exceeding the rate of 5l. per centum per annum."—*Held*, that the 5 and $4\frac{1}{2}$ per cent. at which the stock was issued was the "prescribed" rate within the meaning of section 75 of the Waterworks Clauses Act, 1847, which provides, "with respect to the amount of profits to be received by the undertakers when the waterworks are carried on for their benefit," that the profits of the undertaking to be divided among the undertakers in any year shall not exceed the "prescribed rate," which by section 2 means the rate "prescribed for that purpose in the special Act." *Chelsea Water Co. and Metropolitan Water Board, In re*, 73 L. J. K.B. 532; [1904] 2 K.B. 77; 90 L. T. 831; 52 W. R. 449; 20 T. L. R. 433—C.A.

Voluntary Sale—Common-law Right to Lateral Support.—The plaintiffs, under a special Act conferring at the time no compulsory powers of purchase, but incorporating the Waterworks Clauses Act, 1847, acquired land including the minerals for the purpose of their undertaking by voluntary conveyance. The defendants, the lessees of mines under adjacent lands, by workings partly within and partly without the forty yards limit prescribed by section 22 of the Waterworks Clauses Act, 1847, withdrew the necessary lateral support to the plaintiffs' land and caused subsidences which would have taken place to an equal extent if the waterworks had not been there. The defendants had, pursuant to section 22 of the Waterworks Clauses Act, 1847, given notice to the plaintiffs of their intention to work their mines within the forty yards limit, but the plaintiffs did not state their willingness to make compensation, and relief on their common-law right of lateral support:—*Held*, assuming (and *per* VAUGHAN

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WILLIAMS, L.J., deciding) that the provisions of the mining clauses (sections 18 to 27) of the Waterworks Clauses Act, 1847, applied to the case, still there was nothing in that Act to take away the plaintiffs' common-law right of lateral support from adjacent property either within or without the forty yards limit mentioned in section 22, and that the plaintiffs were entitled to relief on that footing. *Manchester Corporation v. New Moss Colliery*, 75 L. J. Ch. 772; [1906] 2 Ch. 564; 95 L. T. 277; 70 J. P. 409; 4 L. G. R. 1129; 22 T. L. R. 803—C.A. Reversing, 54 W. R. 240—Farwell, J.

Purchase of Metropolitan Waterworks — Scheme for Distribution of Compensation — Meeting of Shareholders.—"Majority in value of the shareholders."—The "majority in value of the shareholders, or of the shareholders of a particular class," which is required by schedule 4, section 1 of the Metropolitan Water Act, 1902, to enable a scheme of the directors for the distribution of the compensation payable for the purchase of a Metropolitan water undertaking to be submitted to the Chancery Division of the High Court, means a majority in value of all the shareholders of the company or of the particular class, and not merely a majority in value of the shareholders present at the meeting. *Clay v. Grand Junction Waterworks Co.*, 21 T. L. R. 31—Warrington, J.

Breaking up Street—Cost of Reinstating.—*See* METROPOLIS, col. 1666.

Rating Company.—*See* LOCAL GOVERNMENT, col. 1424.

3. SUPPLY.

Pure and Wholesome Supply.—*Held*, on the evidence, that the defendant company was not providing a supply of pure and wholesome water as required by section 85 of the Waterworks Clauses Act, 1847. *Att.-Gen. v. Rhymney and Aber Valley Gas and Water Co.*, 71 J. P. 435—Swinfen Eady, J.

"Domestic purposes" — Boarding-house — Trade or Business.—The private Act of a water company provided that the owner or occupier of any house in any street in which any pipe of the company should be laid should be entitled to demand a supply of filtered water for domestic purposes, and that the company should supply such water at certain rates not exceeding the rates specified in the Act; and it was further provided that a supply of water for domestic purposes should not include, *inter alia*, a supply of water for "any trade manufacture or business whatsoever," and that water for purposes other than domestic purposes might be supplied by agreement between the consumer and the water company. A boarding-house keeper claimed a supply of filtered water for domestic purposes, and tendered rates for the same calculated upon the annual value of his house, which contained ordinary sitting-rooms, ten bedrooms, two water-closets, but no fixed bath, and was inhabited by himself, his family, and boarders, who all used the water:—*Held*, that where water supplied to the boarding-house was in fact used for domestic purposes only, and not for the purposes of a trade or business, the

water company could not under their Act claim to supply it by agreement, *Pidgeon v. Great Yarmouth Waterworks Co.*, 71 L. J. K.B. 61; [1902] 1 K.B. 310; 85 L. T. 632; 66 J. P. 309—D.

— **Use for Other Purposes—Agreement between Water Company and District Council.**—By an agreement made between the T. District Council and a water company, the company covenanted to supply water sufficient for purposes of domestic use and the washing of carts, as well as in the case of fire, but not for street watering or sewer flushing purposes. The respondents were ratepayers of T., and used the water for trade purposes:—*Held*, that they had been guilty of an offence within section 18 of the Waterworks Clauses Act, 1863. *Andrews v. Wiggs*, 84 L. T. 124; 65 J. P. 281; 19 Cox C.C. 633—D.

— **Trade, Manufacture, or Business—Dwelling-house—School.**—By sections 50 and 53 of the Waterworks Clauses Act, 1847, and by their special Act incorporating that Act, the plaintiffs, a water company, were empowered to make, and did make, reasonable regulations to be observed by occupiers of dwelling-houses within their district before being entitled to demand a supply of water for domestic purposes. The defendants demanded a supply of water for domestic purposes, but refused to comply with the plaintiffs' regulations:—*Held*, that they were not entitled to a supply for domestic purposes. *South-West Suburban Water Co. v. St. Marylebone Guardians*, 73 L. J. K.B. 347; [1904] 2 K.B. 174; 52 W. R. 378; 68 J. P. 257; 2 L. G. R. 567; 20 T. L. R. 299—Buckley, J.

Section 12 of the Waterworks Clauses Act, 1863, was also incorporated in the plaintiffs' special Act. The defendants were owners and occupiers of a building used by them as a school for the maintenance and education of children of the inmates of a workhouse. They used water supplied by the plaintiffs for the purposes of the school:—*Held*, that the school was a dwelling-house within the meaning of sections 48 and 53 of the Waterworks Clauses Act, 1847. *Held*, also, that the defendants carried on a business at the school; but that water used for the purposes of the school was not necessarily all used for a "business" within the meaning of section 12 of the Waterworks Clauses Act, 1863. *Ib.*

The water supplied by the plaintiffs was used by the defendants (a) to supply cisterns for flushing water-closets; (b) as a continuous and constantly running supply for urinals; (c) to supply hydrants to which hoses were attached for the purpose of washing the yards of the school; and (d) to supply boilers for warming the school buildings by circulation and for heating water for laundry purposes:—*Semble*, that these were domestic purposes within the meaning of section 53 of the Waterworks Clauses Act, 1847. *Ib.*

The water was also used to supply boilers for the purpose of driving machinery for raising water from wells and also of driving machinery in the laundry:—*Semble*, that these were not domestic purposes within the meaning of the same enactment. *Ib.*

Pidgeon v. Great Yarmouth Waterworks Co. (71 L. J. K.B. 61; [1902] 1 K.B. 310) commented on. *Ib.*

— **Water Used for Washing Motor Car—Motor Car Used for Purpose of Profession of Medical Man.**—A supply of water for domestic purposes within the meaning of that term in section 12 of the Waterworks Clauses Act, 1863, includes the supply of water for washing a motor car used by a medical man in the practice of his profession. *Harrogate Corporation v. Mackay*, 76 L. J. K.B. 977; [1907] 2 K.B. 611; 97 L. T. 689; 71 J. P. 458; 5 L. G. R. 876; 23 T. L. R. 632—D.

— **Private Dwelling-houses—Baths and Water-closets—Charge for every Water-closet beyond the First.**—A water company entitled to make a charge in addition to the ordinary water rate in respect of "every water-closet beyond the first" in or belonging to any private dwelling-house cannot make such charge in respect of a water-closet to which water is not laid on, and which, though capable of being used as a water-closet, is in fact used solely as a tool-house. *Roberts v. South Essex Waterworks Co.*, 1 L. G. R. 719; 67 J. P. 404—D.

— **Communication Pipe—Company Cutting off—Trespass.**—The builder and owner of a row of houses laid down communication pipes for the supply of water to the houses from the main of a waterworks company which had been incorporated by special Act. The special Act incorporated the Waterworks Clauses Act, 1847. The pipes were laid down with the approval of the company. The company afterwards refused to make the connection between the pipes and the main. The house-owner thereupon lawfully made the connection which was then immediately cut off by the company. In an action by the house-owner against the company claiming damages and an injunction to restrain the company from preventing him from again connecting the pipes with the main, and from severing such connection if so made again by the plaintiff, *Held*, that there was nothing in sections 48 and 53 of the Waterworks Clauses Act, 1847, which disabled the plaintiff from bringing such an action. *Gale v. Rhymney Gas and Water Co.*, 89 L. T. 399; 67 J. P. 430; 2 L. G. R. 80—C.A.

— **Liability to Repair—Right to Supply of Water.**—A consumer of water who, having the opportunity of repairing his communication pipe without opening the street, does not choose to do so, is not a person entitled to demand a supply of water under section 43 of the Waterworks Clauses Act, 1847. *Grand Junction Waterworks Co. v. Rodocanachi*, 73 L. J. K.B. 441; [1904] 2 K.B. 230; 90 L. T. 819; 52 W. R. 508; 68 J. P. 290; 2 L. G. R. 689; 20 T. L. R. 410—D.

— **Portion of Pipe Laid under Highway.**—The defendant was supplied with water by the plaintiff company, the water reaching the defendant's house from the company's main through an inch pipe laid under a highway and a half-inch pipe connected therewith. The half-inch pipe was laid when the defendant first became a water consumer. The inch pipe had been laid previously, and at one time was used for

the supply of premises other than the defendant's, but by whom or under what circumstances it was laid there was no evidence to shew:—*Held* that, under these circumstances, there was nothing to establish any liability on the defendant as between him and the company for the repair of the inch pipe, either under the Waterworks Clauses Acts or under provisions in the company's special Act making the consumer responsible if he "permits" any pipe connected with the supply of water to him to be out of repair. *Colne Valley Water Co. v. Hall*, 6 L. G. R. 115; 72 J. P. 25—C.A.

Quære, as to the responsibility for the repair of a communication pipe laid under a highway, when the pipe has been laid by the consumer or belongs to him. *Ib.*

House not Exceeding 10l. Annual Value—Waste of Water—House in Occupation of Tenant—Liability of Owner.—By section 51 of the Staffordshire Potteries Waterworks Consolidation and Extension Act, 1853, "If any person supplied with water shall wilfully or negligently do or suffer any act so that the water supplied to him by the company shall be wasted" he is to be liable to a penalty:—*Held*, that the owner of a house let to a tenant upon a weekly tenancy, but who was liable for the payment of the water rate by reason of the house being under the annual value of 10l., was a person supplied with water within the meaning of the section. *Brock v. Harrison*, 68 L. J. Q.B. 730; [1899] 1 Q.B. 958; 80 L. T. 568; 47 W. R. 541; 63 J. P. 455; 19 Cox C.C. 298—D.

Water Supply from Land of Adjoining Owner—Fouling—No Claim to Easement or Right to Water.—The plaintiff drew a supply of water for her premises from a rubble drain on land belonging to B. and R. respectively. The water was conveyed by a pipe passing under a dyke to a cistern on her land, whence it was conveyed by a pipe to her premises. There was no evidence to shew how, when, or under what circumstances the pipe which conveyed the water from the rubble drain to the cistern was placed in position. The defendants on several occasions, by the permission of B. and R., opened the rubble drain for the purpose of ascertaining its direction, &c. The drain was left open by them for several weeks, and the water became muddied, and in that condition reached the plaintiff's premises. The plaintiff sued the defendants in the County Court for a wrongful interference with and damage to her water supply, and in that action expressly disclaimed any easement or right to the water supply:—*Held*, that in view of this disclaimer and of the fact that the defendants had not intentionally fouled the water, the decision of the County Court Judge dismissing the action was right. *Dickinson v. Shepley Sewerage Board*, 68 J. P. 363—D.

Workhouse—Domestic Purposes—Dwelling-house—Part of Dwelling-house—Business Purposes.—By section 43 of the Chester Waterworks Act, 1857, the water company were bound, upon the application of any person entitled to demand a supply of water for domestic purposes, to supply water for such purposes at rates per cent. varying with the annual value of the dwelling-house; and by

section 47 the company were bound upon certain conditions to supply any person with water for other than domestic purposes at such rate as might be agreed upon or determined by two Justices. By section 22 of the Chester Waterworks Act, 1874, "no person shall be entitled to require nor shall the company be bound to supply any dwelling-house with water (otherwise than by meter or by special agreement) where any part of such dwelling-house is used for any trade or business purposes for which water is required." The water company supplied water to a workhouse where paupers and workhouse officials lived. The purposes for which the water was used were (*inter alia*) for two boilers for purposes of power to engines for a ventilating fan, for a drying fan in the laundry, for wringer and washing machines, and for rainwater pumping; for water pumping; for watering pigs and washing piggeries, the pigs being kept primarily to consume refuse, but being fed and sold when fattened; for engines used for heating purposes and chopping wood, the wood being sold; for watering the garden; and for flushing, drinking, and sanitary purposes:—*Held*, that section 22 of the Act of 1874 did not apply, and that the guardians were entitled to a supply for domestic purposes at the domestic rate, and for another supply for non-domestic purposes at a rate to be agreed upon or settled by Justices as provided by section 47 of the Act of 1857; the obligation being upon the guardians, as a condition precedent to make provision for the segregation of the two supplies, and to initiate the proceedings required under section 47. *Chester Waterworks Co. v. Chester Union*, 72 J. P. 121—C.A.

Swimming Bath—"Trade, manufacture, or business."—A supply of water for a swimming bath, erected and used for the purposes of the business of a school, is not a supply of water for "domestic purposes" within the Waterworks Clauses Acts, 1847 and 1863. *Barnard Castle Urban Council v. Wilson*, 71 L. J. Ch. 825; [1902] 2 Ch. 746; 87 L. T. 279; 51 W. R. 102—C.A.

Supply of Water by Meter—Premises—Land Used for Building Operations.—The owner of land abutting on a street in which a water-main is laid, and on which houses are in the course of erection, is not entitled under section 79 of the East London Waterworks Act, 1853, to a supply of water by measure upon the land for use in continuing building operations, because the place at which the supply is requested is not "premises" within the meaning of the word as used in that section. *Metropolitan Water Board v. Paine*, 76 L. J. K.B. 151; [1907] 1 K.B. 285; 96 L. T. 63; 71 J. P. 63; 5 L. G. R. 227; 23 T. L. R. 55—D.

Supply of Water under Pressure—Supply in Bulk.—The provisions of section 35 of the Waterworks Clauses Act, 1847, as to the supply of water under pressure do not relate to a supply in bulk. *Wombwell Urban Council v. Dearne Valley Waterworks Co.*, 71 J. P. 415; 5 L. G. R. 1132—Swinfen Eady, J.

Contract Made with Water Company—Contract to Continue during Existence of Company—Company Taken over by Metropolitan Water Board—Effect of, on Contract.—Section 45 (b)

of the Metropolis Water Act, 1902, which provides that "all contracts . . . subsisting immediately before the appointed day, and affecting any Metropolitan water company, shall be of as full force and effect against or in favour of the Water Board, and may be enforced as fully and effectually as if, instead of the company, the Water Board had been a party thereto," merely means that the contracts of the company are to be enforceable according to their terms. By a contract dated September 25, 1841, the Southwark Water Co. (which subsequently became the Southwark and Vauxhall Water Co.) covenanted with certain persons and their heirs, executors, &c., that they would as from December 25, 1842, "and from thenceforth during the continuance of the existence" of the company, supply water at a special rate. As from June 24, 1904, the Metropolitan Water Board took over, under the Metropolis Water Act, 1902, the undertaking, property, and liabilities of (*inter alia*) the Southwark and Vauxhall Water Co.:—*Held*, that the contract of September 25, 1841, was not enforceable against the Metropolitan Water Board. *Edge v. Metropolitan Water Board*, 97 L. T. 279; 71 J. P. 426; 5 L. G. R. 1183; 23 T. L. R. 698—Swinfen Eady, J.

Inspection of Fittings—Right of Entry—No Notice to Owner or Occupier to Supply Prescribed Fittings.—It is not a condition precedent to the right of an officer of the Metropolitan Water Board under section 80 of the Metropolis Water Act, 1871, to enter premises in order to inspect same for the purposes of the Act, that a notice should have been served under section 27 of the Act requiring the owner or occupier of the premises to supply same with prescribed fittings. *Metropolitan Water Board v. Northcott*, 96 L. T. 708; 5 L. G. R. 770; 71 J. P. 338—D.

Right to Maintain Action in High Court for Penalties—Recovery of Penalties "otherwise provided for" than before Justices.—Under a local water Act a corporation were bound to supply certain compensation water as compensation for the waters taken by them for the purposes of the Act, and in case of neglect to supply such compensation water they were, for every day on which such neglect occurred, to "forfeit and pay to the occupiers of each of the mills and works affected thereby (who may sue for and recover the same) the sum of five pounds," and were also to make compensation for any loss sustained by such occupiers in respect of which the penalties were not a sufficient compensation, and such compensation might be sued for in any Court of competent jurisdiction. Section 145 of the Railways Clauses Consolidation Act, 1845, which was incorporated in the local Act, provides that every penalty or forfeiture, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two Justices:—*Held*, that the 5*l.* penalties imposed by the local Act were intended in the main to be a mode of compensation to the injured occupiers of the mills, and therefore the mode of recovering penalties which is prescribed in section 145 of the Railways Clauses Consolidation Act, 1845, did not apply, and an action to recover the penalties was rightly brought in the High Court. *Meltham Spinning Co. v. Huddersfield Corporation*, 89 L. T. 403; 67 J. P. 445; 2 L. G. R. 32—C.A.

Extinction of Fire—Water taken through Private Pipe—Right to Compensation.—A water company who at the expense and request of the owner have laid down on private property a water pipe communicating with their main, and have fixed in the pipe a fire-plug, are not bound by the Waterworks Clauses Act, 1847, or otherwise, to allow the owner to use water from the fire-plug for the purpose of extinguishing fire, without his making compensation for it. *Weardale and Consett Waterworks Co. v. Chester-le-Street Co-operative Society*, 73 L. J. K.B. 659; [1904] 2 K.B. 240; 91 L. T. 293; 52 W. R. 684; 68 J. P. 386; 2 L. G. R. 805; 20 T. L. R. 464—D.

Hydrants—Rights of User—Metropolis.—A water company which has provided hydrants pursuant to section 32 of the Metropolitan Fire Brigade Act, 1865, and section 34 of the Metropolis Water Act, 1871, or either of these sections, may, in the absence of any agreement under section 4 of the London County Council (General Powers) Act, 1894, and without the consent of the London County Council, lawfully use such hydrants for purposes other than the supply of water for extinguishing fires and the purposes specified in section 37 of the Waterworks Clauses Act, 1847, and such user may, with the permission of the company, be exercised by other persons also. *London County Council v. East London Waterworks Co.*, 69 L. J. Q.B. 304; [1900] 1 Q.B. 330; 82 L. T. 268; 48 W. R. 252—D.

Compensation Water—Statutory Obligation—Penalties.—In actions brought by the occupiers of certain mills and works to recover penalties under the above provisions in respect of a failure on the part of the corporation to deliver the statutory quantity of compensation water, which actions were consolidated and tried together, it appeared that the pipe for the delivery of the water had for many years delivered the proper quantity of water, but that on the days in respect of which the penalties were claimed, it did not deliver the proper quantity of water, though there was a head of water in the reservoir sufficient to cause the necessary quantity to flow through the pipe if it was properly laid and was not obstructed. It was also proved by experts called on behalf of the plaintiffs that pipes of the character of that in question are liable to become obstructed by some kind of deposit after being in use for many years. The defendants failed to prove what the cause of the shortage of water was, or to prove that they had taken any steps to inspect or clean the pipe:—*Held*, that there was ample evidence to justify a finding of the jury that the shortage of water was due to neglect on the part of the corporation; and, *semble*, this would have been so even in the absence of the expert evidence given by the plaintiffs to suggest a cause of the shortage, as the shortage of water was in itself evidence of neglect on the part of the corporation sufficient to throw on them the burden of disproving neglect on their part. *Held*, also, that the penalty imposed on the corporation of 5*l.* for each day's neglect to deliver the statutory quantity of water was not limited to one penalty of 5*l.*, but that this penalty was payable to each of the plaintiffs. *Beaumont v. Huddersfield Corporation*, 67 J. P. 579; 1 L. G. R. 118—C.A.

Costs of Providing.]—*See* LOCAL GOVERNMENT, col. 1416.

Escape of Water—Liability for.]—*See* EASEMENT, col. 729.

"House"—What is.]—*See* LOCAL GOVERNMENT, cols. 1416-7.

Local Authority—Water Supply by.]—*See* LOCAL GOVERNMENT, col. 1416.

Lowering Mains by Local Authority.]—*See* METROPOLIS, col. 1656.

Nuisance — Liability of "Owner."] — *See* METROPOLIS, col. 1635.

Rating Water Company.]—*See* POOR LAW, col. 1853.

Tower Erected under Special Act—Building By-laws.]—*See* LOCAL GOVERNMENT, cols. 1395-6.

4. RATE.

Different Rates in the Pound in Different Districts.]—The Corporation of Northampton having in pursuance of statutory powers purchased the undertaking of a waterworks company, the purchase was carried into effect by the Northampton Waterworks Act, 1884, section 36 of which provided that the corporation might "thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. per annum on the net rateable value of such dwelling-house." There was no section either in that Act, or in any other Act relating to the matter, which gave any specific directions or powers as to either equality or differentiation of rating. In 1901 the corporation charged the domestic consumers in one part of their district at the rate of $7\frac{1}{2}$ per cent. per annum on the net rateable value of their dwelling-houses, and the consumers in another part of their district at the rate of 5 per cent. :—*Held*, that no implication arose from the words of section 36 of the Act of 1884 that the charge made by the corporation for the supply of water for domestic use must necessarily be at an equal rate in the pound on all consumers, and that the corporation were entitled to differentiate the water-rate in the manner above stated. *Northampton Corporation v. Ellen*, 73 L. J. K.B. 329; [1904] 1 K.B. 299; 90 L. T. 71; 52 W. R. 805; 68 J. P. 197; 2 L. G. R. 473; 20 T. L. R. 163—C.A.

On "annual rack rent or value" of Premises—Rate Payable by Owner—Owner Paying other Rates.]—By the Bury and District Joint Water Board Act, 1903, the respondents were to supply water at specified rates—namely, "where the annual rack rent or value of such house shall not exceed 20*l.*, at a rate per centum per annum not exceeding 10*l.*" The appellant was the owner of three cottages let to tenants, and the appellant paid all the rates on such cottages :—*Held*, that in order to arrive at the "annual rack rent or value," upon which he was liable to pay the water rate, the appellant was entitled to deduct the rates so paid by him. *Wilkinson v. Bury Water Board*, 92 L. T. 417; 69 J. P. 214; 3 L. G. R. 715—D.

Extension of Borough Boundaries—Right to Differentiate Rate.]—A corporation under a Waterworks Act were entitled to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. on the net rateable value, and they were also empowered, if there were a deficiency in the amount of the water account for any year, to make up the deficiency out of the general district rate. The corporation, whose boundaries were extended by an extension order, had been charging a uniform water rate of $7\frac{1}{2}$ per cent. over the whole borough, but for certain reasons they reduced it in the old borough to 5 per cent., while retaining it in the added part at $7\frac{1}{2}$ per cent. :—*Held*, that the corporation had no power so to differentiate the water rate, but must charge the same water rate over the whole borough. *Northampton Corporation v. Ellen*, 87 L. T. 335; 66 J. P. 744—Bigham, J.

"Rates" in Added Part not to Exceed a Specified Sum—Whether Water Rates are Included as "Rates."]—An article of the extension order provided that the general district rates to be levied in the added part should not in any one year for a number of years exceed such an amount in the pound as, when added to the poor rate and to the borough rate "and any other rate made by the corporation" in the same year, would make up a certain specified total on each pound of the rateable value :—*Held*, that the water rate was not a "rate" within the meaning of the words "any other rate" in this article, but was merely the price to be paid for the water supplied, and that the water rate, therefore, was not to be included in the computation of such total. *Ib.*

Arrears—Payment by Trustee in Bankruptcy under Protest—Right to Recover Back—"Incoming tenant."]—Where upon adjudication the trustee in bankruptcy takes possession of the debtor's premises and carries on thereon the business with a view to selling it as a going concern, he is in the position of an "incoming tenant" within section 48 of the Metropolitan Water Act, 1871, and is not liable for arrears of water rate left unpaid by the debtor. Where, therefore, a trustee has been required by a water company to pay such arrears, and has done so under protest, he is entitled to recover back the money so paid by him. *Flack, In re; Berry, ex parte*, 69 L. J. Q.B. 458; [1900] 2 Q.B. 32; 82 L. T. 503; 48 W. R. 446; 7 Manson, 141—Wright, J.

Recovery of—Summary Procedure—Demand—Time "Rate made under this Act."]—A person from whom a sum of money is due to a local authority under an agreement for the supply of water made under section 56 of the Public Health Act, 1875, is a person assessed to a "rate made under this Act" within the meaning of section 256, and may therefore, if in default for fourteen days after demand in writing, be summoned before a Court of summary jurisdiction. *Elliott v. Russell*, 72 L. J. K.B. 15; [1902] 2 K.B. 748; 88 L. T. 204; 51 W. R. 269; 67 J. P. 158—D.

For the purposes of section 11 of the Summary Jurisdiction Act, 1848, the matter of complaint arises at the date of the demand, and the summons may be taken out within six months from that date. *Ib.*

— **Cutting off Water not Condition Precedent.**—There is no obligation upon a water company to exercise the power given by section 74 of the Waterworks Clauses Act, 1847, of cutting off the supply of water to premises as a condition precedent to their right to recover arrears of water rate. *Rea v. Hutton; Metropolitan Water Board, Ex parte*, 76 L. J. K.B. 1001; [1907] 2 K.B. 578; 97 L. T. 400; 71 J. P. 424; 5 L. G. R. 914; 23 T. L. R. 642—D.

— **Costs—Discretion of Justices.**—By section 37 of the Ruabon Water Act, 1870, which incorporates the Waterworks Clauses Act, 1847, and 1863, when a person neglects to pay a rate due to the water company, the latter may recover the same, with full costs of suit, in any Court of competent jurisdiction; and by section 38, after a defaulter has been summoned, water rates and costs ordered to be paid may be recovered by distress. Upon a summons before Justices for payment of a water rate,—*Held*, that the Justices were not bound, on making an order for payment of the rate, to order the defaulter to pay the costs, but they had a discretion in the matter. *Ruabon Water Co. v. Evans*, 22 T. L. R. 541—D.

— **Lease of Portion of Building—Covenant to Pay—Landlord's Liability.**—*See* LANDLORD AND TENANT, col. 1244.

— **Occupation of Warehouse.**—*See* *Rea v. Meladew*, 76 L. J. K.B. 262; [1907] 1 K.B. 192.

— **Rating.**—*See* POOR LAW, cols. 1853–4.

— **Receiver in Debenture-holders' Action—Payment by—Recoupment.**—*See* *Mannesman Tube Co., In re*, 70 L. J. Ch. 565; [1901] 2 Ch. 93.

— **Recovery of Overpayments—Mistake.**—*See* MISTAKE, col. 1692.

5. RIVER.

— **Royal Charter—Exclusive Licence—Validity.**—A Royal charter purporting to confer upon the patentee the exclusive navigation for all time of part of a public navigable river, and the exclusive licence of transporting goods thereover, is void both by the Statute of Monopolies, 1623, and by the common law. *Simpson v. Att.-Gen.*, 74 L. J. Ch. 1; [1904] A.C. 476; 91 L. T. 610; 69 J. P. 85; 3 L. G. R. 190; 20 T. L. R. 761—H.L. (E.)

— **Locks and Sluices—Grant by Crown to Owners of Right to take Reasonable Tolls—Franchise—Right of Public to Navigate—Dedication to Public—Duty of Person taking Tolls to keep Locks in Repair.**—There is no presumption in favour of the legal obligation of an immemorial burden. Consequently, a person who under patent or statute has succeeded to the ownership of locks or other mechanical appliances for facilitating navigation, with the right to charge for their use a reasonable toll, is not bound to work or keep them in repair to his own detriment if the tolls are not sufficient to defray the cost of maintenance and repairs, and is justified in closing them altogether. *Ib.*

— **Permissive Act of Parliament.**—An Act of

Parliament authorising and empowering a person to improve the passage of boats, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require, although intended to serve a public purpose, must be construed to be permissive only, and not obligatory. *Ib.*

— **Interference with Flow of Water.**—The plaintiffs claimed damages for injury done to their premises owing to the flooding of same by a river, the waters of which were swollen by a heavy rainfall on a certain date. The plaintiffs alleged that the flooding was due to interference with the stream by means of sluices erected by the defendants:—*Held*, that the obstruction created by the sluices, although it might be regarded as an obstruction to the flow of water, was not the cause of the flooding, and that the plaintiffs were not entitled to damages nor to an injunction. *Ambler v. Bradford Corporation*, 87 L. T. 217—C.A.

— **Pollution—Liability of Local Authority—“Causing or suffering to flow.”**—By an agreement made between the predecessors of the appellants, the local board, and the owner of a margarine factory it was agreed that the owner of the factory, subject to certain conditions, should be entitled to discharge the liquids and effluent from the factory into the sewers of such board. A sewage farm, owned by the board, became vested in the appellants, and, owing to a breach of the agreement by the factory owner, the soil of the farm became clogged and rendered less capable of filtering the sewage in the appellants' district. By reason thereof sewage and other offensive matter flowed into the river B. from the appellants' sewage works:—*Held*, that the appellants “caused or suffered to flow or pass” sewage and other injurious matter into the river B. within section 13, sub-section 1 of the Middlesex County Council Act, 1898. *Southall Norwood Urban Council v. Middlesex County Council*, 83 L. T. 742; 49 W. R. 376; 65 J. P. 215—D.

— **Channel—Stream or Sewer.**—Water from a spring or source above the defendants' mill was conveyed thereto by a channel, and was caught and accumulated by the defendants in a reservoir above such mill. After being used in such mill it was discharged in a channel in a polluted state. After leaving the mill the water so polluted ran past certain cottages into a stream and so into a river. Many cottages emptied their sewage into the channel until 1892, when a sewage scheme was put into operation, and at the present time two cottages discharged their slop water, and three small watercourses fell into the channel below the mill:—*Held*, that the channel was a “stream” within section 20 of the Rivers Pollution Prevention Act, 1876. *Yorkshire (West Riding) Rivers Board v. Preston*, 92 L. T. 24; 69 J. P. 1; 3 L. G. R. 289—D.

— **Discharge of Polluting Liquid into Pipe Communicating with River—“Sewer.”**—From the appellants' dye works a large quantity of polluting liquid was discharged into an open wooden trough, from which it flowed directly into an iron pipe or tap, from the further end of which it flowed into the river Aire. This pipe was laid in 1878 by the respondents, and

when it was laid the wooden trough was shortened to make way for the pipe, and provision was made by an aperture in the pipe for the discharge into it of the contents of the wooden trough. The pipe was fixed at the outlet of an overflow culvert to carry the discharge from it into the river. The culvert was generally dry, but on about thirty days in the year a stream of storm water flowed along it, mingled with ordinary sewage matter, which, on its discharge from the culvert, entered the iron pipe, where it mixed with the polluting liquid from the appellants' works and thence into the river. The appellants contended that the iron pipe was a sewer, but the magistrate held that it was not, and that, even if it could be treated as such, it was not used by the appellants for the ordinary purposes of a sewer, but as a mere conduit pipe to convey the polluting liquids from their trough. He therefore convicted the appellants:—*Held*, that the conviction was right. *Leeds and District Worsted Dyers and Finishers Association v. Yorkshire (West Riding) Rivers Board*, 70 J. P. 480; 5 L. G. R. 72—D.

— Works Constructed after Passing of Act.]

—A manufacturing company against which proceedings were taken, under section 4 of the Rivers Pollution Prevention Act, 1876, for discharging polluting liquids into a river, relying on sections 6 and 10 of the Act, pleaded that they were not liable to be proceeded against as they were using every reasonably practicable and available means of rendering the pollution harmless:—*Held*, that this was no answer, inasmuch as their works had been entirely constructed after the passing of the Act. *Midlothian County Council v. Pumpherson Oil Co.*, 6 F. 387—Ct. of Sess.

—**Prescriptive Right to Pollute.**—Section 16 of the Rivers Pollution Prevention Act, 1876, which enacts that "the powers given by this Act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by Act of Parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this Act had not passed," keeps alive rights to abate a nuisance and does not have the effect of preserving the right to continue pollution. *Id.*

—**Solid Matter—Prohibition against Putting into River—Deposit in Mill-dam—Cleaning out Dam—Deposit Mixed with Water and Turned into River.**—Section 5 of the West Riding of Yorkshire Rivers Act, 1894, makes it an offence for any person to put or cause to be put or knowingly permit to be put into any river or stream within the jurisdiction of the rivers board (after enumerating certain specified solid matters) "any deposit in a mill dam, or any sludge, or any solid sewage matter"; and "solid matter" was defined as not including "particles of matter in suspension in water." The respondents, who were manufacturers, were owners and occupiers of a mill and a large mill-dam into which flowed through a goit the water of a certain river; and polluting trade effluents from several mills and the sewage of several hundred houses also passed into the river above the respondents' mill and thence through the goit into the respondents' dam, and, in consequence of the waters being impounded in the

dam by the respondents, a quantity of mud, sludge, and deposit had been formed in the basin of the dam; but there had been no discharge into the dam by the respondents themselves of any effluent or any polluting matter, solid or otherwise. The respondents, in order to clean out the dam, turned the whole waters of the river into the dam, while men with spades conveyed the mud and deposit into the current as it flowed through the dam, and by this operation the mud, sludge, and deposit in the dam became admixed with water and was carried in suspension through the outlet from the dam into the river below the mill, rendering the river muddy and turbid for a considerable distance. The effluent as it went from the dam into the river consisted of over 99½ per cent. of liquids, and less than ½ per cent. of solids:—*Held*, on the authority of *Ribble River Joint Committee v. Halliwell* (68 L. J. Q.B. 984; [1899] 2 Q.B. 385), that the respondents had committed no offence against section 5 of the Act, either in unlawfully causing to be put, or in knowingly permitting to be carried, into the river the mud, sludge, and deposit from the dam, as the stuff sent out into the river, being in a liquid state and containing less than ½ per cent. of solid matter, could not then be described as mud, sludge, and deposit, and that it was immaterial that it may have been so in the dam before the operation of cleaning began. *West Riding of Yorkshire Rivers Board v. Rawson*, 89 L. T. 363; 67 J. P. 407; 1 L. G. R. 736—D.

—**Putrid Solid Matter—Water Diverted and Impounded—Deposit becoming Putrid—Returning Deposit to River—Particles of Matter in Suspension in Water—Lawful Exercise of Right of Impounding Water.**—The owner of a cotton-spinning mill on the banks of a stream had for many years prior to the passing of the Rivers Pollution Prevention Act, 1876, lawfully exercised the right of diverting and impounding in a reservoir water from the stream for the purposes of his business. The water so diverted contained vegetable matter, discharged into the stream by paper mills higher up the stream. While the water was impounded this vegetable matter settled at the bottom of the reservoir, and after two or three days became putrid. The reservoir was flushed out once a week (on Saturdays, after the mill was stopped) by opening sluice-gates into the stream and allowing the water from the stream to flow through the reservoir and out again into the stream, carrying with it the putrid deposit at the bottom of the reservoir. The effluent water as it went into the stream contained 97·6 per cent. of water, and 2·4 per cent. of solid matter in suspension. In proceedings taken against the mill-owner under section 10 of the Rivers Pollution Prevention Act, 1876, for having, contrary to the provisions of section 2, caused to be put or carried into the stream, so as to pollute its waters, "putrid solid matter,"—*Held* (A. L. SMITH, L.J., and RIGBY, L.J.; VAUGHAN WILLIAMS, L.J., doubting), that, assuming the deposit at the bottom of the reservoir was "solid matter," the mill-owner was not liable to be proceeded against under the Act, for at the time the effluent from the reservoir entered the stream the solid matter was in suspension in water, and by section 20 of the Act "solid matter" shall not include particles of matter in

suspension in water." *Held, also*, that, assuming what was put into the stream was "solid matter" within section 2, the mill-owner was protected by section 17 of the Act, which provides that the Act "shall not apply to or affect the lawful exercise of any rights of impounding or diverting water." *Ribble River Committee v. Halliwell*, 68 L. J. Q.B. 984; [1899] 2 Q.B. 385; 81 L. T. 38; 48 W. R. 22; 63 J. P. 708—C.A.

— **Stream otherwise Polluted—Increase of Pollution inappreciable—Discretion of Court.**—The County Court is not justified, in the exercise of its judicial discretion under section 10 of the Rivers Pollution Prevention Act, 1876, in refusing to make an order under that section restraining the discharge of sewage into a stream in contravention of section 3, where the discharge would appreciably pollute the stream were it otherwise pure, merely because the pollution of the stream from other sources prevents the pollution due to the particular discharge from being appreciable. *Staffordshire County Council v. Seisdon Rural Council*, 96 L. T. 828; 71 J. P. 185; 5 L. G. R. 347—D.

— **Manufacturing Refuse Discharged into Sewer—Sewer Communicating with Stream—Liability of Manufacturer to Penalty.**—Persons draining noxious or polluting liquid proceeding from a factory or manufacturing process into a sewer which communicates with a stream, "commit an offence under section 4 of the Rivers Pollution Prevention Act, 1876 (*semble*) even though they prove that they have obtained facilities for so draining into the sewer under section 7 of the Act. *Yorkshire (West Riding) Rivers Board v. Butterworth*, 98 L. T. 47; 71 J. P. 516; 5 L. G. R. 1246—D.

Notice to Discontinue Flow of Sewage—River Pollution—Notice Complied with—Accidental Recurrence of Flow Three Years Afterwards—"Failing to discontinue."—Under section 92 of the Lee Conservancy Act, 1868, as amended by section 23 of the Lee Conservancy Act, 1900, the Lee Conservancy Board may by notice require any person causing or suffering sewage to flow into the Lee or its tributaries to discontinue the flow of sewage within a time to be specified in the notice, not being less than three months. And by section 93 of the Act of 1868 the person notified is required to discontinue the flow in accordance with the notice, and "if he fails to do so" is liable to heavy penalties. The respondent council, in compliance with a notice from the board under these enactments, discontinued a flow of sewage into a tributary of the Lee from their sewage farm which was due to their using an inadequate number of the tanks at the farm. But three years afterwards, owing to the negligence of one of their employees, sewage was on one occasion again suffered to flow into the tributary in question from the sewage farm:—*Held*, that the mere proof of the discharge of sewage on this isolated occasion was not under the circumstances sufficient to shew that the council had been guilty of an offence under section 93. *Lee Conservancy Board v. Leyton Urban District Council*, 95 L. T. 487; 4 L. G. R. 662; 70 J. P. 318—D.

· **Statutory Procedure Preliminary to Prosecution under Rivers Pollution Act.**—A sanitary

authority, without having obtained the consent of the Secretary of State for Scotland (in England, the Local Government Board) under section 6 of the Rivers Pollution Act, 1876, gave notice to a manufacturer within its district of its intention to institute proceedings against him under section 4 of the Act, and thereafter, having obtained the consent of the Secretary for Scotland, instituted proceedings:—*Held*, first, that the notice was insufficient, as, prior to obtaining the consent of the Secretary for Scotland, the sanitary authority was not in a position to take proceedings; and secondly, that as the defender had by the want of notice been deprived of his right to be heard under section 6 by the sanitary authority, he was entitled to object to the competency of the proceedings on the ground of want of notice. *Midlothian County Council v. Oakbank Oil Co.*, 5 F. 700—Ct. of Sess.

Semble, the sanitary authority was not entitled to insist, as a condition of granting such hearing in regard to the remedial measures which the manufacturer had taken or was prepared to take, that the fact of pollution should be admitted. *Id.*

— **Notice of Intention to take Proceedings—Consent of Local Government Board—Validity of Notice.**—Where proceedings are proposed to be taken by a sanitary authority against a person for an offence within section 4 in Part III. of the Rivers Pollution Prevention Act, 1876, the consent of the Local Government Board, required by section 6 of the Act, to such proceedings being taken must be obtained before the notice under section 13 of the intention to take such proceedings at the expiration of two months after such notice can be given to the offender. *Midlothian County Council v. Oakbank Oil Co.* (5 Fraser, 700) followed. *Yorkshire (West Riding) Rivers Board v. Scarr End Mill Co.* (65 J. P. 776) overruled. *Haylock v. Sparke* (22 L. J. M.C. 67; 1 E. & B. 471) distinguished. *Yorkshire (West Riding) Rivers Board v. Robinson*, 76 L. J. K.B. 426; [1907] 1 K.B. 431; 96 L. T. 162; 71 J. P. 137; 5 L. G. R. 409; 23 T. L. R. 249—C.A.

"Tidal waters."—The expression "tidal waters" in section 24 of the West Riding of Yorkshire Rivers Act, 1894, is not confined to those waters where there is a horizontal ebb and flow only; it may include waters in which there is only a vertical rise and fall. *Yorkshire (West Riding) Rivers Board v. Tadcaster District Council*, 97 L. T. 436; 71 J. P. 429; 5 L. G. R. 1208—D.

Application to Transfer Action from County Court to Chancery Division.—An action having been begun in a County Court by the plaintiffs against the defendants for an alleged pollution of a stream by the discharge into it of manufacturing-refuse, an application was made by the plaintiffs to transfer the action to the Chancery Division under section 11 of the Rivers Pollution Act, 1876, on the ground that the case involved legal questions of considerable difficulty and intricate questions of fact:—*Held*, that the application must be refused as great expense would be incurred, and, further, a local investigation precluded by acceding to it. *Yorkshire (West Riding) Rivers Board v. Ravens-*

thorpe Urban Council, 71 J. P. 209—Joyce, J. And see LOCAL GOVERNMENT, col. 1360.

Medium Filum—Main and Subsidiary Channels.]

—Where the *alveus* between the banks of a river is divided by an island or islands into a main and subsidiary channels, the subsidiary channels being at times dry but carrying water when the river is in its ordinary state, the *medium filum* of the river is the centre-line of the *alveus* from bank to bank, and not the centre-line of the main stream. *Menzies v. Breadalbane* (No. 1), 4 F. 55—Ct. of Sess.

— **Inclosure Act—Award—Several Fishery—Land Abutting on River—Ownership of Bed of River—Right to Take Gravel from Bed of River—Custom—Prescription—Lost Grant.]**—In an action brought to restrain the defendants from taking gravel, &c., from the bed of a river in which the plaintiff had a several fishery, and of the bed of which he claimed to be the owner, the defendants justified the taking of the gravel—first, on the ground that the inhabitants of the parish had from time immemorial enjoyed the right (for which a legal origin could be presumed) to take gravel, &c., from the river; and secondly, under an inclosure award allotting, pursuant to the Inclosure Act under which it was made, a strip of land, eight yards wide, on each side of the river within the parish for the purpose of being used by the inhabitants for throwing and cutting weeds out of the river, and for such other purposes as might be necessary for their accommodation, and to the same extent as they enjoyed the same at the passing of the Act:—*Held*, first, that the immemorial right set up was not established by the evidence, and further, that the right claimed, being to take gravel &c., without stint in the land of another, could not exist in law. *Constable v. Nicholson* ([1863] 14 C. B. (N.S.) 230; 32 L. J. C. P. 240) followed; second, that the award gave the inhabitants no rights in the bed of the river; apart from other considerations the presumption that a grant of land adjoining a river includes the bed of the river *ad medium filum* was inapplicable to such an award. *Ecroyd v. Coulthard* (66 L. J. Ch. 751; [1897] 2 Ch. 554; 67 L. J. Ch. 458; [1898] 2 Ch. 358) followed; and thirdly, on the facts, that the plaintiff had established his ownership of the bed of the river. *Hough v. Clark*, 5 L. G. R. 1195; 23 T. L. R. 682—Swinfen Eady, J.

Power of Commissioners to Place on Adjoining Land Mud Taken from Rivers.]—Section 32 of the Middle Level Act, 1810, merely enables the commissioners appointed under the Act to place the mud and sillage taken from the rivers and drains in their area in such place as in their discretion they think proper, provided they have power to lay it in such place. Under section 59 of the same Act the commissioners can, however, deposit such mud and sillage upon adjoining lands on making compensation to the party or parties injured thereby. *Moulton and Middle Level Commissioners, In re*, 97 L. T. 391; 5 L. G. R. 961; 71 J. P. 402—Bray, J.

Thames Conservators—Upper Thames—Dredging Licences—Sale of Proceeds—Licensee's Own Profit—Riparian Owner.]—The Conservators of the River Thames are not empowered by the Thames Conservancy Act, 1894, to grant dredg-

ing licences for the Upper Thames to their agents, servants, or workmen, authorising them to dredge, and also to sell the proceeds of the dredging for their own personal profit. *Palmer v. Thames Conservators*, 73 L. J. Ch. 212; [1902] 1 Ch. 163; 86 L. T. 537; 66 J. P. 55—Kekewich, J. And see THAMES and SHIPPING.

Damage Caused to Vessel by Taking the Ground.]—See NEGLIGENCE, col. 1744.

Fishing in.]—See FISHERY.

6. RIPARIAN PROPRIETOR.

Natural Watercourse—Spring Artificially Improved.]—The rule in *Dudden v. Clutton Union* (26 L. J. Ex. 146; 1 H. & N. 627), that the owner of a source of a spring may not destroy the natural flow from the spring into the course of the stream fed by the spring, is not affected by the circumstance that at some remote date the issuing point of the spring has been built over, and an artificial channel formed for the passage of the water. *Mostyn v. Atherton*, 68 L. J. Ch. 629; [1899] 2 Ch. 360; 81 L. T. 356; 48 W. R. 168—Byrne, J.

Abstraction of Water for Uses Unconnected with Riparian Tenement.]—A riparian owner is not entitled to abstract the water of a natural stream for purposes foreign to or unconnected with his tenement. *McCartney v. Londonderry and Lough Swilly Railway*, 73 L. J. P.C. 73; [1904] A.C. 301; 91 L. T. 105; 53 W. R. 385—H.L. (Ir.)

A railway company, owners of a small strip of land adjoining a stream, inserted a pipe into the stream for the purpose of carrying the water into a tank at some distance and using it for the service of their engines along the whole of their line:—*Held*, that they were not entitled to make such use of the water, and that the adjacent owner had a right to stop the pipe. *Sandwich (Earl) v. Great Northern Railway* (49 L. J. Ch. 225; 10 Ch. D. 707) overruled. *Id.*

Fish-ponds—Legitimate Purposes—Percolation—Prescription Act—Right of Way.]—A riparian proprietor abstracted water from a stream by pipes and syphons to supply his fish-ponds, and thereby interfered with the flow of water to the lower riparian proprietor's mill. The higher riparian proprietor made a claim that, prior to his use of the pipes and syphons to convey water from the stream to his fish-ponds, he had obtained the same amount of water by percolation through the banks of the stream, and therefore he had a right to such water under the Prescription Act. The lower riparian proprietor claimed a right of way by prescription to repair the bank of the stream where it ran through the higher riparian proprietor's property. The gate by which he entered the higher riparian proprietor's property had always been kept locked and the key kept by the higher riparian proprietor or his servants; but this key had always been asked for as a matter of right when it was required, and had never been refused:—*Held*, the lower riparian proprietor had such a right as mentioned in *Beeston v. Weate* (25 L. J. Q.B. 115; 5 E. & B. 986) to

keep the bank in repair on the higher riparian proprietor's property, and for that purpose to have access to his premises. Such a right was from time immemorial, and the fact of the gate being kept locked did not affect such right. *Held*, also, the higher riparian proprietor could not justify abstracting water by pipes and syphons on the ground that if the bank had not been made watertight he would have been entitled to the same amount of water by percolation. Such a claim was not sustainable under the Prescription Act as a watercourse or otherwise. *Held*, an injunction must be granted to restrain the abstraction of water from the stream by such pipes and syphons, and that they must be taken up and removed; but the order must state that a riparian proprietor was not entitled to restrain absolutely another riparian proprietor from taking any water from the stream for legitimate purposes. *Roberts v. Fellowes*, 94 L. T. 279—Joyce, J.

Diversion of Water—Diminishing the Flow of Water—Unreasonable Use of Water—Pollution of Stream.—The owner and occupiers of lands abutting on a natural stream complained that the occupiers of dye-works immediately above their lands were diverting the water so as substantially to diminish the flow of water, and were also polluting the stream, and brought an action to restrain them. The defendants claimed a right to use the water of the stream for the purposes of their works, and denied that they were substantially diminishing the flow of water or polluting the stream except occasionally and accidentally:—*Held*, on the evidence, that the defendants were dealing unreasonably with the water of the stream, so as visibly and materially to diminish the quantity of water coming down, and also polluting the water; and that the plaintiffs were therefore entitled to succeed, even without proof of actual damage, on the general principles of law as to the rights of riparian owners laid down in *Sampson v. Hoddinott* (26 L. J. C.P. 148; 1 C. B. (n.s.) 590) and *Wood v. Waud* (18 L. J. Ex. 805; 3 Ex. 748). *Sharp v. Wilson*, 93 L. T. 155; 21 T. L. R. 679—Joyce, J.

Curtailment of Rights by Statute—Archiving over Stream—Girder—"Building, erection, or thing over the bed."—By section 135 of the Burnley Borough Improvement Act, 1871, "if any building, erection, or thing has been built, erected, or placed in or on the sides of either the Brun or Calder and within fifteen feet from the centre thereof," the corporation can summon the owner or builder before the Justices, who shall order the same to be removed and can inflict penalties. By section 135 "nothing in this Act contained shall prevent the owners of land adjoining the said streams from arching over the same, provided always that the span of such arch shall be not less than thirty feet," and a certain space was to be left under such arch. By section 46 of the Burnley Borough Improvement Act, 1883, "notwithstanding anything in the Act of 1871 contained, every building, erection, or thing . . . built, erected, or placed above the bed . . . shall be so built, erected, or placed as to leave a clear space between such building, erection, or thing, and any building, erection, or thing in or on the opposite side of such respective river of not less than thirty feet," and if this is not complied

with the owner or person erecting can be summoned by the corporation. The appellants, who were the owners of both sides of the river, placed across the river an iron girder, which was the first of several, on one half of which girders they proposed to make a carriage-way. They were summoned for unlawfully erecting this girder and not leaving a space between such girder and a building on the side of the river of not less than thirty feet. The magistrates held that section 135 of the Act of 1871 was superseded, and that this was a building, erection, or thing placed above the head of the waterway:—*Held*, that the view of the magistrates was correct, and that this was in contravention of section 46 of the Act of 1883, section 135 not being applicable, but that so far as section 46 was inconsistent with section 135 it must be taken to override or limit the earlier section. Also that the words "above the bed" meant "over the bed." *Per WRIGHT, J.*: It was very doubtful whether this was arching at all. *Burnley Co-operative Society v. Pickles*, 77 L. T. 803; 62 J. P. 260—D.

Servitude Conferred by Charter—Claim to Abstract River Water without Restriction.—By the general law applicable to running streams every riparian proprietor has a right to the ordinary use of the water flowing past his land; and he may also, provided that he does not interfere with the rights of other proprietors below or above him, dam up the stream for the purpose of a mill. *White v. White*, 75 L. J. P.C. 14; [1906] A.C. 72; 94 L. T. 65—H.L. (Sc.)

A Crown charter granting a mill "*Cum stagnis . . . aqueductis aliisque integris privilegiis et pertinentiis ejusdem quibuscunque*," cannot be construed as conferring rights beyond those of ordinary dams or *stagna*, and gives no exclusive property in the running water. *Ib.*

Prescriptive Rights—Obstruction of Passage of Salmon—Rights of Upper Owners—Interdict—Form of Interdict.—Owners of a salmon fishery are entitled to interdict against the obstruction by a lower riparian owner of the free passage of salmon. *Pirie v. Kintore (Earl)*, 75 L. J. P.C. 96; [1906] A.C. 478—H.L. (Sc.)

The effect of forty years' user of the water of a river is to give the persons so using it a right to continue that user *modo et forma* within the limits of the prescription. *Ib.*

The appellants for their trade purposes had diverted the river water—which by prescription they were entitled to abstract to a specified extent—into artificial channels impossible of passage to salmon, with the result at times of leaving the main channel bare of water. The respondents were owners of salmon fisheries on the upper reaches of the river:—*Held*, that the respondents were entitled to an interdict coupled with a declaration that in the event of any future substantial change in the river any party affected by such change might apply to the Court of Session for remedy. *Ib.*

Island—Ownership of Soil—Presumption of "medium filum aquæ"—River Running along

Waste.—By a Commons Act certain common and waste lands were vested in the plaintiffs freed and discharged from manorial rights, but upon the trusts and with the powers declared by the Act for the benefit of the inhabitants of a certain borough. The lands were bounded on one side by a river which flowed round a considerable island probably as old as the banks themselves. The plaintiffs were unable to shew a title to this island as such. In an action against the defendants, the owners of lands on the opposite bank of the river, for an injunction to restrain them from taking gravel from the river-bed at a spot on the island which was on the plaintiffs' side of a line drawn down the middle of the stream and across the island, but was not on the plaintiffs' side of a line drawn down the middle of the arm of the stream flowing on their side:—*Held*, that the plaintiffs' action failed, as the rule that, where a stream flows between two manors or properties, in the absence of evidence to the contrary the boundary is to be taken to be the *medium filum aquæ*, should be applied, where there is an island, by drawing a *medium filum* as a boundary through each arm of the stream. *Great Torrington Commons Conservators v. Moore Stevens*, 73 L. J. Ch. 124; [1904] 1 Ch. 347; 89 L. T. 667; 68 J. P. 111; 2 L. G. R. 397—Joyce, J.

Foreshore — Boundary — Medium Filum.—Where adjoining properties were situated *ex adverso* of the convex side of a bend in a tidal river, the actual *medium filum* (as determined by the report of a skilled geographer) being approximately an arc of a circle.—*Held*—first, that the method of determining the foreshore boundary by drawing a perpendicular from the end of the land boundary at high-water mark to an average *medium filum* represented by a straight line was inapplicable; and secondly, that the proper method was to draw a perpendicular to a tangent of the circular arc forming the actual *medium filum*, by joining the end of the land boundary at high-water mark to the centre of the circle. *Darling's Trustees v. Caledonian Railway*, 5 F. 1001—Ot. of Sess.

Accretion — Change in Course — Non-tidal River—Ownership of Soil.—Where a non-tidal river separating two estates belonging to different owners suddenly changes its course, the property in the soil does not change. *Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer*, 21 T. L. R. 637—P.C.

Exercise of Statutory Powers—Pollution of Compensation Water—Absence of Negligence.—Riparian proprietors are entitled, except so far as their rights are varied by statute or special circumstances, to require that nothing shall be done to affect to their prejudice either the quantity or the quality of the stream as it flows in a natural state; and when an Act of Parliament authorises interference with the natural flow, the original rights of the riparian proprietors are impaired only so far as the reasonable exercise of the statutory rights impairs them. But where a water company was empowered by Act of Parliament to construct a reservoir on a stream, in order to supply a town with water, and the Act provided that a fixed amount of compensation water should be allowed to flow from the reservoir for the benefit of the riparian proprietors lower down the

stream.—*Held*, that, in the absence of negligence, the water company was not liable for damage caused by the pollution of the compensation water from accidental causes. *Edinburgh Water Trustees v. Somerville*, 95 L. T. 217—H.L. (Sc.)

"Banks" of River Ure—Flood Banks Erected Outside Natural Banks—Liability to Repair.—Under 7 Geo. 3, c. xciii. and 1 Geo. 4, c. xxxv. there is no obligation on the North-Eastern Railway, as the successors of the Ure Navigation Commissioners, to keep in repair the flood banks erected outside the natural banks of the river Ure. *Fyner v. North-Eastern Railway*, 20 T. L. R. 192—C.A.

Natural Flow—Grant of Licence to Abstract.—See LOCAL GOVERNMENT, col. 1418.

Natural Watercourse—Interference by Railway.—See RAILWAY, col. 2011.

7. CANAL.

Statute.—61 & 62 Vict. c. 16 is the *Canals Protection (London) Act*, 1898.

Right to Support—Working of Subjacent and Adjacent Minerals—Compensation for Minerals left Unworked.—By the Act 30 Geo. 3, c. 82, the plaintiffs were incorporated as a company for carrying on and maintaining a navigable canal; and it was enacted that they should for that purpose have power to purchase lands for making the canal and the several works thereby authorised to be made, and to enter into and upon the lands of any person or persons, and to construct and do all other matters which the company should think necessary and convenient for making and using the canal and other works, the company doing as little damage as might be in the execution of the several powers thereby granted, and making satisfaction in manner thereafter mentioned for all damages to be sustained by the owners of and persons interested in such lands as should be taken, used, or prejudiced in or by the execution of the Act, provided, nevertheless, that nothing in the Act should entitle the company, on purchasing any lands for making the canal or for any other the purposes aforesaid, to any mines of coal, ironstone, or other minerals which should be found in cutting or making the canal and other works aforesaid or that should be under the same, but that all such mines should appertain and belong to such person or persons as would have been entitled to the same in case the Act had not been made. The plaintiffs duly acquired the lands necessary, and constructed and completed the canal and works under the powers of the Act. The purchase-money and compensation properly payable upon taking the lands were duly ascertained, and there had been no default in payment. The defendants were the owners of a colliery which they were working, and the land under which their mines were situate was traversed for a considerable distance by the canal. The defendants, in the ordinary course of working their mines, were desirous of working the coal subjacent or adjacent to the canal.—*Held*, that the defendants were entitled to get so much of the subjacent

and adjacent coal as they could get without destroying or injuring the proper support of the canal and works; but that they were not entitled to get the coal to the destruction or injury of that support; and that the whole compensation having been assessed at once at the time of the purchase by the plaintiffs—that is, compensation for the right of support as well as for the conveyance of the surface of the land—the defendants could not now be entitled to compensation for that in respect of which they had already been compensated. *London and North-Western Railway Co. v. Evans* (62 L. J. Ch. 1; [1893] 1 Ch. 16) considered and applied. *Glamorganshire Canal Co. v. Nixon's Navigation Co.*, 85 L. T. 53—C.A.

— **Compulsory Purchase—"Possession" of Lands Required for Support—Vendor and Purchaser—Purchase-money—Interest.**—A railway company's special Act provided that, if the workings of any mine-owner in any seam of minerals should have come within a certain distance of a canal, and such mine-owner should desire to continue (and but for the existence of the canal would have continued) to work within such distance, the company might, if it should appear that such working was likely to damage the canal, give notice to the mine-owner of their willingness to purchase and make compensation for such seam within the prescribed distance, and then the said seam should not be wrought but should be purchased by the company, the purchase-money and compensation to be settled in case of dispute by arbitration, the compensation to include (in addition to the value of the seam) such additional expenses and losses as should be incurred by the mine-owner by reason of the leaving of minerals for the support of the canal or of the continuous working of his mines being interrupted or of other kindred matters. On November 19, 1892, the railway company gave the plaintiff notice of their willingness to purchase under the above provision. The parties endeavoured to settle the amount of the purchase-money and compensation between themselves, but it was eventually referred to arbitration, and in 1901 the arbitrator awarded the sum of 16,565*l.* as the amount of purchase-money and compensation to be paid by the company, with interest:—*Held*, that upon the construction of the Act the plaintiff was not entitled to interest, but that upon the general principles applicable to vendor and purchaser, as laid down in *Birch v. Joy* (3 H.L. Cas. 565) and applied in *Rhys v. Dare Valley Railway* (L. R. 19 Eq. 93), he was entitled to interest at 4 per cent. from November 19, 1892, to the time of payment. *Caledonian Railway v. Carmichael* (L. R. 2 H.L. Sc. 56) distinguished. *Fletcher v. Lancashire and Yorkshire Railway*, 71 L. J. Ch. 590; [1902] 1 Ch. 901; 50 W. R. 423; 66 J. P. 631—Buckley, J.

Obligation to Keep Branch Open—Power to Make Branch as Feeder—Subsequent Power to Make Navigable—Part of Branch Kept Open for Traffic—Part Closed and Used as Feeder—"Reasonable facilities."—A canal company were authorised by their special Act, passed in 1793, to construct a canal for navigable purposes, to levy rates, and to construct (amongst other things) reservoirs and feeders for supplying the canal with water; and all persons were to have

the right of navigating and using the canal on payment of the specified rates, the owners of adjoining lands having some special privileges of navigation. Under this power to make feeders, a cut or branch from the main canal, some seven miles in length, was begun, and, by a special Act passed in the following year, the company were "authorised and empowered to make navigable" this cut, which was at first intended to act only as a feeder, and to make applicable to it the provisions of the previous Act as to the levying of rates and the rights of adjoining owners of land to use the branch. The branch was opened for traffic before the year 1800, and continued to be used as a navigable cut or branch down to 1898, when, owing to the scarcity of water through drought, the company drew off the water from the greater part of the branch for the supply of their canal, and that part of the branch had since been closed for navigable purposes and used only as a feeder; but the remainder of the branch—the two miles nearest the main line—had continued to be and was open and used for traffic. The company refused to re-open the closed part of the branch for traffic. Upon an application by adjoining landowners, under the "reasonable facilities" clauses of the Railway and Canal Traffic Acts, to compel the company to re-open the whole branch for traffic, the company proved that, having regard to the dwindling traffic on the branch, the very large cost necessary to re-instate it, and the extra cost of maintaining it, if opened, owing to the porous nature of the chalk soil through which it was constructed, the traffic would not be sufficient to compensate them for the outlay:—*Held*, that, as the provision in the second Act to make the cut navigable was permissive only and not obligatory, and as the power under the earlier Act to make the branch as a feeder was not taken away by the power in the second Act to make it navigable, the company were entitled to keep the cut, or any part of it, open as a feeder only, without thereby incurring any obligation to maintain and keep it open for traffic; that the mere fact that the company kept a part open for traffic did not impose upon them the obligation of keeping the whole branch open for traffic; and that the Court could not under colour of giving reasonable facilities under the Traffic Acts, order the company to work what they were not compellable to work, and were not in fact working; and, further, upon the facts, that, as the company had shewn that the cost of restoring and maintaining the branch for traffic would be far in excess of any advantage likely to accrue either to the applicants and persons using the branch, or to the company themselves, the facilities claimed were not "reasonable facilities." *Rothschild (Lord) v. Grand Junction Canal Co.*, 91 L. T. 386; 12 Ry. & Can. Traff. Cas. 141; 20 T. L. R. 503—Ry. Com.

Abstraction of Water—Proprietors of Canal—Millowners—Compensation—Private Acts of Parliament.—An Act of Parliament authorised the construction of a canal and cut, to be supplied with water from a river, and empowered the proprietors to do anything "which they shall think requisite and necessary or convenient for . . . maintaining and using the said canal and cut . . . doing as little damage as may be," and making compensation as

provided by the Act. A later Act authorised the construction of a tidal basin and entrances in connection with the canal, and extended the powers conferred by the earlier Act to such additional works. The proprietors of the canal drew water from the river through the canal to scour out silt which was deposited in the tidal basin and entrances and tended to choke them, and by so doing interfered with the supply of water to mills situated on the river:—*Held*, that they were justified under the powers contained in the Act in so using the water, and that the remedy of the millowners was under the compensation clauses. *Redler v. Great Western Railway*, 96 L. T. 98—H.L. (E.)

Dredging—Statutory Obligation—Right of Traders to Sue.—By virtue of section 88, subsection 14 of the Manchester Ship Canal Act, 1885, as modified by an agreement of 1896, which was confirmed by and scheduled to the Manchester Ship Canal Act, 1896, the traders at Warrington are entitled to sue the canal company for breach of their statutory obligation to dredge the bed and banks of the Mersey so that at all times there shall be a depth of eight feet of water at low water of spring tides between certain specified limits. *Crosfield v. Manchester Ship Canal* (No. 2), 22 T. L. R. 192—C.A.

Waste Water—Wrongful Abstraction of Water.—By a private Act of Parliament it was provided that all the "waste water" of the appellants' canal, with certain immaterial exceptions therein mentioned, should be discharged into another canal, which had since become the property of the respondents. The appellants had for many years supplied water from their canal to various manufacturing works situated near the canal:—*Held*, that as the appellants were a canal company, not a waterworks company, "waste water" meant all water not legitimately needed for the purposes of navigation, and that they might be restrained from so disposing of their water as to prevent it from passing into the respondents' canal. *Rochdale Canal Co. v. Manchester Ship Canal*, 85 L. T. 585—H.L. (E.)

Navigation of Barges.—See SHIPPING, col. 2399.

Obstructions—Duty to Keep Free from.—See SHIPPING, col. 2397.

8. SUBTERRANEAN WATER.

Definite, but Unknown Channel—Channel Ascertainable only by Excavation.—There is no right in lower riparian owners to water flowing in an upper defined underground channel, unless the course of such channel is known, or can, at any rate, be easily and inevitably inferred, without recourse to exploratory excavations. *Bradford Corporation v. Ferrand* (No. 2), 71 L. J. Ch. 859; [1902] 2 Ch. 655; 87 L. T. 388; 51 W. R. 122; 67 J. P. 21—Farwell, J.

WAY.

1. *Statutes*, 2708.
2. *Claim to Right of Way*, 2708.

3. *Dedication*, 2709.
4. *Boundaries and Fences*, 2714.
5. *Ownership of Soil*, 2716.
6. *Trespass*, 2717.
7. *Bridge*, 2718.
8. *Ferry*, 2719.
9. *Drain*, 2720.
10. *Tramway*, 2720.
11. *Traffic*, 2721.
 - (a) *Generally*, 2721.
 - (b) *Locomotives*, 2726.
 - (c) *Motors*, 2729.
 - (d) *Cycles*, 2732.
12. *Maintenance and Repair*, 2733.
13. *Highway Authority*, 2742.
14. *Obstruction of Highway*, 2742.
15. *Diversion of Highway*, 2746.
16. *Other Matters*, 2747.

1. STATUTES.

Lights on Vehicles.—7 Edw. 7 c. 45 is the *Light on Vehicles Act*, 1907.

Motor Cars.—3 Edw. 7 36 is the *Motor Car Act*, 1903.

2. CLAIM TO RIGHT OF WAY.

Right not Established—User of Country Paths—Absence of Injury—Injunction Refused.—Where a defendant sets up, as a defence to an action for trespass, a public right of way which he fails to establish, and the public use of the way does no present injury to the landowner, who, moreover, disclaims any intention of stopping it so long as it does not conflict with the due enjoyment of his property, the Court will not interfere by injunction, but will make a declaration and impose nominal damages for the trespass. *Behrens v. Richards*, 74 L. J. Ch. 615; [1905] 2 Ch. 614; 93 L. T. 623; 54 W. R. 141; 69 J. P. 381; 3 L. G. R. 1228; 21 T. L. R. 705—Buckley, J.

From the public use of country paths by permission for the purpose of pleasure no dedication can be inferred. *Ib.*

Ancient Monument—Stonehenge—Free User and Access by Public—Trust—Presumption—Absolute Ownership—Thoroughfare—Cul-de-sac.—Where the owner of an ancient monument of great public interest produces his title-deeds shewing that he holds under conveyances made to him and his ancestors without any trust for the free user of and access to the monument by the public, it is impossible for the Court to presume a lost grant or lost Act of Parliament in order to establish such a trust. *Att.-Gen. v. Antrobus*, 74 L. J. Ch. 599; [1905] 2 Ch. 188; 92 L. T. 790; 69 J. P. 141; 3 L. G. R. 1071; 21 T. L. R. 471—Farwell, J.

On the evidence at the trial,—*Held*, that, with the exception of the Netterton Way,

admittedly a public highway, there were no roads or tracks subject to public rights of way running up to and through the circle of stones at Stonehenge. *Ib.*

The rights of the public in relation to a *cul-de-sac* in a town and in the country discussed. *Ib.*

Right of Public to Pass and Repass—User for other Purposes—Trespass.]—Any user of a highway by the public beyond the reasonable user thereof as a highway is a trespass. *Hickman v. Maisey*, 69 L. J. Q.B. 511; [1900] 1 Q.B. 752; 82 L. T. 321; 48 W. R. 385—C.A.

The plaintiff was possessed of a piece of land and of the soil of a public highway crossing it. Over the land on each side of the highway he had granted to R. a licence to exercise horses. The defendant owned a newspaper in which he published the doings of racehorses. He entered upon the highway and walked up and down for a considerable time within a short space observing the doings of R.'s horses to the detriment of R. and the plaintiff by depreciating the value of the land. The defendant justified under the public right of passing and repassing:—*Held*, that he was a trespasser. *Harrison v. Rutland (Duke)* (62 L. J. Q.B. 117; [1893] 1 Q.B. 142) followed. *Ib.*

Ancient Highway—User by Defendant.]—A small triangular piece of ground adjoining a public bridge over the Ouse at St. Ives was in 1871, at the request of the defendant's father, who was allowed to use it, inclosed by the plaintiffs. At that time the defendant's father gave an acknowledgment in writing that the piece of ground belonged to the plaintiffs. The defendant's father died in 1890, and the defendant had since then occupied the piece of ground and claimed to have acquired a title to it under the Statute of Limitations:—*Held*, on the evidence that the defendant had acquired no title, as there was evidence that prior to 1871 the piece of ground formed part of an ancient highway. *St. Ives Corporation v. Wadsworth*, 72 J. P. 73—Swinfen Eady, J. *And see EASEMENT.*

3. DEDICATION.

Presumption from Public User—Rebutting Evidence.]—Entries in the court roll of a manor that greens along the side of a highway are described as waste, and evidence that they have been subsequently dealt with as private property, are admissible to rebut the presumption of dedication arising from the fact that the public have walked and ridden over the greens. *Friern Barnet Urban Council v. Richardson*, 62 J. P. 547—C.A.

Power to Dedicate—Land Vested in Company for Statutory Purposes—Canal Company—Reservoir Embankments.]—A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated. So a canal company, which was empowered and obliged to make a canal and the works incident and necessary for the purpose of making and maintaining the canal, was held to have been

incapable of dedicating to the public a right of way over the embankments of reservoirs constructed by or in pursuance of its powers in a case where it was subsequently proved that the user by the public of the right of way must ultimately lead to the destruction of the embankment and consequent damage to the public unless great expense was incurred by the company to prevent such a result. *Great Western Railway v. Solihull Rural Council*, 86 L. T. 852; 66 J. P. 772—C.A.

—Forecourts—Dedication—Consent of Freeholder—Presumption of—Dedication for a Term.]—The tenant, for a term of eighty-two years, of land adjoining a highway built houses on the land standing a few feet back from the highway, thus leaving a strip between the houses and the highway. Gratings communicating with the cellars of these houses were placed in the strip, and it was, from the time when the houses were built, to some extent used by the occupiers for exposing goods for sale and the like. The strip was, at the request of one L. who was interested in the property as sub-lessee and afterwards as assignee of the head-lease, paved by the local authority shortly after the houses were built, and there was no physical demarcation between the strip and the footpath at the side of the road:—*Held*, that, apart from the circumstance that the land was throughout on lease, there was no evidence from which dedication of the strip to the public as a highway could be presumed. *Corseilis v. London County Council*, 77 L. J. Ch. 120; [1908] 1 Ch. 13; 71 J. P. 561; 6 L. G. R. 78; 24 T. L. R. 80—C.A.

Held, also, by the COURT OF APPEAL, that, even if as against L. the local authority had a right to insist that the strip should be given up to the use of the public during his term, this right could not be enforced against purchasers for value without notice of the claims of the local authority. *Ib.*

Public Footway—Private Carriage-way along Same Line—Presumption as to Extent of Public Right of Footway.]—Where a public right of footway exists across land, and a certain amount of the surface of land lying along the course of the public footway is devoted to traffic, even if it be private traffic, the presumption is that the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in fact devoted to traffic, even if it be private traffic. The principle laid down in *Grand Surrey Canal Co. v. Hall* (9 L. J. C.P. 329; 1 Man. & G. 392, 406) applied. *Att.-Gen. v. Esher Linoleum Co.*, 70 L. J. Ch. 808; [1901] 2 Ch. 647; 85 L. T. 414; 50 W. R. 22; 66 J. P. 71—Buckley, J.

Grass Space between Hedge and Metalled Road—Margin—Presumption of Dedication to Public.]—There is no irrebuttable presumption that a strip of land left between a metalled highway and the fence of the adjoining property has been dedicated to public use as part of the highway. *Belmore (Countess) v. Kent County Council*, 70 L. J. Ch. 501; [1901] 1 Ch. 873; 84 L. T. 523; 49 W. R. 459; 65 J. P. 456—Cozens-Hardy, J.

The fact that the margin of such a strip.

adjoining the metalled road has occasionally been walked over by the public is too indefinite a use to form the foundation of a public right or to establish a dedication as part of the highway. *Ib.*

Strip of Roadside Land—Dedication—Presumption—Evidence.—“Once a highway always a highway.”—In the case of a highway running between fences the presumption is that the public right of way extends over the whole space of ground between the fences and is not confined to the hard or metalled portion. *Prima facie* the fences are to be taken as having been originally put up for the purpose of separating land dedicated as highway from land not so dedicated, unless there is something to rebut the presumption. The public right over a highway cannot be released nor lost by mere disuse, and no length of time will preclude the public from resuming the exercise of the right where once enjoyed. *Need v. Hendon Urban Council* (81 L. T. 405) and *Belmore (Countess) v. Kent County Council* (70 L. J. Ch. 501; [1901] 1 Ch. 873) observed upon and distinguished. *Harvey v. Truro Rural Council*, 72 L. J. Ch. 705; [1903] 2 Ch. 638; 89 L. T. 90; 52 W. R. 262; 68 J. P. 51; 1 L. G. R. 758—Joyce, J. And see *Att.-Gen. v. Richmond Corporation*, *ante*, VENDOR AND PURCHASER.

Roadside Waste—Presumption—Evidence.—Fences by the side of a highway are *prima facie* the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space of ground between the fences. But the mere existence of fences on either side of a highway is not conclusive. In order to raise the presumption it must be proved that there is nothing to shew that they were not put up as boundaries of the highway. The plaintiff claimed that a triangular piece of land abutting on and not fenced off from a highway belonged to him:—*Held*, that, in the absence of anything to shew the contrary, it must be assumed from the nature and position of the fence surrounding the land that it had been put up as a boundary of the highway; that the presumption therefore arose that the land formed part of the highway; and, on the evidence, that there was nothing to rebut that presumption. *Offin v. Rochford Rural Council*, 75 L. J. Ch. 348; [1906] 1 Ch. 842; 94 L. T. 669; 54 W. R. 244; 4 L. G. R. 595; 70 J. P. 97—Warrington, J.

Road and Ditch Alongside—Highway—Dedication to Public—Filling up of Ditch—Widening of Highway—Added Roadway—Paving Expenses.—There may be a dedication to the public of a space lying between two fences, including a ditch, although at the time of the dedication the ditch was incapable of being used for the passage of foot-passengers and carriages. *Chorley Corporation v. Nightingale*, 75 L. J. K.B. 793; [1906] 2 K.B. 612; 95 L. T. 443; 70 J. P. 500; 4 L. G. R. 1066—D.

Where an obstruction or excavation which for a time has prevented the user of the whole space of a highway for passage has been removed or disappears, the inclusion of the formerly obstructed or excavated portion is not to be treated as an addition to the highway so as to cast an obligation upon the frontagers of

bearing the cost of making up the road under the concluding portion of section 150 of the Public Health Act, 1875. *Ib.*

The appeal against this decision having been practically abandoned on the appeal by the plaintiffs, the appeal was dismissed upon the ground that as there was evidence to support certain findings of fact the COURT OF APPEAL could not interfere with those findings. *Chorley Corporation v. Nightingale*, 76 L. J. K.B. 1003; [1907] 2 K.B. 637; 97 L. T. 465; 71 J. P. 441; 5 L. G. R. 1114; 23 T. L. R. 651—C.A.

Footway Appointed under Inclosure Award—Subsequent Use for Wheeled Traffic—Nuisance Caused by Wheeled Traffic—Post Erected by Local Authority Pulled Down in Assertion of Right of Way—Action by Local Authority—Non-joinder of Attorney-General.—The plaintiff council, with the object of preventing the use of a narrow passage between buildings in their district, which they alleged was a highway for foot-passengers only, from being used by horses and wheeled vehicles, erected a post in the passage. The defendant, who contended that the way was a highway for all kinds of traffic, pulled down the post, whereupon the plaintiff council brought an action, claiming a declaration that the passage was a highway for foot-passengers only, an injunction, and damages. The passage was originally appointed as a public footpath of the width of 6 ft. by an inclosure award of 1811. It was subsequently encroached on in places by buildings, and so reduced to 4 ft. 4 in. in width at the narrowest point. There was evidence that for the past forty years it had been used to a considerable extent by fishermen with small carts drawn by ponies and donkeys; and that the lord of the manor, in whom the soil was vested, had long regarded it as a highway for all kinds of traffic:—*Held*—first, that the action, being in substance an action for interference with the plaintiffs' property, was maintainable, though the Attorney-General was not joined; secondly, that the use of the passage for wheeled traffic had all along been a public nuisance in view of the obstruction caused to foot-passengers; and that there could not, therefore, have been any dedication of the way as a highway for wheeled traffic, and that it remained a highway for foot-passengers only. *Sheringham Urban Council v. Holsey*, 91 L. T. 225; 2 L. G. R. 744; 68 J. P. 395; 20 T. L. R. 402—Joyce, J.

Obstructions—Embayments—User by Public—Cleaning and Repairing by Highway Authority—Evidence of Dedication.—A building erected in 1869 upon land leased from the Corporation of L., who were the owners of the freehold, was built with recessed windows or embayments on the ground floor, and the main wall of the building on either side projected beyond the embayments and overhung them above the windows, the embayments being some eleven inches deep. In 1899 the tenant of the house reconstructed these windows so as to cause them to project three inches beyond the main wall, and so as to fill up the embayments. During the period from 1869 till the reconstruction in 1899, the paving of the embayments was not distinguishable or marked off from the paving of the footway, and had been cleaned and repaired by the corporation, as the

highway authority, at the same time as the paving of the footway, and the public were in the habit, without any objection by any lessee, of entering upon and passing in and out of the embayments, the windows of which were used for the exhibition of shop goods. Upon an information against the tenant for causing an obstruction in the street by building so as to fill up the embayments,—*Held*, that neither the user by the public nor the fact that the paving of the embayments was not marked off from the paving of the footway and was cleaned and repaired by the corporation as highway authority was any evidence of the dedication of the embayments to the public use as part of the highway, and that therefore no obstruction had been committed. *Piggott v. Goldstraw*, 84 L. T. 94; 65 J. P. 259; 19 Cox C.C. 621—D.

Custom—Promenade.]—In an action brought by an owner in fee for a declaration of title to a strip of land adjoining the town of Fermoy, called "The Barnane Walk," subject to a right of way on foot possessed by the public over the premises, the evidence adduced regarding the character and user of the premises shewed that so long as memory went back it had been devoted to the recreation of the inhabitants of the town, by whom it was used as a promenade:—*Held*, that the Town Commissioners of Fermoy had no right to erect a barrier across the entrance to the walk, and that the owner in fee of the land, subject to the said right of the inhabitants of Fermoy, could not encroach on the walk by granting to his tenants of other lands abutting thereon a right to pass over the walk in carriages, unless such grant were subject to the condition that the use of the inhabitants should not be thereby interfered with, or by converting the walk into a public road to be traversed by all kinds of vehicles. Distinction between the right to use a place as a promenade possessed by the inhabitants of a district, and a right of way over a place on foot possessed by the public. *Abercromby v. Fermoy Town Commissioners*, [1900] 1 Ir. R. 302—C.A.

Building Scheme—Plan—Implied Representation—Power to Vary—Vacant Space Used as Road—Subsequent Building on Road—Dedication to Public—Cul-de-sac.]—The plaintiff purchased a plot of land which was part of an estate laid out under a building scheme. Upon a plan annexed to the conveyance land adjoining the plot purchased was shewn as a vacant space, such space being used as a road, though only as a *cul-de-sac*. The conveyance was made subject to a power to vary the plan and conditions. In an action by the plaintiff to restrain the defendant from building on the vacant space in contravention of the building scheme,—*Held*, that the plan did not amount to a binding representation that the vacant space would always remain such; that the power to vary applied to this vacant space, and that it had not been dedicated to the public. *Whitehouse v. Hugh*, 75 L. J. Ch. 677; [1906] 2 Ch. 283; 95 L. T. 175; 22 T. L. R. 679—C.A. Affirming, 54 W. R. 294—Kekewich, J.

Evidence—Interruption.]—In order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate, an *animus dedicandi* of which the user by the public is evidence

and no more, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. User by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to his personal notice, and the weight to be attached to user depends somewhat upon the nature of the land itself—e.g. whether it is cultivated or is rough and uncultivated land. *Chinnock v. Hartley Wintney Rural Council*, 63 J. P. 327—Cozens-Hardy, J.

User.]—Where the user by the public of a path extended from the earliest memory of a witness aged eighty-seven, with the knowledge and consent of the owner of the path,—*Held*, to be sufficient evidence of an intention by the owner to dedicate the soil of the path to the public. *Leckhampton Quarries Co. v. Ballinger*, 68 J. P. 464; 20 T. L. R. 559—Swinfen Eady, J.

Land Acquired for Statutory Purpose.]—See *Lancashire and Yorkshire Railway v. Davenport, ante*, STATUTE, col. 2498.

4. BOUNDARIES AND FENCES.

Highway—Extent of User.]—Where a highway has been set out or fenced at each side by metes and bounds and afterwards for a length of time, or in course of time, part only of the space so defined has been metalled and used as a road, the public right of passage *prima facie* extends to the whole space set out. In the absence of clear evidence to the contrary, or with slight evidence of user of the land fringing the actual road, by foot-passengers, or for other public purposes connected with the highway, even the owner cannot appropriate or obstruct the more or less waste and useless land adjoining the metalled road; in such cases, however, the proof of original dedication of the whole space rests on the plaintiff, though such proof is sufficiently supplied by the evidence of the original setting-out or fencing of the space in question. But where there is a defined and metalled road edged by an appropriate water-table, the mere fact that adjoining land, more or less waste and useless, is open and accessible from the highway will not, in the absence of other evidence, establish dedication of any land except that which has been actually used for highway purposes, and even slight evidence of user for private purposes, having regard to the character of the place in question, will establish the private right of exclusive occupation. *Att.-Gen. v. Perry*, [1904] 1 Ir. R. 247—C.A.

Right of Passage—Extent of—Roadside Strips—Special Act—Construction.]—Where a highway, though of varying and unequal width, runs between fences, the public right of way *prima facie* extends over the whole space between the fences. The effect of descriptions in special Acts of Parliament affecting interests in land considered. *Locke-King v. Woking Urban Council*, 77 L. T. 790; 62 J. P. 167—Kekewich, J.

Roadside Strip—Waste of Manor—Land between Fences—Presumption—Rebutting Evidence.]—On one side of a metalled road, which was a public highway, was an irregular shaped

piece of land, formerly part of the waste of the manor, beyond which was an ancient hedge inclosing private property. On the other side of the road was another ancient hedge. In 1864, by the licence of the lord of the manor, one of the copyholders dug up and carried away several cartloads of soil from the surface of this piece of land. In 1872, in accordance with the customs of the manor, the lord granted a licence to inclose the land, and admitted the licensee as copyholder thereof. In 1874 the copyholder inclosed the land by erecting a fence by the side of the metalled road at a distance of 15 feet from the centre of the road, the surveyor of the highway board assisting in setting out the line. In 1884 the fence, being decayed, was restored. In 1880 the lord of the manor enfranchised the land. No objection was made by any one to any of these acts until in 1897 the defendants threw down the fence, alleging that it was an obstruction to the highway:—*Held*, that, assuming that there was a *prima facie* presumption that the whole space of land between the two ancient hedges was part of the highway, such presumption was rebutted by the evidence before the Court, and that therefore the land inclosed in 1874 was not part of the highway. *Neeld v. Hendon Urban Council*, 81 L. T. 405; 63 J. P. 724—C.A.

Public Footpath through Lane of Varying Breadth between Fences—Presumption as to Extent of Public Right.—Where a public footpath passes through a lane of irregular shape containing a private occupation-road and of a varying breadth between the fences, there is no presumption, as there is in the case of an ordinary public highway bounded by fences, that the public right extends to the whole space between the fences. The question how far in such cases the public right extends depends upon the evidence in each particular case, and the mere fact that the public in passing through the lane have been accustomed, without objection, to walk upon the greensward or strips of grass land between the fences does not shew that any such presumption exists, or that the public right extends to the fences. *Ford v. Harrow Urban Council*, 88 L. T. 394; 67 J. P. 248; 1 L. G. R. 256—Ridley, J.

Dangerous Part of Highway—Removal of Fence—Misfeasance.—The defendant council, in which the powers of highway surveyors were vested, removed a fence which had been in existence for many years at the side of a dangerous part of a highway, with the intention of erecting posts instead. Before the posts were erected the plaintiff's husband, while driving along the road in the dark, drove into a ditch, which was in flood at this point of the road, and was drowned:—*Held*, that there was evidence of misfeasance on the part of the defendant council in removing the fence, and that the death of the deceased man was attributable to such act of misfeasance, for which therefore the defendants were liable. *Whyler v. Bingham Rural Council*, [1901] 1 Q.B. 45; 64 J. P. 771—C.A.

Lateral Fence.—*Held*, on the evidence, that the presumption was rebutted that a lateral fence of a highway was its boundary, and that the acts of user of a strip adjoining the metalled

part of a highway which had been proved did not amount to a dedication to the public. *Att.-Gen. v. Moorson-Roberts*, 72 J. P. 123—Eve, J.

Defective Fence.—See NUISANCE, col. 1758.

5. OWNERSHIP OF SOIL.

Lane in Town—Evidence as to Streets in other Parts of Town—Acts of Ownership—Maintaining Post in Lane.—The Masters and Fellows of University College, Oxford, were the owners of land on both sides of Logic Lane, Oxford, and for a long period of time had exercised acts of ownership thereover, including the maintenance of a post in the lane to prevent vehicular traffic passing through it. The Corporation of Oxford claimed that the lane was vested in them, and they put in evidence acts done by them with reference to other streets or lanes in the city, claiming to be entitled to do so because under a Royal charter of 1199 the King granted and confirmed to the burgesses of Oxford the vill or town of Oxford:—*Held* (assuming, but without deciding in favour of the corporation that the evidence would be sufficient to establish a presumption from which the Court ought to draw the inference that the corporation owned those streets to which their evidence related), that, in the absence of evidence of acts of ownership by the defendants in the lane in question, and the fact of acts of ownership exercised over a long period of time by the Masters and Fellows of the college, they had established that the soil of the lane and the right to maintain a post therein was vested in the college. *University College, Oxford v. Oxford Corporation*, 68 J. P. 470; 20 T. L. R. 637—Swinfen Eady, J.

Conveyance of Land—Adjoining Highway—Street—Presumption—Ownership ad Medium Filum.—The presumption that a conveyance of land passes one-half of the soil of the adjoining highway extends to streets in towns and is not rebutted by the circumstance that the grantor is the municipal authority entitled to part of the soil of the other half of the street. *White's Charities, In re; Charity Commissioners v. London Corporation*, 67 L. J. Ch. 430; [1898] 1 Ch. 659; 78 L. T. 550; 46 W. R. 479—Romer, J.

Land adjoining Highway—Presumption as to Ownership.—*Prima facie* the presumption is, that a strip of land lying between a highway and the adjoining inclosure, is, as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the inclosure. But if the strip of land communicate with open commons or other larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them. *Grose v. West* (7 Taunt. 39) followed. *Plumbley v. Lock*, 67 J. P. 237; 1 L. G. R. 54—D.

Footway—Trespass—Right of Adjoining Owner—Obstruction—Mandatory Injunction.—Where a sanitary authority has taken a portion of a footway to a street in order to construct an approach to public conveniences, this constitutes a trespass upon the property of the owner of an adjoining house, to whom (in the absence of evidence to the contrary) the soil *usque ad*

medium filum vice belongs, by virtue of a legal presumption; and a mandatory injunction will be granted for the removal of that portion of the approach, inasmuch as the subsoil of the footway does not vest in the sanitary authority under section 44, sub-section 2 of the Public Health (London) Act, 1891. *London and North-Western Railway v. Westminster Corporation*, 71 L. J. Ch. 34; [1902] 1 Ch. 269; 85 L. T. 544; 50 W. R. 268; 66 J. P. 343—Joyce, J.

Lease of Land adjoining New Street—Presumption as to Ownership of Soil usque ad Medium Filum Viæ—Rebutting Circumstances.—The presumption that a conveyance of land abutting on a highway passes the soil of the road *usque ad medium filum* is rebutted by the surrounding circumstances where a new street is made by commissioners under an Act of Parliament which imposes on them duties and obligations inconsistent with the presumption, and where the parcels and plan shew no intention to pass any part of the street. *Mappin v. Liberty*, 72 L. J. Ch. 63; [1903] 1 Ch. 118; 87 L. T. 523; 51 W. R. 264; 67 J. P. 91; 1 L. G. R. 167—Joyce, J.

Semble, the presumption does not apply to building estates or schemes. *Quære*, whether the presumption applies to leases or to grants from the Crown. *Ib.*

Body Incorporated for Building Bridge and Approaches—Presumption of Ownership.—The plaintiffs were incorporated by an Act of 36 Geo. 3, c. xciv., for the purpose of building a bridge over the river Itchen, at Northam, and for making roads communicating therewith. The Act empowered the plaintiffs to set out the lands through which the roads were to pass, and to purchase the lands so set out, and the Act vested the bridge and the roads in them. The bridge and roads were completed in 1800, and the plaintiffs had ever since been in possession of the site and subsoil of the roads. The defendants, as the local authority, made a sewer under one of the roads, and upon an arbitration to assess the compensation payable to the plaintiffs therefor the latter were unable to produce any conveyance to them relating to the soil of that part of the road in which the sewer was laid. The lord of the manor in which the road was situated had joined in the conveyance to the plaintiffs of other portions of the road, but it was admitted that the lord of the manor was not entitled to the subsoil in question. The defendants contended that under the Act it was not necessary for the plaintiffs to purchase the subsoil of the road; that in the absence of any deed of conveyance of the subsoil it ought to be presumed that no such deed had been made; and that, therefore, the subsoil had never been acquired by the plaintiffs:—*Held*, that the whole scheme of the Act was that the plaintiffs should purchase the fee-simple of the lands set out for the roads, and that, having been in possession ever since the road was made, it must be taken that they had acquired the fee-simple in the subsoil and were the owners thereof. *Northam Bridge Co. v. South Stoneham Rural Council*, 71 J. P. 345; 23 T. L. R. 476—C.A.

6. TRESPASS.

User of Highway—Injunction.—An injunction to restrain the defendants from trespassing on

a public highway by using it for the purpose of catching moths by means of lamps and other appliances, and from trespassing on the adjoining land, refused, the trespasses being merely technical and the defendants never threatening or intending to infringe any rights of property and desisting from doing so when requested. *Fielden v. Cox*, 22 T. L. R. 411—Buckley, J.

7. BRIDGE.

Liability to Maintain—Approaches to Bridge—Liability to Repair Highway for 300 feet from Each End of Bridge.—By the common law, where a person cuts through a highway, even although empowered to do so by statute, there is an obligation imposed upon him, even if the statute is silent on the subject, to make a bridge for the passage of the King's subjects and to maintain it for all time. The Statute of Bridges, 1581, which imposes upon the person liable to maintain a bridge the liability to maintain the highway also to the extent of 300 feet from each end of the bridge, applies to a case where the county at large is liable to repair the bridge, and where a party is liable to do so by prescription, or *ratione tenuræ*, but the Court will not extend the operation of the statute to a case where the obligation to make and maintain the bridge is imposed by the statute which enables the interference to be made with the highway. *Hertfordshire County Council v. New River Co.*, 74 L. J. Ch. 49; [1904] 2 Ch. 513; 91 L. T. 796; 53 W. R. 60; 68 J. P. 532; 3 L. G. R. 64; 20 T. L. R. 686—Swinfen Eady, J.

The New River Company's Act, 1606, empowered the corporation to interfere with the highway by making cuts across it, but required them to make and maintain convenient bridges and ways:—*Held*, that the expression "bridge," as used in the statute, did not necessarily mean a bridge with the approaches defined by the Statute of Bridges—namely, a bridge and approach to the extent of 300 feet from each end. *Ib.*

Fences by Side of Raised Approach—Liability to Repair.—The defendants under their statutory powers constructed a canal and crossed a highway, which they carried over their canal by means of a bridge, to which they made a raised approach along the highway and fenced it off from the rest of the highway. The fences had since fallen into disrepair, so as to constitute a public nuisance. By their Act of Parliament passed in 1829, the bridges were vested in the defendants, and section 26 provided that the defendant company should not be liable to repair any part of the road approaching any bridge over the canal after such roads had been first made and used for one year, and then put into good and sufficient repair by the defendant company, beyond or further than the extremity of the wing walls of any such bridge, but nothing therein contained should be construed to exonerate the defendant company from the future repair of all such bridges and the wing walls, ramparts, and side banks thereof:—*Held*, that the Act of Parliament drew a clear distinction between the bridges, as such, which were vested in the defendants, and the approaches to the bridges, which were

not vested in the defendants, and which they were now relieved from all liability to keep in repair, and that the defendants were therefore not liable to repair the fences. *Semble*, the obligation lay on the county council. *Att.-Gen. v. Oxford Canal Navigation*, 72 L. J. Ch. 285; 88 L. T. 250; 51 W. R. 386; 67 J. P. 130; 1 L. G. R. 282—C.A.

Liability of County Council.—A county council are not relieved from their *prima facie* duty of repairing a bridge built before the County Bridges Act, 1803, by proof that occasional repairs have been done to the bridge by the highway authority, or that the bridge was built over an artificial channel to carry a highway already in existence when the channel was formed. *Att.-Gen. v. West Riding of Yorkshire County Council*, 67 J. P. 173; 1 L. G. R. 223—Kekewich, J.

Bridge over Canal—Raised Approaches to Bridge—Liability to Repair Fences.—A canal company liable to repair bridges and “the wing walls ramparts and side banks thereof,” but not liable to repair “roads approaching bridges” beyond the extremity of the wing walls thereof, is not liable to repair the fences to the raised approaches to bridges. *Att.-Gen. v. Oxford Canal Navigation*, 71 L. J. Ch. 660; 87 L. T. 93; 66 J. P. 698—Kekewich, J.

Bridge Tolls.—See TOLL, col. 2522.

Cost of Maintenance.—See LOCAL GOVERNMENT, col. 1320; RAILWAY, col. 2003.

Railway—Bridge over.—See RAILWAY, col. 2002.

Repair of.—See RAILWAY, col. 2002.

Width—Liability of Railway Company.—See RAILWAY, col. 2003.

8. FERRY.

Disturbance—Ferry from Vill to Vill—Change of Circumstances—New Traffic.—A right of ferry from one vill or township to another is a right known to the law. *Cowes Urban Council v. Southampton, Isle of Wight, and South of England Steam Packet Co.*, 74 L. J. K.B. 665; [1905] 2 K.B. 287; 92 L. T. 658; 53 W. R. 602; 69 J. P. 298; 8 L. G. R. 807; 21 T. L. R. 506—Kennedy, J.

Under a lease from the Crown conveying an ancient ferry “across the river Medina between East Cowes and West Cowes” and also two landing-places, the plaintiffs claimed the exclusive right to carry persons between any point on the east bank and any point on the west bank of the river within East Cowes and West Cowes. The ferry had always been worked between two, but not always the same two, defined points:—*Held*, that the lease conveyed a right of ferry between the landing-places only. *Semble*, that East Cowes and West Cowes are not villis in such a sense that a right to ferry from any point in either to any point in the other could be validly granted. *Id.*

The defendants, who carried passengers in

steamers between Cowes and the mainland, conveyed those and other passengers in steam launches between East Cowes and West Cowes, at landing-places distant 230 and 875 yards respectively from the termini of the plaintiffs’ ferry. The defendants’ launches dealt with a traffic which had newly developed and was different from that dealt with by the plaintiffs:—*Held*, that there had been no disturbance of the plaintiffs’ ferry. *Id.*

Bridge.—The owner of a ferry cannot maintain an action for loss of traffic caused by the construction of a bridge. The dictum of BLACKBURN, J., in *Reg. v. Cambrian Railway* (40 L. J. Q.B. 169; L. R. 6 Q.B. 422) is overruled by *Hopkins v. Great Northern Railway* (46 L. J. Q.B. 265; 2 Q.B. D. 224). *Dillon v. Skirrow*, 77 L. J. Ch. 107; [1908] 1 Ch. 41; 97 L. T. 658; 71 J. P. 555; 6 L. G. R. 108; 24 T. L. R. 70—C.A.

9. DRAIN.

Flow of Water from Public Highway over Adjoining Land—Pipe under Road connecting Catchpits—“Drain.”—A highway authority for many years prior to 1868 had kept in an efficient condition a pipe which ran through a bank separating the highway from the defendant’s adjoining land, and which carried through it and discharged on to the land the rain and storm waters running off the highway into catchpits, and thence through the pipe, but there was no defined channel on the land in question along which such water could flow after it had been discharged through the pipe:—*Held*, that the pipe was a drain within the meaning of section 67 of the Highway Act, 1835, and that, owing to the long period during which it had existed, the Court ought to presume a legal origin to a claim of right on the part of the highway authority to discharge the water through the pipe on to the defendant’s land. *Att.-Gen. v. Copeland*, 71 L. J. K.B. 472; [1902] 1 K.B. 690; 86 L. T. 486; 50 W. R. 490; 66 J. P. 420—C.A.

Easement—Dominant and Servient Tenement.—A highway authority can claim no easement to continue the flow of water through such a pipe, on the ground that the public, as occupiers of the road, have for more than the statutory period enjoyed the privilege of pouring the water through it, because a public right of way is not a dominant tenement for the purpose of having such a right attached to it. *Per Lord ALVERSTONE, s.c.*, 70 L. J. K.B. 512; [1901] 2 K.B. 101; 84 L. T. 562; 49 W. R. 489; 65 J. P. 581—Lord Alverstone, C.J.

10. TRAMWAY.

Contract—Clearing Snow from Track.—By agreement between the corporation of M. and a tramway company running tram-cars through the streets it was agreed that “the company shall, under instructions from the city, keep their track free from ice and snow”:—*Held*, that the company were not bound to remove from the streets altogether the snow and ice cleared off the tramway track, and that the

words "under instructions from the city" only applied to the extent of the work to be done, not to the particular method to be adopted for doing it. *Ogston v. Aberdeen District Tramways Co.* (66 L. J. P.C. 1; [1897] A.C. 111) distinguished. *Montreal City v. Montreal Street Railway*, 72 L. J. P.C. 119; [1903] A.C. 482; 89 L. T. 30—P.C. And see *TRAMWAY*.

11. TRAFFIC.

(a) Generally.

Extraordinary Traffic—Person by whose Order the Traffic is Conducted.—The appellant Pethick was the contractor for the erection of a lunatic asylum at Charminster, for the Dorset County Council. He entered into a contract with one Trenchard for the haulage of goods, plant, and materials to the works. These were to be delivered as required by Pethick, and either by carts or trucks drawn by traction-engines, but no route was prescribed by which these goods, plant, and materials were to be brought. This delivery caused extraordinary traffic, and the highway was thereby damaged:—*Held*, that the appellant was not the person by whose order the traffic was conducted within section 23 of the Highways and Locomotives (Amendment) Act, 1878, so as to make him liable for the damage done to the highway by such extraordinary traffic. *Pethick v. Dorset County Council*, 77 L. T. 683—D. Affirmed, 62 J. P. 579—C.A.

— Person "by whose order" Traffic is Conducted.—A purchaser who enters into contracts for the supply of materials to be delivered at a certain price, has no property in the goods until they are delivered, does not employ or pay the persons conveying them, and does not direct or control the mode of carriage or the road by which they are to be carried, is not a person "by whose order" such traffic is conducted within the meaning of section 23 of the Highways and Locomotives Act, 1878, and, such traffic being "extraordinary" in the statutory sense, is not liable for the expenses incurred in repairing the road in consequence of such excessive user. *Kent County Council v. Lord Gerard*, 66 L. J. Q.B. 677; [1897] A.C. 683—H.L. (E.)

— Hospital Building.—The defendants entered into agreements with two firms of contractors for the erection of a temporary hospital and for the alteration of certain existing buildings so as to adapt them for use as a permanent hospital. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads in the district:—*Held*, that the defendants were persons "by or in consequence of whose order" the traffic was conducted within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12, sub-section 1 (c) of the Locomotives Act, 1898, and were therefore liable for extraordinary expenses incurred by the plaintiffs in repairing the roads. *Kent County Council v. Gerard (Lord)* (66 L. J. Q.B. 677; [1897] A.C. 683) considered. *Epsom Urban Council v. London County Council*, 69 L. J. Q.B. 933;

[1900] 2 Q.B. 751; 83 L. T. 284; 64 J. P. 726—Bigham, J.

— House Building.—The defendant, who was building a house in the plaintiffs' district, ordered from a brick company a quantity of bricks to be delivered upon the building land, but gave no instructions as to the mode in which they were to be delivered. The brick company gave an order to a contractor to deliver the bricks by means of a traction-engine and trucks. Damage having been caused to certain roads by the excessive weight of the engine and trucks, an action was brought in the County Court to recover the amount of the expenses of repairing the roads:—*Held*, that the County Court Judge was not wrong, under the circumstances, in coming to the conclusion that the defendant was not a person "by or in consequence of whose order" the traffic had been conducted within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12, sub-section 1 (c) of the Locomotives Act, 1898, and that he was therefore not liable. *Egham Rural Council v. Gordon*, 71 L. J. K.B. 523; [1902] 2 K.B. 120; 87 L. T. 31; 50 W. R. 703; 66 J. P. 759—D.

— Haulage of Timber over Roads—Timber the Natural Produce of Land—Period of Limitation for Recovery of Expenses—"Particular work extending over long period."—The defendants for a period extending over two years bought from the owner of an estate a large quantity of timber which was felled on the estate, and the timber was hauled by the defendants to the railway station over two roads for a distance of between two and three miles on each road, the haulage being done partly by horses and partly by a traction-engine. The quantity of timber so hauled was about 1,500 tons, and the felling and hauling were done under several separate contracts extending over two years. During this period the traffic of the defendants over the roads was unusual traffic, did unusual damage to the roads, and caused unusual expenses in repairing the roads, which were constructed to bear ordinary country traffic, usually agricultural traffic. In an action brought by the highway authority to recover the expenses of repairing the roads, as being "extraordinary expenses" incurred by them in consequence of the "extraordinary traffic" within section 23 of the Highways and Locomotives Act, 1878, the defendants alleged that the timber was the natural produce of the land and that the carting of such produce to the railway station was ordinary traffic and an ordinary user of the road:—*Held*, that, having regard to the total weight carried, the frequency of the loads, and the means by which it was carried, the traffic was "extraordinary traffic" within the meaning of section 23, and the fact that the timber was the natural produce of the land did not, under the circumstances, prevent the traffic from being "extraordinary," or the expenses from being "extraordinary expenses," which the highway authority were entitled to recover:—*Held*, further, that the work was not a "particular work extending over a long period" within the meaning of section 12, sub-section 1 (b) of the Locomotives Act, 1898, and that therefore the sub-section did not give the highway authority the right to

bring their action for the recovery of the whole of the expenses within six months after the completion of the work, and consequently that by the sub-section their claim was barred for any expenses incurred more than twelve months before the commencement of the action. *Norfolk County Council v. Green*, 90 L. T. 451; 68 J. P. 223; 2 L. G. R. 652—Walton, J.

— By a contract made between the defendants and A., the latter agreed to make a reservoir in four calendar months, the contract being silent as to the method or route of haulage for any material that might be required. From May 4 to December 30, 1905, A. employed traction-engines with trucks to haul materials from the railway station to the site of the reservoir, a distance of about one and a quarter miles. In an action against the defendants for the extraordinary expenses incurred in repairing the highways alleged to have been damaged by this extraordinary traffic, a witness for the defendants stated that if during the period in question the same weight of material had been carried by carts no damage would have been caused to the roads; and the defendants' engineer, who was also called by the plaintiffs, said that he thought the contractor would have laid a light railway across the fields for the purpose of the haulage of materials. The County Court Judge having held at the close of the plaintiffs' case that there was no evidence of the traffic having been conducted in the way it was in consequence of the defendants' order, stopped the case:—*Held*, that the County Court Judge was wrong in stopping the case, and that there was a case for the defendants to answer. *Reigate Rural Council v. Sutton District Water Co.*, 71 J. P. 405; 5 L. G. R. 917—D.

— **Haulage of Materials for Repairing Roads—Contract for Twelve Months—"Work extending over a long period"—Limitation of Action.**—The defendants entered into two contracts for the supply to them of flints and sand for the twelve months from March, 1904, to March, 1905. Under these contracts the contractors, by means of traction engines and waggons, hauled a quantity of flints and sand along a road within the plaintiffs' district in such a way as to constitute extraordinary traffic, and to cause damage to the road. The plaintiffs having brought an action to recover the amount of the expenses incurred by them in repairing the road during the whole period of twelve months,—*Held*, that the haulage work done under the contracts was not similar to work done under a "particular building contract," and was not "work extending over a long period" within the meaning of section 12, sub-section 1 (b) of the Locomotives Act, 1898, and that the latter part of the sub-section had therefore no application. *Held*, further, that under the earlier part of the sub-section the plaintiffs were only entitled to recover in respect of so much of damage as was done within the twelve months next before the date of the writ. *Bromley Rural Council v. Croydon Corporation*, 77 L. J. K.B. 335; [1908] 1 K.B. 353; 98 L. T. 165; 72 J. P. 17; 6 L. G. R. 165; 24 T. L. R. 132—C.A.

— **Contributory Negligence of Local Authority—Road out of Repair—Excessive Weight.**—While the fact that a local authority have

been in default in failing to keep a road in proper repair affords no complete answer to a claim by them to recover under section 23 of the Highways and Locomotives Acts (Amendment) Act, 1878, extraordinary expenses incurred in repairing the road in consequence of extraordinary traffic passing over such road, it is an essential element for consideration in estimating the amount of damage caused by such extraordinary traffic. *Hemsworth Rural Council v. Micklethwaite*, 68 J. P. 345; 2 L. G. R. 1084—D.

Everything which bears upon the question of whether there has been excessive weight upon a road has to be taken into consideration in such cases—not only the amount of pressure per square inch of the wheels of the particular vehicles, but also the concentration of that weight upon a comparatively small space. *Ib.*

Per WILLS, J.—In considering whether traffic is extraordinary or not, it is not sufficient to take simply the year to which the question relates and compare other traffic on the road during that year with the traffic complained of; the test is whether the particular traffic has by the usage of trade and of society, and by the varying circumstances applicable to the case, by that time become such as can fairly be called ordinary traffic. *Ib.*

— **Recovery of Expenses—Action Commenced before Repair Effected.**—An action under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover expenses of highway repairs occasioned by extraordinary traffic or excessive weight, brought before the repairs have been executed, is premature and must be dismissed. *Little Hulton Urban Council v. Jackson*, 2 L. G. R. 986; 68 J. P. 451—D.

— **Limitation of Time—Action against Public Authority.**—The Public Authorities Protection Act, 1893, s. 1, limiting to six months the period within which an action must be brought does not apply to an action against a public authority to recover the expenses of extraordinary traffic for which the public authority is liable under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as amended by section 12, sub-section 1 (c) of the Locomotives Act, 1898, where the damage has been done not by the public authority or their servants, but by contractors under a contract to deliver stone to the public authority within their borough in connection with an improvement scheme which is in course of execution by the public authority. *Kent County Council v. Folkestone Corporation*, 74 L. J. K.B. 352; [1905] 1 K.B. 620; 92 L. T. 309; 53 W. R. 371; 69 J. P. 125; 3 L. G. R. 438; 21 T. L. R. 269—C.A.

The period within which such an action must be brought is, by the Locomotives Act, 1898, s. 12, sub-s. 1 (b), twelve months from the date when the damage was done, or six months from the completion of the work under the contract by the contractors to deliver the stone (whichever period is longer), but not six months from the completion of the entire improvement scheme. *Ib.*

— — — **Contract to Lay Water Pipes—Maintenance Clause—“Building contract”**—“Work extending over a long period.”—Section 12, sub-section 1 (b) of the Locomotives Act, 1898, requires proceedings for the recovery of expenses of extraordinary traffic to be commenced within twelve months of the time at which the damage has been done, or, where the damage is the consequence of any particular building contract, or work extending over a long period, not later than six months after the completion of the contract or work. That means that the time begins to run, in the case of a building contract, from the completion of that contract so far as relates to the work causing the damage, and, in the case of work extending over a long period, from the completion of the work causing the damage. *Lancaster Rural Council v. Fisher*, 76 L. J. K.B. 1070; [1907] 2 K.B. 516; 97 L. T. 560; 71 J. P. 401; 5 L. G. R. 1223; 23 T. L. R. 614—C.A.

Where, therefore, an action was, on May 20, 1905, commenced by the road authority to recover expenses incurred by them in repairing certain high roads by reason of the damage caused by extraordinary traffic thereon, such traffic being the haulage of water pipes by the defendants under a contract dated May 26, 1902, with the Manchester Corporation, which contained a maintenance clause under which the entire work was to be at the risk of the defendants for twelve months after the completion of the work, and the greater part of the damage had occurred prior to May 20, 1904, and the haulage had ended in August, 1904, the entire work being completed on October 31, 1904,—*Held*, without deciding whether the contract was a building contract within section 12, sub-section 1 (b) of the Locomotives Act, 1898, or whether the work was work extending over a long period within that section, that in either case the six months had expired, and that the defendants were not liable for such damage as had been occasioned before May 20, 1904. *Ib.*

— — — **Motor Cars—Jurisdiction of County Court.**—Section 17, sub-section 2 of the Locomotives Act, 1898, which enacts that nothing in that Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896, does not prevent the provisions in section 12 of that Act rendering expenses of highway repair occasioned by damage due to extraordinary traffic recoverable by action, instead of by summary procedure, from applying in cases where the vehicles causing the damage are light locomotives. *Rex v. Bath County Court Judge*, 77 L. J. K.B. 402; 6 L. G. R. 160; 72 J. P. 67—D.

— — — **Inspection of Highway Authority's Books.**—The defendant in an action brought by a highway authority to recover expenses in respect of extraordinary traffic upon a particular highway is not entitled to inspect the books of the highway authority to ascertain the amounts expended upon other highways; he is entitled to inspection of the highway authority's books in reference to the highway in question in the action, but he is not entitled to have such inspection made by an engineer. *Bromley Rural Council v. Chittenden*, 70 J. P. 409; 4 L. G. R. 967—C.A.

By-law — Lighting of Vehicles — Responsibility of Owner for Omission of Servant—Reasonableness.—H. was convicted under a by-law which provided that, during the period between one hour after sunset and one hour before sunrise, the owner of every vehicle which should be driven, or be, upon any street or public place should cause to be attached to such vehicle a lamp or lamps, so constructed and placed, and lighted, and kept lighted, as to exhibit an uncoloured light in the direction in which the vehicle was proceeding, and afford adequate means of signalling the approach or position of such vehicle. At the time in question H.'s vehicle was in charge of his servant:—*Held* (Gibson, J., *dissentiente*), that the by-law was not void for making a master liable to be convicted in respect of the *quasi*-criminal omission of his servant, or for unreasonableness, and that H. was rightly convicted. *Heiton v. M'Sweeney*, [1905] 2 Ir. R. 47—K.B. D. And see **MAINTENANCE AND REPAIR**, col. 2733.

(b) *Locomotives.*

Locomotives.—61 & 62 Vict. c. 29 is the *Locomotives Act*, 1898.

Traction-engine and Trucks—Damage to Highway—Neglect of Local Authority to Maintain Road—Nuisance—Injunction.—The defendant was in the habit of driving a traction-engine and trucks laden with stone from quarries in the vicinity over a main road repairable by the county council. The road became very rough, muddy and inconvenient for traffic. The immediate causes of this condition of the road were the defendant's traction traffic, the haulage of stone by carts and horses, the ordinary traffic, and the wetness of the weather; but the primary and chief cause was the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual than they ought to have expected to come upon it. The Attorney-General and the county council brought an action against the defendant claiming a perpetual injunction to restrain him from conducting any traffic upon the road in such a way as by damage thereto or obstruction thereof to cause a public nuisance:—*Held*, that the claim could not be maintained. *Att.-Gen. v. Scott* (No. 2), 74 L. J. K.B. 803; [1905] 2 K.B. 160; 93 L. T. 249; 69 J. P. 109; 3 L. G. R. 272; 21 T. L. R. 211—C.A.

Traction-engine — Damage to Pipes under Highway.—The defendant's traction-engine whilst being driven along a street injured the water and sewer pipes of the plaintiff authority laid beneath the street. The engine was properly constructed, and there was no negligence in its management. The pipes were at a depth beneath the street sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the traction-engine:—*Held*, that the defendant was liable upon the ground that a traction-engine was exceptionally calculated to inflict such damage, and injury had resulted from its use that would not have resulted from ordinary traffic, and that the Locomotive Acts did not restrict the defendant's liability. *Armagh Union v. Bell*, [1900] 2 Ir. R. 371—C.A.

Water Mains under Highway—Main Broken by Traction-engine — Excessive Weight of Engine—Road Authority also Owners of Water Mains.]—A traction-engine, which weighed ten tons and upwards, in passing through a street broke one of the water mains laid under the street. The water mains, which were the property of the plaintiffs, in whom also as the road authority was vested the duty of maintaining the roads, were sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district. There was no negligence or want of skill or care on the part of the owner of the traction-engine or his servants as regards either the construction or user of the engine; nor was there any neglect or default by the plaintiffs in their duty as road authority. The County Court Judge found that the engine by reason of its weight was likely to cause damage to pipes laid as the main in question was constructed and laid, and he held that the damage was in fact caused simply by the great weight of the engine:—*Held*, that, on these facts, the County Court Judge was entitled so to hold, and that the owner of the traction-engine was liable for the damage caused to the water main. *Gas Light and Coke Co. v. St. Mary Abbott's Vestry* (54 L. J. Q.B. 414; 15 Q.B. D. 1) and *Att.-Gen. v. Scott* (74 L. J. K.B. 803; [1905] 2 K.B. 160) considered. *Chichester Corporation v. Foster*, 75 L. J. K.B. 33; [1906] 1 K.B. 167; 93 L. T. 750; 54 W.R. 199; 70 J. P. 73; 4 L. G. R. 205; 22 T. L. R. 18—D.

Damage Caused to Highway—Public Nuisance — Injunction.]—The common-law liability of a person using a locomotive upon a highway to abstain from using it in such a manner as to create a public nuisance upon the highway, which is preserved in terms by section 13 of the Locomotive Act, 1861, still exists, and has not been destroyed nor affected by the provisions of the Highways and Locomotives Amendment Act, 1878, which gives county councils power to recover the expenses caused by extraordinary traffic, nor by the provisions of the Locomotives Act, 1898, which enables county councils to make by-laws prohibiting or restricting the use of locomotives upon highways. *Att.-Gen. v. Scott* (No. 1), 73 L. J. K.B. 196; [1904] 1 K.B. 404; 89 L. T. 726; 68 J. P. 137; 2 L. G. R. 461—C.A.

In an action by the Attorney-General, on the relation of a highway authority, for an injunction to restrain the defendant from using a locomotive upon a highway, so as by damage of the highway to cause a public nuisance, it is no defence that the nuisance was caused by the neglect of the highway authority to fulfil their statutory duty to keep the highway in repair, since the defendant should have availed himself of the provisions of the law enabling him to compel the highway authority to perform their duty. *Ib.*

Conformity with the provisions and regulations made in and under the Locomotive Acts is not a defence to such an action. *Ib.*

Excessive Speed—Motor Car driven to Common Danger of Passengers.]—To convict the driver of a motor car of the offence of driving it at an excessive speed "to the common danger of

passengers" on a highway, contrary to Article IV. section 1 of the Light Locomotives on Highways Order, 1896, it is not necessary to prove that there were passengers on the highway. *Mayhew v. Sutton*, 71 L. J. K.B. 46; 86 L. T. 13; 50 W. R. 216; 20 Cox C.C. 146—D. *And see cols. 2729–2732.*

Light Locomotive — Excessive Speed.]—Article 4 (1) of the Light Locomotives on Highways Order 1896, provides that a person driving or in charge of a light locomotive when used on a highway shall "not drive the light locomotive at any speed greater than is reasonable and proper, having regard to the traffic on the highway":—*Held*, that in order to constitute an offence under this article it is not necessary to prove that any vehicle or person was interrupted, interfered with, incommoded, or affected by the speed at which the light locomotive was being driven. *Smith v. Boon*, 84 L. T. 593; 49 W. R. 480; 65 J. P. 486—D.

Interference with Vehicle or Person.]—Article 4 (1) of the Light Locomotives on Highways Order, 1896, provides that a person driving or in charge of a light locomotive when used on a highway shall "not drive the light locomotive at any speed greater than is reasonable and proper, having regard to the traffic on the highway":—*Held*, that in order to constitute an offence under this article it is not necessary to prove that any vehicle or person was interrupted, interfered with, incommoded, or affected by the speed at which the light locomotive was being driven. *Smith v. Boon*, 84 L. T. 593; 49 W. R. 480; 65 J. P. 486; 19 Cox C.C. 698—D.

Spikes on Driving-wheel of Road Locomotive.]—The driving-wheels of a road locomotive had diagonal cross-bars of not less than three inches in width or more than three-quarters of an inch in thickness. In these cross-bars holes were drilled, into which metal spikes could be fixed, and in frosty weather spikes were fixed into the holes to prevent the wheels from slipping. The spikes, when fixed, projected two inches from the cross-bars, and the effect of using the spikes was to damage the road:—*Held*, that the use of such spikes in the manner stated was a contravention of section 3, sub-section 4 of the Locomotives Amendment (Scotland) Act, 1878, which corresponds to section 28, sub-section 4 of the Highways and Locomotives (Amendment) Act, 1878. *Milne v. MacLennan*, 4 F. (Just. Cas.) 79—Ct. of Justy.

User of Locomotive or Steam-Roller—Licence from County Council.]—A steam-roller crossing one county to perform work in another is, whilst passing over highways in its journey, being "used" within the meaning of section 32 of the Highways and Locomotives (Amendment) Act, 1878, and requires a licence in cases in which the county authority have made by-laws rendering a licence necessary. *London County Council v. Wood*, 66 L. J. Q.B. 712; [1897] 2 Q.B. 482; 77 L. T. 812; 46 W. R. 143; 61 J. P. 567; 18 Cox C.C. 639—D.

Regulation Made under Statutory Powers—Direction that Regulation be Laid before Parliament—Effect of Non-compliance with Direction.]—In a prosecution for a contravention of a regulation made by the Secretary of State for

Scotland (in England, by the Local Government Board) under section 6 of the Locomotives on Highways Act, 1896, it is not incumbent on the prosecution to prove that the regulation has been laid before Parliament as required by sub-section 2 of that section. A prosecution is competent even if the regulation has not been laid before Parliament, in respect that the enactment does not import that presentation to Parliament is a condition precedent of the regulation coming into force. *Hepburn v. Wilson*, 4 F. (Just. Cas.), 18—Ct. of Justy.

Crown—Liability of—Locomotive Driven at Excessive Speed.—See CROWN, col. 665.

(c) Motors.

Motor Cars.—3 Edw. 7 c. 36 is the *Motor Car Act*, 1903.

Lights on Vehicles.—7 Edw. 7 c. 45 is the *Lights on Vehicles Act*, 1907.

Speed Limit in Royal Park.—By rule 4 of the Statutory Rules and Orders, 1904, No. 979: "Cars propelled or drawn by mechanical means shall only be admitted [into Royal parks] subject to such regulations as may from time to time be passed by the Commissioners of his Majesty's Works and Public Buildings, and published by notice exhibited in the parks." These rules were made under the Parks Regulation Act, 1872, and were duly laid before Parliament. The Commissioners published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament:—*Held*, that the regulation contained in the notice was good. *Musgrave v. Kennison*, 92 L. T. 865; 3 L. G. R. 982; 69 J. P. 341; 20 Cox C.C. 874; 21 T. L. R. 600—D.

Offence against Park Regulations—Conviction—Indorsement of Licence.—The offence of exceeding the speed limit for motor cars in Royal parks, fixed under the regulations made under the Parks Regulation Act, 1872, stands in exactly the same position as regards indorsement of the conviction, under the Motor Car Act, 1903, upon the driver's licence, as a conviction for exceeding the speed limit under the Motor Car Act, 1903. Therefore, where a person is convicted of a first offence of driving a motor car in St. James's Park at a speed exceeding that fixed by the park regulations—namely, ten miles an hour—his licence cannot be indorsed, as he comes within the exception in section 4 of the Motor Car Act, 1903. *Rex v. Marsham*; *Chamberlain, Ex parte*, 76 L. J. K.B. 1036; [1907] 2 K.B. 638; 97 L. T. 396; 71 J. P. 445; 5 L. G. R. 998; 23 T. L. R. 629—D.

Excessive Speed—"Opinion of one witness"—**Stop-watch.**—A police sergeant stationed a police constable at a point upon a road a quarter of a mile distant from him. A motor car passed the point at which the constable was stationed, and the latter immediately gave a signal to the sergeant, who at once started a stop-watch which he had, and when the car passed the spot where he was he stopped the watch, and he found that the car had travelled

the quarter of a mile in 31½ seconds, or at the rate of twenty-eight miles an hour. Upon an information charging the motor-car driver with exceeding the legal limit of speed, the stop-watch was produced in Court and not objected to, and the police sergeant alone gave evidence to the above effect. The driver was convicted:—*Held*, that this evidence was not merely the "opinion" of one witness as to the rate of speed within the meaning of section 9, sub-section 1 of the Motor Car Act, 1903, but was evidence of fact—namely, the time taken by the stop-watch in which the car covered the distance. *Planey v. Marks*, 94 L. T. 577; 4 L. G. R. 503; 70 J. P. 216; 21 Cox C.C. 157; 22 T. L. R. 432—D.

Driver—Evidence of Identity—Notice of Intended Prosecution—Sufficiency of.—The defendant was convicted under section 9, sub-section 1 of the Motor Car Act, 1903, of having driven a motor car at a speed exceeding the legal limit of twenty miles an hour. The evidence was to the effect that two constables were stationed at the seventh milestone and two other constables at the third milestone from St. Albans, at which latter milestone the car was stopped, which the defendant was then driving, the chauffeur sitting beside him. The defendant held a licence for driving. The car traversed the distance between the two milestones at the rate of twenty-eight miles an hour. The defendant did not give evidence:—*Held*, that there was evidence that the defendant had driven the car over the whole distance as alleged upon which the Justices could convict him. The notice under section 9, sub-section 2 of the Act, of the intended prosecution, alleged the offence to have been committed between Markyate and St. Albans, two places which were between ten and twenty miles apart. *Held*, that, as the defendant was not misled by it, the notice was valid. *Beresford v. St. Albans (Justices)*, 22 T. L. R. 1—D.

Information for Driving "in a manner dangerous to the public"—Evidence of Excessive Speed.—Upon the hearing of an information under section 1, sub-section 1 of the Motor Car Act, 1903, against the driver of a motor car for having driven the motor-car on a public highway "in a manner which was dangerous to the public," evidence of the speed at which the motor car was driven is admissible and may be taken into consideration by the Justices, although the sub-section makes it a separate and distinct offence for a person to drive a motor car on a public highway "at a speed which is dangerous to the public." *Rex v. Wells* (91 L. T. 98) explained and distinguished. *Hargreaves v. Baldwin*, 93 L. T. 311; 69 J. P. 397; 3 L. G. R. 973; 21 T. L. R. 715—D.

Reckless Driving—Evidence of Offence.—A collector of tolls at a bridge who was rightly or wrongly endeavouring to obtain payment of toll from the driver of a motor car, after being warned to stand clear of the car, took hold of the car while in motion, and after being carried along hanging on to the car for some little time, during which he asked the driver to stop, let go the car, fell, and was injured:—*Held*, that these facts constituted no evidence of reckless driving on the part of the driver within section 1, sub-section 1 of the Motor Car Act, 1903. *Per*

KENNEDY, J.—The sub-section does not strike at driving which is reckless as regards passengers in the car, but at driving which is reckless as regards the public. *Troughton v. Manning*, 92 L. T. 855; 53 W. R. 493; 69 J. P. 207; 3 L. G. R. 548; 21 T. L. R. 408; 20 Cox C.C. 861—D.

— **Conviction for Driving at, "having regard to all the circumstances of the case"**—**Appeal to Quarter Sessions—Evidence as to Traffic Usually on Road—Admissibility.**—The appellant was convicted under section 1, sub-section 4 of the Motor Car Act, 1903, for having driven a motor car on a certain highway at a speed which was dangerous to the public, "having regard to all the circumstances of the case":—*Held*, that at the hearing of an appeal to quarter sessions from such conviction evidence was properly admitted as to the traffic that might reasonably be expected to be on the highway in question. *Elwes v. Hopkins*, 75 L. J. K.B. 450; [1906] 2 K.B. 1; 94 L. T. 547; 70 J. P. 262; 4 L. G. R. 615; 21 Cox C.C. 133—D.

Refusal by Owner of Motor Car to Give Driver's Name or Address—Conviction of Owner—Omission of Allegation that Driver had Committed an Offence.—The conviction of the owner of a motor car under section 1, sub-section 3 of the Motor Car Act, 1903, for refusing to give the name or address of the driver of the car, must allege in terms that an offence has been committed by the driver. It is not, however, a condition precedent to the conviction of the owner under the sub-section that the driver should first have been asked, and should have refused to give, his name or address, or have given a false name or address. *Rex v. Hankey*, 74 L. J. K.B. 922; [1905] 2 K.B. 687; 93 L. T. 107; 54 W. R. 80; 69 J. P. 219; 3 L. G. R. 554; 21 T. L. R. 409; 21 Cox C.C. 1—D. S.P. *Rex v. Chancellor*, 69 J. P. 888; 3 L. G. R. 1012—D.

Driving Motor Bicycle at Speed Dangerous to Public—No Evidence of Actual Traffic.—The defendant was convicted under section 1 of the Motor Car Act, 1903, for having driven a motor bicycle recklessly and at a speed dangerous to the public on the highway in the middle of the day. No evidence was given as to the actual state of traffic at the time. The conviction stated that the defendant was convicted for that he "at Stephen's Green, East, . . . did drive a motor bicycle on the public highway at a speed dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the said highway":—*Held*, that the conviction was good in form, and that it was not necessary that it should appear on its face whether the circumstances taken into consideration by the magistrate were the amount of the traffic which was actually at the time on the highway, or the amount which might reasonably be expected to be there. *Rex v. Dublin Justices*, [1904] 2 Ir. R. 698—K.B. D.

Aiding and Abetting.—*See CRIMINAL LAW*, col. 648.

Smoke Nuisance—Smoke Caused by Excess of Lubricating Oil—Omnibus under Five Tons—Exemption.—A motor omnibus, not exceeding

five tons in weight, which was driven by petrol, emitted quantities of blue-coloured smoke while being driven on a highway. The engine of the omnibus was a smokeless engine, and the smoke emitted was not made by the locomotive engine of the omnibus, but was caused through the negligence of the driver in supplying an excessive quantity of lubricating oil to the working parts of the machinery of the omnibus. The owner of the omnibus was charged with having unlawfully used on the highway a motor omnibus which did not consume, so far as practicable, its own smoke, contrary to the provisions of section 30 of the Highways and Locomotives (Amendment) Act, 1878:—*Held*, that, as the omnibus was so constructed that no smoke or visible vapour could be emitted therefrom except by reason of the driver's negligence, section 1 of the Locomotives on Highways Act, 1896, applied so as to exempt it from the provisions of section 30 of the Highways and Locomotives (Amendment) Act, 1878; and further that, even if section 30 of the Act of 1878 applied, that section did not apply to the mere putting of too much lubricating oil into the working part of the machinery of a properly constructed engine which consumed its own smoke. *Star Omnibus Co. v. Tagg*, 97 L. T. 481; 71 J. P. 352; 5 L. G. R. 808; 23 T. L. R. 488—D.

— **Carelessness of Driver.**—The owner of a motor car was convicted for having used, on a certain highway, his motor car, which did not consume so far as practicable its own smoke, contrary to the provisions of the Highways and Locomotives (Amendment) Act, 1878. The motor car was one which came within section 1 of the Locomotives on Highways Act, 1896. It appeared that, owing to the negligence of the driver of the motor car, smoke issued from it for a few moments:—*Held*, that, as the emission of smoke was due to a temporary cause, no offence had been committed. *Rex v. Wilbraham; Rowcliffe, Ex parte*, 96 L. T. 712; 5 L. G. R. 764; 71 J. P. 386—D.

Appeal to Quarter Sessions—Sum Adjudged to be Paid—Fine and Costs.—A person who is adjudged to pay a fine under the Motor Car Act, 1903, has under section 11, sub-section 2 of the Act the right to appeal where the fine, taken by itself, exceeds 20s., but any costs which he may be ordered to pay cannot be taken into consideration in calculating the amount of the fine for the purpose of ascertaining whether he has the right to appeal. *Rex v. Novis, Ex parte*, 74 L. J. K.B. 633; [1905] 2 K.B. 456; 93 L. T. 534; 69 J. P. 238; 3 L. G. R. 753; 21 Cox C.C. 33; 21 T. L. R. 517—D.

Excessive Speed—Liability of Crown.—*See CROWN*, col. 665.

Obstructing Police.—*See CRIMINAL LAW*, cols. 646-7.

(d) Cyclists.

Bicyclist Travelling at Night without Lamp—Arrest by Police Constable—Assault.—The powers given under section 78 of the Highway Act, 1835, to apprehend without warrant drivers of carriages offending against that Act, are not incorporated in section 85 of the Local Government Act, 1888, which declares bicycles to be

carriages within the Highway Acts, and a police constable cannot arrest a bicyclist who commits the offence under section 85 of riding at night without a lighted lamp, and who refuses to stop when called upon. *Hatton v. Treeby*, 66 L. J. Q.B. 729; [1897] 2 Q.B. 452; 77 L. T. 309; 46 W. R. 6; 61 J. P. 586; 18 Cox C.C. 633—D.

12. MAINTENANCE AND REPAIR.

Failure to Clean out Ditch on Highway—Misfeasance or Nonfeasance.—The non-cleaning out of a ditch by the side of a highway is nonfeasance and not misfeasance. *Irving v. Carlisle Rural Council*, 71 J. P. 212; 5 L. G. R. 776—D.

Liability to Repair Ratione Tenuræ—Repairs Effected by District Council—Recovery of Sums Expended.—The remedy for the recovery of the expenses of placing in repair a highway repairable *ratione tenuræ* from "the person liable to repair," afforded to district councils by section 25, sub-section 2 of the Local Government Act, 1894, is confined to the occupier of the land chargeable with the obligation, and creates no liability in the owner of such land to repay sums so expended. *Cuckfield District Council v. Goring*, 67 L. J. Q.B. 539; [1898] 1 Q.B. 865; 73 L. T. 530; 46 W. R. 541; 62 J. P. 358—D.

Exemption from Highway Rates.—The fact that a person is liable to repair a highway *ratione tenuræ* is not by itself sufficient to entitle him to the exemption from the payment of highway rates given by section 33 of the Highway Act, 1835. To entitle him to the benefit conferred by that section there must also be evidence of the non-payment of rates or other circumstances to shew exemption. *Ferrand v. Bingley Urban Council*, 72 L. J. K.B. 734; [1903] 2 K.B. 445; 89 L. T. 333; 52 W. R. 77; 67 J. P. 370; 1 L. G. R. 845—D.

— Where the occupier of land liable *ratione tenuræ* for the repair and maintenance of a highway is legally exempt from the payment of highway rates under section 33 of the Highway Act, 1835, and the provisions of section 35 of the Highway Act, 1862, are put in force, and the highway converted into a parish highway, such occupier on payment of the composition provided for in that section is discharged from all liability in respect of the payment of highway rates for the repair and maintenance of highways generally in the parish. *Dalton Overseers v. North-Eastern Railway*, 69 L. J. Q.B. 650; [1900] A. C. 345; 82 L. T. 693; 64 J. P. 612—H.L. (E.)

Estoppel—Res Judicata.—An occupier of lands formerly liable for the repair of a certain highway, and on that ground exempt from highway rates, paid the composition provided for in section 35 of the Highway Act, 1862, on the conversion of the highway into a parish highway. He was subsequently rated in respect of his lands for the repair of the highways in his parish. He appealed to quarter sessions on the ground that he was exempt from all contributions towards the repair of the highways, and the rate was quashed:—*Held*, that on an appeal against a subsequent rate made for the same purpose against the same occupier in

respect of the same lands, the rating authority was not estopped from denying that the occupier was entitled to the exemption which he claimed. S.C. C.A. 67 L. J. Q.B. 715; [1898] 2 Q.B. 66; 78 L. T. 524.

Highway rates have not ceased to exist since the passing of the Local Government Act, 1894, ss. 25 and 29. *Ib.*

Main Road—Paved Footways in Urban District—Contribution by County Council.—Where under section 11 of the Local Government Act, 1888, an urban authority undertake the maintenance and repair of the main roads within their district, the liability of the county council of the county to contribute to the costs of such maintenance and repair includes the costs of the maintenance and repair of paved footways at the side of disturnpiked roads, which were constituted main roads by section 13 of the Highways and Locomotives (Amendment) Act, 1878. *In re Warminster Local Board and Wilts County Council* (59 L. J. Q.B. 434; 25 Q.B. D. 450) approved. *In re Burslem Corporation and Staffordshire County Council*, 65 L. J. Q.B. 1; [1896] 1 Q.B. 24—C.A.

Liability of Non-Occupying Owner of Lands.—Section 25, sub-section 2 of the Local Government Act, 1894, which gives a district council power to recover the expenses of placing a highway repairable *ratione tenuræ* in proper repair from the person liable to repair it, makes an alteration in procedure only, and makes no alteration in the onus of direct liability as it previously existed. The expenses, therefore, of placing such a highway in proper repair cannot be recovered from an owner of land who is not in occupation thereof. *Daventry District Council v. Parker*, 69 L. J. Q.B. 105; [1900] 1 Q.B. 1; 81 L. T. 403; 48 W. R. 68; 63 J. P. 708—C.A.

Inclosure of Ancient and Substitution of New Highway—Inquisition ad quod Damnum—Licence of Crown—Legal Origin of Obligation to Repair.—In 1773, upon the taking of an inquisition *ad quod damnum*, it was found that it would not be to the damage or prejudice of the King if licence were granted to the owner of a certain estate to inclose and stop up a highway for carts, carriages, and foot-passengers, if such owner did in his own lands set out in place of it another highway to be for ever thereafter kept in good and sufficient repair by him, his heirs and assigns:—*Held*, that a grant from the Crown may be a legal origin of an obligation to repair *ratione tenuræ*, and that the grant of a licence by the Crown in the terms of the inquisition of 1773 was sufficient to create such an obligation, apart from prescription and apart from the fact that the existing highway had been set out within legal memory. *Further*, that the present owner and occupier of the mansion and of part of the estate, being an assign of the owner referred to in the inquisition, was by reason of his tenure liable under section 25, sub-section 2 of the Local Government Act, 1894, to repay to a district council the expenses incurred in placing the existing highway in proper repair. *Esher and Dittons Urban Council v. Marks*, 71 L. J. K.B. 309; 86 L. T. 222; 50 W. R. 330; 66 J. P. 243—Walton, J.

Highway Repairable by Inhabitants—Substitution—Width not Specified in Indictment—Liability of Highway Authority.]—In 1891, by an order of quarter sessions, a highway was stopped and a new road substituted for it, which was made by the owner, at whose instance the change was made. The certificate stated that the new road was 12 yards wide, but in fact it was 1½ yards or 15 yards wide. The new road having got into bad repair, an order was made under section 10 of the Highways and Locomotives Act, 1878, on the defendants, and an indictment was preferred. After the order the defendants served notices on the frontagers under section 150 of the Public Health Act, 1875. The width of the road was not specified in the indictment, and the jury found that the old road was a highway repairable by the inhabitants at large before 1835:—*Held*, that judgment was rightly entered for the Crown. *Rea v. Crompton Urban Council*, 86 L. T. 762; 66 J. P. 566; 20 Cox C.C. 243—D.

Statutory Liability to Repair—Injury Occasioned by Nonfeasance.]—In construing an Act of Parliament which transfers to a public body the common-law obligations of the inhabitants at large to repair highways, there is a *prima facie* presumption that the Legislature did not by such a transfer intend to impose any greater obligation on the public body than that which existed on the inhabitants at large before such transfer. *Maguire v. Liverpool Corporation*, 74 L. J. K.B. 369; [1905] 1 K.B. 767; 92 L. T. 374; 53 W. R. 449; 69 J. P. 153; 3 L. G. R. 485; 21 T. L. R. 278—C.A.

By the Liverpool Improvement Act, 1846, s. 36, the corporation were constituted surveyors of highways within the borough, with similar powers and liabilities. By section 37 the management and control, and the pavements and materials, were vested in the corporation. By section 38 the corporation were to pave and keep in repair streets within the borough, and by section 58 the corporation were liable to be indicted at common law for the want of repair of any public highway within the borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of the Act. Owing to the non-repair of a public highway the plaintiff's horse was injured:—*Held*, that no action for damages lay by the plaintiff against the corporation. *Ib*.

Hartnall v. Ryde Commissioners (33 L. J. Q.B. 39; 4 B. & S. 361), if and so far as it lays down any general principle applicable to Acts of Parliament of this nature, is to be treated as overruled by *Cowley v. Newmarket Local Board* (62 L. J. Q.B. 65; [1892] A.C. 345). *Ib*.

Non-repair—Accident Due to Condition of Highway—Liability of Highway Authority.]—A highway which the highway authority had paved two years before became dangerous owing to the oozing up through the pavement, in exceptionally hot weather, of pitch from a composition on which the pavement was laid, and owing to the condition of the road an accident occurred resulting in damage to the plaintiff. There was evidence of negligence on the part of the highway authority in failing to

restore the road to a safe condition after the pitch had oozed up, but no evidence, unless the fact that the pitch had oozed up afforded such evidence, of negligence on their part in the original paving of the highway:—*Held*, that there was no evidence of misfeasance as distinguished from nonfeasance on the part of the highway authority, and that they were consequently not liable in damages to the plaintiff. *Shoreditch Borough Council v. Bull* (2 L. G. R. 756) distinguished. *Holloway v. Birmingham Corporation*, 3 L. G. R. 878; 69 J. P. 358—D.

Footbridge—Right of Member of Public to Erect New Bridge—Trespass—Nuisance—Abatement.]—A person who is merely entitled as one of the public to use a highway has no right to enter on the plaintiff's land and construct on it a permanent footbridge because an old footbridge forming part of the highway has been allowed to decay and disappear. Such acts amount to a trespass, and do not fall within the doctrine of abating a nuisance. *Campbell-Davys v. Lloyd*, 70 L. J. Ch. 714; [1901] 2 Ch. 518; 85 L. T. 59; 49 W. R. 710—C.A.

“Driftway, or private carriage or occupation road”—Owners or Occupiers of Road—Person having Right of Way—Order for Maintenance of Road by Parish.]—A person who has a mere right of way over a driftway, or private carriage or occupation road, is not an “occupier” thereof within the meaning of section 36 of the Highway Act, 1862; his consent in writing is therefore not necessary before the Justices can make an order under the section declaring such a road to be a public highway repairable at the expense of the parish. *Rea v. Somers; General Estates Co., Ex parte*, 75 L. J. K.B. 144; [1906] 1 K.B. 326; 94 L. T. 194; 54 W. R. 402; 70 J. P. 37; 4 L. G. R. 161; 22 T. L. R. 137—D.

Fence between Highway Subject to Flood and Adjoining Ditch—Removal by District Council.]—A highway authority erected a fence between a part of a highway subject to flood and a ditch situate alongside. Twenty-two years afterwards the surveyor of the district council then having the management of the highway reported that the fence was in bad repair and not needed except a little at each end, and the council ordered the work recommended by the surveyor to be done. The fence was thereupon removed, it being the intention of the surveyor to erect a short fence at each end and guiding posts between. Three weeks after the removal of the fence, and before the guiding posts had been erected, the highway was flooded, and a person driving along it got into the ditch and was drowned. In an action by his widow to recover damages in respect of his death the jury found for the plaintiff, upon a direction that they ought to do so if the removal of the fence in the manner and circumstances in which it was done was an act which persons reasonably careful that other persons should not suffer damage from their contemplated act would not have done. Judgment having been entered for the plaintiff, —*Held*, that judgment was rightly entered, as the finding of the jury amounted to a finding that there had been an act of misfeasance on the part of the district council, and there was evidence to justify the finding. *Whyler v. Bingham Rural Council*, 70 L. J. K.B. 207; [1901] 1 K.B. 45; 83 L. T. 652; 64 J. P. 771—C.A.

Isle of Wight—Maintenance of Roads in—Dispute—Arbitration.]—In section 12, sub-section 2 of the Local Government Act, 1888 (which relates to the repair and maintenance of roads in the Isle of Wight), the words "arbitration under this Act" mean arbitration under section 62, and do not apply to arbitration under section 11, sub-section 4. This latter section deals with particular disputes arising in a particular way. *Isle of Wight Rural Council and Isle of Wight County Council, In re*, 65 J. P. 87—D.

Subsidence through Working Mines—Measure of Damages—Cost of Restoring Highway to Original Level.]—A highway was vested in the plaintiffs as the urban authority under section 149 of the Public Health Act, 1875. The defendants were owners of mines under the highway. By section 27 of the Highways and Locomotives Act, 1878, the defendants had the right of working and getting the mines, but so, nevertheless, that in such working and getting no damage should be done to the highway. In the course of working and getting their mines they caused a substantial subsidence in the soil of the highway. In an action brought by the plaintiffs to recover damages from the defendants in respect of the subsidence,—*Held*, that the measure of damages was the cost of restoring the highway to its original level. *Wednesbury Corporation v. Lodge Holes Colliery Co.*, 76 L. J. K.B. 68; [1907] 1 K.B. 78; 95 L. T. 815; 71 J. P. 73; 5 L. G. R. 43; 23 T. L. R. 80—C.A.

Subsidence of Highway—Liability of Sanitary Authority.]—*See* LOCAL GOVERNMENT, col. 1366.

Sea Wall—Esplanade—Works Necessary for Protection of Road—Annual Payment.]—A local authority under an obligation to keep up a road is chargeable with the cost of works necessary for the preservation of the road, even though they may not actually form part of it, such as a sea wall and groynes necessary to prevent a road running along the sea shore from being periodically injured by inroads of the sea. The fact that a footpath along the top of such sea wall is, besides being part of the highway, used as a promenade or esplanade for the purposes of pleasure, does not affect the liability to repair. The words "annual payment towards the costs of maintenance and repair" in section 11, sub-section 2 of the Local Government Act, 1888, means a payment to be made annually in respect of the expenditure of the particular year, not a fixed sum to be arrived at by taking the average expenditure over a series of years. *Sandgate Urban Council v. Kent County Council*, 79 L. T. 425—H.L. (E.)

Tarmac Paving—Money Spent on—Motor-car Trials—Bona Fide Exercise of Statutory Powers—Ultra Vires.]—The Court refused to order a writ of *certiorari* to issue to bring up and quash a resolution of the Corporation of Brighton for the payment of certain sums of money for paving a road in the borough with tarmac, the expenditure not having been incurred solely for the purpose of enabling the motor-car speed-trials of the Automobile Club to be held on the road, but having been incurred in good faith for the purpose of improving the road for the benefit of the inhabitants of the borough, though the

occasion of the alteration of the surface of the road was the meeting of the club. *Rea v. Brighton Corporation*, 96 L. T. 762; 5 L. G. R. 584; 71 J. P. 265; 23 T. L. R. 440—C.A.

Stile—Non-repair of.]—The fact that a person has done repairs to a way may be some evidence of liability to repair the way *ratione tenurae*. Where, however, a person and his predecessors in title have done slight repairs to a stile upon an immemorial public highway running through a farm of which such person is the yearly tenant, but there is no evidence that the parish has ever repaired or has ever required such person or any prior occupier to repair, and it is quite consistent with such small repairs as have been done by such person that they were done by him for his own benefit, there is no sufficient evidence of liability of such person to repair the stile *ratione tenurae*. It is not as if the repairs had been done outside such person's own land, or as if he had done the repairs under threat of legal proceedings, or had admitted that in doing them he was discharging a legal obligation. *Rundle v. Hearle*, 67 L. J. Q.B. 741; [1898] 2 Q.B. 83; 78 L. T. 561; 46 W.R. 619—D.

It is doubtful whether an action will lie at the instance of a private person against one liable *ratione tenurae* to repair. *Id.*

Footways Repairable by Frontagers—Effect of General on Previous Special Act.]—Section 11 of the Local Government Act, 1888, which casts the entire maintenance of main roads upon the county council, does not repeal section 53 of the Huddersfield Improvement Act, 1871, which empowers the corporation to call upon frontagers to make and repair footways. *Ashton-under-Lyne Corporation v. Pugh* (67 L. J. Q.B. 32) followed. *Lodge v. Huddersfield Corporation* (No. 1), 67 L. J. Q.B. 568; [1898] 1 Q.B. 847; 78 L. T. 422; 62 J. P. 387—D. Affirmed on facts, 67 L. J. Q.B. 571; [1898] 1 Q.B. 859; 62 J. P. 515—C.A.

Retaining Walls—Liability to Repair—County Council.]—A County Council is not, by virtue of the Local Government Act, 1888, under any direct liability to repair retaining walls by the side of a main road. *Att.-Gen. v. Staffordshire County Council*, 74 L. J. Ch. 153; [1905] 1 Ch. 386; 92 L. T. 288; 53 W. R. 312; 69 J. P. 97; 3 L. G. R. 379; 21 T. L. R. 139—Joyce, J.

The liability of a road authority to repair a highway, whether at common law or by statute, is general; and the Court will not, either by declaration or mandatory order or otherwise, prescribe what particular works or repairs are necessary, or whether any particular work or repairs be necessary for the maintenance of the road. *Quare*, whether there be any legal liability to repair a highway upon any one other than the inhabitants of the parish. *Id.*

Surface of Road—Obligation of Company to Keep in Good Condition—Structural Repair—Neglect of Duty—Damages for Accident.]—The obligation of a tramway company under section 28 of the Tramways Act, 1870, to keep in good condition and repair, to the satisfaction of the road authority, so much of the roadway as is in the Act defined, involves the duty, by temporary

expedients or permanent work, of providing against temporary and recurrent sources of danger to traffic; and failure to discharge this obligation will make the company liable in damages to any person injured by such neglect. *Dublin United Tramways Co. v. Fitzgerald*, 72 L. J. P.C. 52; [1903] A.C. 99; 87 L. T. 532; 51 W. R. 321; 67 J. P. 229; 1 L. G. R. 386—H.L. (Ir.)

Standard of Maintenance—Nuisance Primarily Due to Default of Road Authority.—The defendant conducted traffic throughout a considerable period by means of a traction-engine over a main road repairable by the plaintiff council, and the road got into a condition so bad as to amount to a nuisance. The condition of the road was not caused primarily by the defendant's traffic, but, though that traffic with other traffic and the state of the weather were contributory causes, primarily by the failure of the plaintiff council to maintain the road in a fit state to bear the traffic over it, including the defendant's traction traffic, which was not more unusual or onerous than the council ought to have expected to come on it. The plaintiff council ultimately reconstructed the road in such a way that there was no appreciable risk, if ordinary care were exercised by the council, that in the future the defendant's traffic would cut up the road or reduce it to a condition such as to constitute a nuisance:—*Held*, that, under these circumstances, an injunction ought not to be granted, in an action brought by the Attorney-General on the relation of the plaintiff council and by the plaintiff council, to restrain the defendant from conducting traffic upon the road in such a way as to cause a public nuisance. *Att.-Gen. v. Scott* (No. 2), 2 L. G. R. 1113; 68 J. P. 502; 20 T. L. R. 630—Jelf, J.

Obtaining Materials for Repairs—River Bed—River Running through Inclosed Land.—The provisions of section 51 of the Highway Act, 1835, empowering a highway authority to obtain road-making materials in any "waste land or common ground, river or brook," without a Justices' licence, do not extend to the gathering of materials from the bed of a river running through inclosed land. *Allison v. Cumberland County Council*, 97 L. T. 187; 5 L. G. R. 871; 71 J. P. 398; 23 T. L. R. 606—D.

— "Waste land or common ground"—**Welsh Mountain—Sheep Walks.**—The plaintiff, claiming to be the owner of a mountain in Wales, sought to restrain the defendant council from obtaining stone for highway repair from it. The defendants claimed the right to obtain the stone as from "waste land or common ground" under section 51 of the Highway Act, 1835, and also disputed the plaintiff's title. The plaintiff proved no paper title to the land, but proved that she was the owner of certain farms adjoining the mountain, and had long been accustomed to let to the tenants of these farms rights of grazing sheep on the mountain, a particular part of the mountain being appropriated for this purpose to each farm. There was no evidence of any title to the soil of the mountain in the Crown or in any person other than the plaintiff:—*Held*, that the plaintiff had sufficiently proved ownership of the mountain to sustain the action, and that the mountain was not waste land or common ground. *Scott v.*

Towyn Rural Council, 5 L. G. R. 1050—Lord Alverstone, C.J.

Licence to Surveyor to take Materials from Inclosed Lands for Repair of Highways—Excepted Lands—Jurisdiction of Justice.—By the joint effect of sections 53 and 54 of the Highway Act, 1835, the Justices may license the surveyor of highways to take materials for the repair of the highways "at such time or times as to such Justices shall seem proper" from the inclosed lands of any person, "such lands . . . not being a . . . park." On an application by a surveyor of highways for a licence under those sections the Justices made an order authorising him to take materials for a period of five years from certain inclosed land which in the opinion of the High Court was a park:—*Held*, that the question whether the land was a park or not was one which was preliminary to the exercise of the jurisdiction given by the statute, and that the Justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter. *Rea v. Bradford*, 77 L. J. K.B. 475; [1908] 1 K.B. 365; 72 J. P. 61—D.

— **Time for which Licence may be Granted.**—A licence, to be valid, must not purport to operate for a longer period than is necessary for the execution of the repairs, and the licence, being for a period of five years without reference to the necessities existing at the date of the grant, was bad. *Ib.*

Surveyor Supplying Team Work—Member of District Council—Surveyor or not.—By the Highways Act, 1835, s. 46, the surveyor of the parish may contract for the purchasing, getting, and carrying of materials required for the repairing of the highways, but he may not share or have any interest in any such contract without the licence in writing of two Justices of the peace previously obtained by him, under certain penalties. By the Public Health Act, 1875, s. 144, urban authorities have the powers of surveyors of highways and of parish vestries under the Highways Acts. By the Local Government Act, 1894, s. 25, the district council of every rural district "... shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sections 144 to 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district, and of the council thereof, in like manner as in the case of an urban district and an urban authority." And by section 46 of that Act a person is not to be disqualified from being a member of the council "by reason of being interested . . . in the transport of materials for the repair of roads or bridges in his own immediate neighbourhood." The respondent H. was a member of the Saddleworth District Council, and in March, 1897, he on his own account let to hire a team to be used in repairing a highway within the district of the council of which he was a member, and he received from the council payment in respect thereof. He did not before letting for hire as aforesaid obtain any licence in writing from two Justices of the peace. He was thereupon summoned before the magistrates for the penalties contained in the Highways Act, 1835, s. 46, who, however, dismissed the summons:—*Held*, that the magistrates were right. *Burkley v. Hanson*,

77 L. T. 664; 62 J. P. 119; 18 Cox C.C. 688—D.

Restoration of Highway after Laying Sewer—Misfeasance of Local Authority—Negligence.]—The Metropolitan Vestry of S., the predecessors of the defendant council, being both highway authority and sewer authority, laid a sewer in a highway and negligently filled in the trench in such a way that, though made temporarily fit for traffic, the part of the highway where the trench had been dug became dangerous in a few days. A cab-driver driving along the side of the road which had thus become dangerous, which was his near side, crossed to his off side in order to avoid the danger, and drove against a heap of soil which had been placed on the latter side of the highway without the knowledge or consent of the vestry, but of the existence of which they were, by their officers, aware; and the cab overturned. *Held*—first, that the vestry, having negligently failed to put the highway, which they had themselves rendered impassable, into a proper condition of permanent repair, were in the position of misfeasors, and not of mere non-feasors, with reference to the consequences of their dealings with the road; secondly, that the accident was such a consequence of the vestry's misfeasance as to render them and their successors liable in damages to a person injured by the accident. *Semble*, that the vestry and their successors would have been equally liable had the vestry not been aware of the existence of the heap of soil. *Bull v. Shoreditch Borough*, 67 J. P. 37; 1 L. G. R. 81—C.A.

Non-repair — Indictment — Rural District Council.]—Proceedings were taken before Justices under section 19 of the Highway Act, 1862, in respect of the non-repair of a certain highway, and upon liability being denied by the defendant council the Justices made an order that an indictment should be preferred against them for such non-repair: *Held*, that neither under the Highway Acts of 1835 or 1862 had the Justices power to make such an order, and that the indictment should be quashed. *Semble*, where Justices make an order that an indictment shall be preferred the order should be set out in the indictment. *Reg. v. Biggleswade Rural Council*, 64 J. P. 442—Wright, J.

— **Order for Repair by County Council** “to the satisfaction of county surveyor.”]—The fact that a county council in making an order on a highway authority under section 10 of the Highways and Locomotives (Amendment) Act, 1878, requires the highway to be repaired “to the satisfaction of the county surveyor” does not vitiate an indictment following thereon against the highway authority for the non-repair of the highway. *Reg. v. Southport Corporation*, 65 J. P. 184—Bucknill, J.

Bridge and Turnpike Tolls.]—See TOLLS, cols. 2522, 2523.

Charitable Object—Road taken over by Local Authority.]—See CHARITY, col. 237.

Contract with Road Authority.]—See TRAMWAY, col. 2563.

Road Crossing Railway.]—See RAILWAY, col. 2003.

13. HIGHWAY AUTHORITY.

Surveyor of Highways—Period of Office—Power to Bind Successor—Agreement for Construction of Bridge.]—The period of office of the surveyor of highways appointed under section 6 of the Highway Act, 1835, is limited to one year. By section 3 of the Highways and Bridges Act, 1891, power is given to the council of any administrative county and any highway authority to make agreements for the construction, alteration, or improvement of any highway or bridge wholly or partly situate within the jurisdiction of any one of the parties to the agreement, and for defraying expenses incurred in pursuance of that section. Where the highway authority is the surveyor of highways, *Held*, that the power to make such agreements is not limited to cases where the construction, alteration, or improvement is to be completed within the surveyor's year of office. *Hertfordshire County Council v. Barnet Rural Council*, 71 L. J. K.B. 610; [1902] 2 K.B. 48; 86 L. T. 880; 50 W. R. 582; 66 J. P. 531—C.A.

14. OBSTRUCTION OF HIGHWAY.

Interference with Road—Duty of Public Body Authorising Interference towards Public.]—*Per PALLES, C.B.*: Where a body, having lawful authority, authorises an interference with a public road, or authorises works which in the natural course of things will result in such an interference, there is a duty cast upon that body to use due care to prevent danger being caused to the public using the road, by the execution of the works authorised; that that duty extends to seeing that the workmen actively engaged are careful; and that such body cannot relieve itself of the obligation by delegating it to another who fails to perform it. *Clements v. Tyrone County Council*, [1905] 2 Ir. R. 415—K.B. D. Affirmed, [1905] 2 Ir. R. 542—C.A.

Right of Action—Particular Damage—Dedication—Dedication of Substituted Way—Dedication by Limited Owner.]—Between 1884 and 1850 the sublessee for a term of years of certain lands, over which there had been in existence prior to 1805 a public right of way, substituted therefor another way, with a bridge and path. In 1874 the sublessee surrendered his interest to his immediate landlord, who held under a fee-farm grant dating from 1857. The fee-farm grantee continued in occupation of the lands for two years, when he re-let them to the defendant. During the two years of his occupation the fee-farm grantee acquiesced in the public user of the substituted way, and at the trial the jury found that he had acquiesced in and adopted the dedication to the public of the right of way as so altered. There was no evidence of dedication or of acquiescence in the substituted way by the owner in fee. The plaintiff, a small farmer, had been using said way as a means of access from his farm to the public road leading to the market town, about four miles distant. The defendant obstructed the way by removing the bridge and erecting a fence. The plaintiff was thereby forced to take a longer and more circuitous route when going to the

market town, which he required to do about once a week, and was obliged on some occasions to pay for a car.—*Held*, that it was competent to the grantee in a fee-farm grant to dedicate a public right of way, and that, under the circumstances of the case, the acquiescence of the fee-farm grantee in the act of his former tenant amounted to a dedication to the public of the substituted way, binding upon his interest, and all claiming under him, including the defendant. *Held*, further (KENNY, J., dissenting), that the evidence was sufficient to sustain the finding of the jury that the plaintiff had suffered particular damage beyond that which was common to the public at large, and that the verdict for damages found for the plaintiff by the jury at the trial could not be disturbed. *Smith v. Wilson*, [1903] 2 Ir. R. 45—K.B. D.

Damage Arising Therefrom—Tramway—Reconstruction under Statutory Powers.—In converting a tramway system from horse traction to electrical driving power, the alterations were carried out in such a way as to be an obstruction to a highway. The alterations were so carried out with a view to maintain a continuous service of tramcars on a double set of rails, but there was no obligation to do so. The statute under which the alterations were made contained a clause, "Subject to the provisions of this Act, the council, for the purpose of working the tramways by electrical power . . . may exercise the following powers (that is to say): . . . they may reconstruct or make such alterations of the tramways, and may execute all such works on or in connexion therewith in over or under the streets or roads in which the same are laid, as may be necessary for adapting the same to be so worked":—*Held*, that the clause did not authorise the obstruction to the highway, inasmuch as the works constructed were not works necessary for adapting the tramways to be worked by electricity. *Tilling, Lim. v. Dick Kerr & Co.*, 74 L. J. K.B. 359; [1905] 1 K.B. 562; 92 L. T. 731; 53 W. R. 380; 69 J. P. 172; 3 L. G. R. 369; 21 T. L. R. 281—Warrington, J.

Coffee Stall—Right of Passage—Finding of Jury—Traffic in Street not Appreciably Interfered with—Verdict of "Guilty" Entered—Verdict set Aside.—The defendant was indicted for a nuisance by placing and keeping a coffee stall upon a public carriage-way, and so obstructing the same. The coffee stall was placed as a permanent structure in a space between a public convenience and a fountain, nearly in the middle of one of the main streets of a certain town. The jury found that "the coffee stall was an obstruction, but that it did not appreciably interfere with the traffic in the street." The Judge directed a verdict of "guilty" to be entered:—*Held*, that the conviction must be quashed, as the finding of the jury, in the absence of a finding that the coffee stall was a nuisance, was insufficient to support a verdict of "guilty." *Rex v. Bartholomew*, 77 L. J. K.B. 275; [1908] 1 K.B. 554; 72 J. P. 79; 6 L. G. R. 262—C.C.R.

Fowl Straying on Highway Causing Injury to Cyclist—Fowl Frightened by Dog of Third Person—Liability of Owner of Fowl.—Some fowls belonging to a person whose premises adjoined a highway strayed on to the highway.

Having been frightened by the dog of a third person, one of them flew into the spokes of a wheel of a bicycle passing along the highway, causing the cyclist to be upset and the bicycle to be damaged:—*Held*, that the owner of the fowl was not liable in damages, as the proximate cause of the injury was the tortious act of a third person's animal; and, further, that there was no evidence that the presence of fowls on the highway constituted a danger to passers-by. *Hadwell v. Righton*, 76 L. J. K.B. 891; [1907] 2 K.B. 345; 97 L. T. 133; 5 L. G. R. 881; 71 J. P. 499; 23 T. L. R. 548—D.

Semble (per BRAY, J.), that it is not an unreasonable and improper user of a highway for the owner of premises adjacent thereto to allow his fowls to stray on to the highway. *Ib.*

Cox v. Burbidge (32 L. J. C.P. 89; 13 C. B. (N.S.) 430) followed. *Ib.*

"Leaving" Carriage on Highway so as to Obstruct it.—The driver of a carriage may be convicted under section 78 of the Highway Act, 1835, of leaving the carriage on the highway so as to obstruct the passage thereof, notwithstanding that the carriage was not at the time in question left unattended. But the fact that there was some one in attendance may be material in determining whether in fact the passage of the highway was obstructed. *Hinde v. Evans*, 96 L. T. 20; 4 L. G. R. 1152; 70 J. P. 548; 21 Cox C.C. 331—D.

Rubble—Laying, to the "interruption and personal danger" of Persons on Highway—Separate Offences—Form of Conviction.—Section 72 of the Highway Act, 1835, in prohibiting the laying of anything upon a highway "to the injury of such highway, or to the injury, interruption or personal danger of any person travelling thereon," has created not four separate offences but only two—namely, (a) the doing of something to the injury of the highway, and (b) the doing of something to the injury, interruption, or personal danger of any person travelling thereon. Therefore a conviction of a person for having laid rubble on a highway "to the interruption and personal danger of any person travelling thereon" is not bad for duplicity. *Smith v. Perry*, 75 L. J. K.B. 124; [1906] 1 K.B. 262; 94 L. T. 140; 70 J. P. 93; 4 L. G. R. 224; 22 T. L. R. 158; 21 Cox C.C. 98—D.

Rubbish in Road—Liability of Local Authority.—The appellants, who were both the sanitary and the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench and opened the road for traffic. About a week afterwards the respondent was driving along the road in a cab at night. The driver found that the part of the road where the trench had been opened was soft, and crossed on to the other side, and ran into a heap of rubbish, with the result that the cab was overturned and the respondent was injured. The rubbish had been wrongfully deposited in the road without the permission of the appellants, but they knew that it was there, and had not lighted or fenced it. The jury found that the part of the road where the trench had been opened had been properly filled

in, but had been rendered soft by subsequent rain, and was dangerous to traffic at the time of the accident:—*Held*, that the appellants were liable for the injury. *Shoreditch Corporation v. Bull*, 90 L. T. 210; 68 J. P. 415; 2 L. G. R. 756; 20 T. L. R. 254—H.L. (E.)

Timber—Order for Removal of, from Highway—Omission of Word “Timber” from Operative Part of Section.]—Under section 73 of the Highway Act, 1835, an order may be made for the removal from a highway of any timber which has been laid thereon so as to be a nuisance, notwithstanding that the word “timber” (which is referred to in the first part of the section) is omitted in the operative part. *Dixon v. Chester*, 70 J. P. 380; 4 L. G. R. 1127; 22 T. L. R. 501—D.

Trees—Cutting Near—Timber Trees—Yew.]—The appellant Bullen was summoned under section 65 of the Highway Act, 1835, for that a yew-tree growing on his lands obstructed a carriage-way, and the magistrates made an order for its removal. It was contended on his behalf that, as no order had been made for widening the road, under section 66 he could not be ordered to remove it, even if it was an obstruction. But, even if they could order its removal, they could not do so in July, when they made the order:—*Held*, that the order was right, and that section 66 did not apply to such a case as this at all. *Bullen v. Wakely*, 77 L. T. 689; 62 J. P. 166; 18 Cox C.C. 692—D.

User for Loading and Unloading Goods—Temporary Appropriation—Injunction.]—The primary object of a public street is the free passage of the public, and anything which obstructs that free passage without reasonable necessity is a nuisance and may be restrained. In a case of doubt the right of a private individual to carry on his business by means of the street must give way to the public right of using the street. *Att.-Gen. v. Brighton and Hove Co-operative Supply Association*, 69 L. J. Ch. 204; [1900] 1 Ch. 276; 81 L. T. 762; 48 W. R. 314—C.A.

Per VAUGHAN WILLIAMS, L.J.—The mere fact that the width of a roadway is temporarily reduced by the user of it by an individual does not necessarily make that user unlawful or the obstruction caused an unlawful obstruction. To ascertain whether a particular user is reasonable and lawful it is necessary to consider all the facts of the case. *Ib.*

The appropriation by a tradesman of half of a highway for several hours in each day for the purpose of loading and unloading goods to and from his vans,—*Held*, not to be a reasonable user of the highway. *Ib.*

Inappreciability—Rule as to—Resolution of County Council—Action by Attorney-General on Behalf of Public.]—A county council cannot legally sanction the erection of a permanent structure, not authorised by the necessities of the public service, along or upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction. When the soil has been taken for county purposes everything between the road fences is *prima facie* part of the public highway.

An obstruction placed upon a county road can only be looked on as inappreciable when the obstruction is temporary in character, or where it is so small in extent that it could not, under any circumstances, impede traffic. *Att.-Gen. v. Mayo County Council*, [1902] 1 Ir. R. 13—M.R.

Indictment.]—See CRIMINAL LAW, col. 644.

And see METROPOLIS, col. 1665.

15. DIVERSION OF HIGHWAY.

Notices at Each End of Diverted Highway—Period of Publication.]—It is not a condition precedent to the granting of a certificate by Justices under section 85 of the Highway Act, 1835, that, before an order can be made for the diversion of a highway, the notices directed by that section to be affixed at each end of the highway proposed to be diverted should be so affixed for four consecutive weeks—that is, for the full period of twenty-eight days, after the Justices have viewed such highway. *Rev. v. Kent Justices*, 74 L. J. K.B. 50; [1905] 1 K.B. 378; 92 L. T. 132; 53 W. R. 183; 69 J. P. 69; 3 L. G. R. 261; 21 T. L. R. 95—C.A.

Certificate of Justices—Validity.]—The Justices who give the certificate need not be the Justices to whom the original application was made. *Ib.*

Consent of Landowners.]—The consent in writing of the owners of the land through which the diverted highway is to pass need not be recited in the certificate. *Ib.*

Substitution of One Highway for Another—Statutory Requirements—Absence of Evidence—Presumption from Long User.]—By a resolution of a vestry in the year 1842, a new highway was substituted for an older one which was repairable by the inhabitants at large. The old highway was thereupon closed, and the substituted one was continuously used by the public:—*Held*, that a Court of summary jurisdiction was entitled, by reason of the long user of the new highway, to presume that the requirements of sections 84 to 92 of the Highway Act, 1835, had been duly complied with, and to find that it was a highway repairable by the inhabitants at large. *Leigh Urban Council v. King*, 70 L. J. K.B. 313; [1901] 1 K.B. 747; 83 L. T. 777; 65 J. P. 243—D.

Diverting and Stopping up—Plan—“Ad-measurement.”]—The plan attached to a certificate of Justices as to the stopping up and diversion of a highway consisted of a sheet of the Ordnance Survey with a scale printed thereon, on which the old and proposed new highway was indicated in colours. The width thereof was stated on the plan in writing, but not the length, which could only be ascertained by measuring the highway so indicated and by reference to the scale:—*Held*, that the plan did not describe the highway by “ad-measurement” as required by section 85 of the Highway Act, 1835. *Rev. v. Surrey Justices; Locke-King, Ex parte*, 77 L. J. K.B. 167; [1908] 1 K.B. 374; 98 L. T. 42; 72 J. P. 53; 6 L. G. R. 98—D.

Justices’ Certificate—Refusal of Quarter Ses-

sions to Enrol—*Mandamus*.]—*Held*, also, that where quarter sessions have decided as to the sufficiency of the plan, the Court will not interfere by *mandamus* to compel them to enrol the certificate. *Ib*.

Proposed New Road — Appeal to Quarter Sessions from Justices' Certificate — Proposed Road found to be more Commodious to Public, but that Appellant would be Injured & Aggrieved.]—Where under section 89 of the Highway Act, 1835, the jury find that the party appealing to quarter sessions would be injured or aggrieved by a proposed new highway, the appeal must be allowed, notwithstanding the fact that the jury may also have found that the proposed new highway would be more commodious to the public than the existing highway. *Walker v. York Corporation*, 75 L. J. K.B. 413; [1906] 1 K.B. 724; 94 L. T. 744; 54 W. R. 493; 4 L. G. R. 524; 70 J. P. 270; 22 T. L. R. 456—D. *And see METROPOLIS.*

16. OTHER MATTERS.

Damage to Gas-Pipes—Explosion.]—*See NEGLIGENCE*, col. 1741.

Expenses—Recovery of, from Local Authority—Time.]—*See PUBLIC AUTHORITIES PROTECTION*, col. 1993.

Expenses not Exceeding 250l.—Recovery of—High Court or County Court.]—*See Chesterfield Rural Council v. Newton*, *ante*, *COSTS*, cols. 576-7.

Local Authority—Liability of.]—*See NEGLIGENCE*, col. 1741.

Tramways.]—*See TRAMWAY.*

Underground Telegraph Wires.]—*See TELEGRAPH*, cols. 2511-2.

WEIGHTS AND MEASURES.

Statute.]—4 Edw. 7 c. 28 is the *Weights and Measures Act*, 1904.

Disc Affixed to Arm of Scale — Weight of Article Sold Less than that Indicated—"False or unjust" Scale.]—The respondents, wholesale tea merchants, had upon their premises two beam scales in use for weighing tea. One scale had a metal disc affixed by wire to the arm of the scale on which the scoop for receiving the tea was placed, the effect being that the quantity of tea required to turn the scale with a weight of $\frac{1}{2}$ lb. in the opposite pan was less than $\frac{1}{2}$ lb. by the weight of the disc—that is, by 2 or 2½ drachms. The weight of the disc was as nearly as possible equivalent to the weight of the paper bag in which each quantity of the tea was to be placed. The second scale had a paper bag placed underneath the scoop in which the tea was weighed. This had the same effect as the disc. The respondents weighed out tea in this manner only for customers who were retail dealers in tea, and who requested to be supplied with it so packed, and such customers themselves supplied the bags for the purpose. Each bag had printed on it an intimation that the weight of the paper was included. Upon informations charging the respondents with having used for trade scales which were "false or unjust," contrary to sec-

tion 25 of the *Weights and Measures Act*, 1878,—*Held*, that the scales were "false or unjust" within the meaning of that section, notwithstanding the acquiescence of the customers in the use of the scales. *London County Council v. Payne* (No. 1), 73 L. J. K.B. 192; [1904] 1 K.B. 194; 89 L. T. 632; 52 W. R. 299; 68 J. P. 21; 2 L. G. R. 184; 20 Cox C.C. 580; 20 T. L. R. 93—D.

Paper placed under Scoop of Weighing Machine.]—A tea-merchant, with a view to quicken the process of weighing out tea to be made up into packets, weighed the tea for each packet without first putting it into the bag in which it was to be sold; but in order to throw upon the customer part of the cost of the bag, placed between the bottom of the scoop of the weighing machine in which the tea was weighed and the cup in which the scoop rested a piece of paper weighing less than the bag, which caused the machine to indicate a weight greater by the weight of the paper than the actual weight of the tea in the scoop:—*Held*, that he was liable to the fine imposed by section 25 of the *Weights and Measures Act*, 1878, upon a person who has in his possession for use for trade a weighing machine which is "false or unjust." *Lane v. Randall*, 69 L. J. Q.B. 8; [1899] 2 Q.B. 673; 81 L. T. 445; 43 W. R. 153; 63 J. P. 757; 19 Cox C.C. 399—D.

Paper Bag Placed under Scoop—Weight of Article Sold Less than that Indicated—"False or unjust" Scale.]—The respondents, wholesale tea merchants, had upon their premises a beam scale in use for weighing tea. The scale had a paper bag (supplied by the customer) placed underneath the scoop in which the tea was weighed, the effect being that the quantity of tea required to turn the scale with a weight of a quarter of a pound in the opposite pan was less than a quarter of a pound by the weight of the bag—that is, by 2½ drachms. The scale without the paper bag was accurate. The paper bag was given by the respondents' forewoman to the girl who weighed the tea to fold up and place under the scoop at the commencement of each weighing operation, and was always removed by the forewoman a few minutes after it was finished. No two weighings out with a bag were allowed to be consecutive, a full-weight order being always interposed. Tea was never so weighed out by the respondents unless at the request of the customer. Upon an information charging the respondents with having used for trade a beam scale which was "false or unjust," contrary to section 25 of the *Weights and Measures Act*, 1878,—*Held*, that the scale was "false or unjust" within the meaning of that section, inasmuch as it would not hang true at the time of the weighing when an equal weight was put into the goods scoop and into the weight dish on the other side. *London County Council v. Payne* (No. 2), 74 L. J. K.B. 108; [1905] 1 K.B. 410; 92 L. T. 120; 53 W. R. 319; 69 J. P. 80; 3 L. G. R. 118; 20 Cox C.C. 768; 21 T. L. R. 162—D.

Paper Added to Goods Pan when Weighing Tea — Custom or Trade Usage — Weighing in Customer's Presence.]—In proceedings against a grocer, under section 26 of the *Weights and Measures Act*, 1878, for being unlawfully and

wilfully a party to the commission of a fraud in using a certain scale by adding paper to the goods pan when weighing tea, evidence of a custom or trade usage to weigh tea with paper is admissible as bearing on the question whether there has been a wilful commission of a fraud. *King v. Spencer*, 91 L. T. 470; 2 L. G. R. 979; 68 J. P. 530; 20 Cox C.C. 692—D.

The offence in question may be committed where tea is weighed with paper though the weighing is done before the customer's eyes, if it is so done as to suggest to the customer that the net weight of the tea alone is being ascertained. *Id.*

Article Weighed in Paper Bag.—The appellant, a grocer, handed to a purchaser, who asked for and expected to receive one pound of sugar, a package consisting of a quantity of sugar in a paper bag, the sugar and the bag together weighing exactly one pound, and the sugar without the bag weighing less than one pound. The package was one of a number of similar packages which had been previously weighed by the appellant, the sugar in each package having been weighed in the paper bag in which it was contained. The scales in which the packages were weighed were perfectly just and accurate, and gave the weight of each package correctly. The appellant had no intention to defraud the customer:—*Held*, that the appellant's conduct did not amount to a fraud wilfully committed in the "using" of a weighing machine within the meaning of section 26 of the Weights and Measures Act, 1878. *Stone v. Tyler*, 74 L. J. K.B. 18; [1905] 1 K.B. 290; 92 L. T. 83; 69 J. P. 4; 2 L. G. R. 1363; 20 Cox C.C. 763; 21 T. L. R. 33—D.

Barrel used as Measure—No Facility by Local Authority for Verification and Stamping.—A local authority are not precluded from prosecuting a person for using a measure not stamped in conformity with section 29 of the Weights and Measures Act, 1878, by reason of having failed to fix times and places for verifying and stamping weights and measures in accordance with section 44 of the same Act. *Hayley v. Taylor*, 82 L. T. 803; 19 Cox C.C. 538—D.

Testing Weights and Weighing Machines—Detention and Seizure—Duty of Inspectors—Misconduct.—The respondent, an inspector of weights and measures, ascertained that certain weights carried in a cart for the purpose of weighing coal were unjust, whereupon he defaced the stamps on such weights and handed them to the driver of the coal cart, but took no proceedings against the owners of the weights in question. He also ascertained, otherwise than by comparing it with a local standard, that the weighing machine carried in the cart was unjust, whereupon he seized the weighing machine. Two informations were thereupon preferred against the respondent, charging him with misconduct in his office within section 49 of the Weights and Measures Act, 1878, the first information stating the misconduct to consist in his having defaced the stamps on the weights, the second stating the misconduct to consist in his having seized the weighing machine without having first tested it with a local standard. Both informations were dismissed:—*Held*, that the Justices were right in

dismissing the informations. *Wedderburn v. Smith*, 92 L. T. 853; 3 L. G. R. 533; 69 J. P. 217; 20 Cox C.C. 855—D.

Statutory Fees—Resolution of Local Authority that such Fees be not Taken—Non-collection of Fees by Inspector—Liability of Inspector to Surcharge.—The local authority has no power to resolve that the fees directed by section 13 and the First Schedule of the Weights and Measures Act, 1889, to be taken in respect of the verification and stamping of weights, measures, and weighing instruments, be not taken; and an inspector of weights and measures ceasing in pursuance of a resolution of the local authority to take such fees is liable to be surcharged with the amount of such fees which he has not collected. *Rea v. Roberts*, 70 L. J. K.B. 590; [1901] 2 K.B. 117; 84 L. T. 530; 49 W. R. 488; 65 J. P. 359—D.

Coal—By-law—"Correct weighing instrument"—Coal Carried out in Cart for Sale by Retail—Failure of Seller to Carry Sufficient Proper Weights.—A by-law made under section 28, sub-section 1 of the Weights and Measures Act, 1889, provided that every coal dealer should provide, and every person employed by him to carry out coal for sale by retail out of any vehicle should carry, a correct weighing instrument, stamped by an inspector, for the purpose of weighing any quantity of coal not exceeding two hundredweight. The respondent, a coal dealer, was carrying out a number of sacks of coal in a cart for sale by retail, some of the sacks containing half a hundredweight and others a hundredweight. He had in the cart a correct weighing machine, duly stamped, but only one 56-lb. weight:—*Held*, that, inasmuch as the respondent had no proper weights for weighing in one operation the coal in one of the larger sacks, he had committed an offence against the by-law. *Crick v. Nicholls*, 74 L. J. K.B. 283; [1905] 1 K.B. 501; 92 L. T. 169; 53 W. R. 481; 69 J. P. 144; 3 L. G. R. 277; 20 Cox C.C. 777; 21 T. L. R. 235—D.

Sale in Bulk—Tare Weight of Vehicle—Weight "previously ascertained."—Under section 22 of the Weights and Measures Act, 1889, which relates to the selling of coal in bulk exceeding two hundredweight, it is not necessary that the vehicle in which the coal is conveyed to the purchaser should be weighed before every delivery; the true test is whether the Justices had evidence before them that the vehicle had been weighed so recently and under such circumstances that its correct weight previous to the particular delivery had been ascertained. *Beardsley v. Pike*, 90 L. T. 652; 68 J. P. 273; 2 L. G. R. 710; 20 Cox C.C. 648—D.

Delivery in Vehicle in Bulk—Time and Place of Weighing.—The weighing of coal for delivery on sale in a vehicle in bulk contemplated by section 22, sub-section 1 of the Weights and Measures Act, 1889, the result of which is by section 21 to be indicated on a ticket to be forwarded to the purchaser, is to be performed at the premises of the seller previous to the load being sent out, and not on delivery at the premises of the purchaser. *Knowles v. Sinclair*, 67 L. J. Q.B. 67; [1898] 1 Q.B. 170; 77 L. T. 624; 46 W. R. 188; 62 J. P. 102; 18 Cox C.C. 681—D.

— **Delivery of Coal Exceeding Two Hundred-weight—Weight Ticket—Insertion of Seller's Name—Trade Name of Seller.**—The requirements of section 21 and schedule 3 of the Weights and Measures Act, 1889, as to the insertion of the seller's name upon the weight ticket required to be delivered to the purchaser of coal before the unloading of the coal, are sufficiently satisfied by the insertion of the name under which the seller carries on business. *Cameron v. Tyler*, 68 L. J. Q.B. 759; [1899] 2 Q.B. 94; 80 L.T. 764; 47 W. R. 559; 63 J. P. 567; 19 Cox C.C. 353—D.

— **Delivery in Vehicle—Weighing—Time and Place of Insertion of Weight in Ticket.**—It is a sufficient compliance with section 21 of the Weights and Measures Act, 1889, that the ticket in the form in schedule 3, to be delivered by the seller to the purchaser of coal, be filled up after the arrival but before the unloading of the coal at the purchaser's premises, and that the weight so inserted be ascertained at the purchaser's premises. *Edwards v. Purnell*, 68 L. J. Q.B. 272; [1899] 1 Q.B. 449; 79 L. T. 737; 47 W. R. 380; 63 J. P. 249; 19 Cox C.C. 286—D.

Unjust Measure Found in Possession of Servant—Measure Made Unjust by Servant for his own Purposes—Use of Measure by Servant off Master's Premises—Liability of Master.—The appellants supplied their servant with two correct measures to be used by him in supplying oil to customers on his rounds. For his own purposes and not in the interests of the appellants, and without their knowledge, the servant substituted for one of the correct measures with which he had been supplied a measure which had been discarded by the appellants and which the servant had made unjust, and which he was using on his rounds when it was seized by an inspector of weights and measures. The appellants were thereupon charged with having such unjust measure in their possession for use for trade, and were convicted:—*Held*, that the conviction must be quashed, as in the circumstances the possession of the unjust measure by the servant was not the possession of the appellants. *Anglo-American Oil Co. v. Manning*, 77 L. J. K.B. 205; [1908] 1 K.B. 536; 72 J. P. 35—D.

Prosecution by Inspector—Consent of Local Authority.—The consent by the local authority, required by section 14 of the Weights and Measures Act, 1904, to a prosecution before a Court of summary jurisdiction or Justices of an information, complaint, or proceeding arising under that Act, need not be a particular consent in each case, a general consent being sufficient. *Tyler v. Ferris*, 75 L. J. K.B. 142; [1906] 1 K.B. 94; 93 L. T. 843; 54 W. R. 469; 70 J. P. 88; 4 L. G. R. 201; 21 Cox C.C. 73; 22 T. L. R. 181—D.

Bread—Weighing, on Sale.—See SALE OF GOODS, col. 2191.

WEST INDIES.

See COLONY.

WIFE.

See HUSBAND AND WIFE.

WILD BIRDS.

STATUTES.

2 Edw. 7 c. 6 is the *Wild Birds Protection Act*, 1902.

4 Edw. 7 c. 4 is the *Wild Birds Protection Act*, 1904.

4 Edw. 7 c. 10 is the *Wild Birds Protection (St. Kilda) Act*, 1904.

Exposing for Sale—"Recently taken."—A wild bird is not of necessity not recently taken because it has been in the possession of a person for a period of three weeks. The offence of exposing for sale, or having possession of any wild bird recently taken, is dependent upon section 3 of the *Wild Birds Protection Act*, 1880, as amended by the Act of 1881, and it is incumbent upon the prosecution to shew that the birds were wild birds and have been recently taken. *Green v. Carstang*, 85 L. T. 615; 66 J. P. 102; 20 Cox C.C. 92—D.

No Public Notice of Secretary of State's Order.—By an order of the Secretary of State of January 30, 1906, made under the *Wild Birds Protection Acts*, 1880 to 1902, the killing and taking of certain birds is prohibited during that period of the year to which the protection afforded by the *Wild Birds Protection Act*, 1880, does not extend. On a prosecution for an infringement of the Acts and order, it did not appear that the county council had given public notice of the order as directed by section 4 of the *Wild Birds Protection Act*, 1894:—*Held*, that public notice by a county council was not a condition precedent to proceedings against a person charged with a breach of the Acts and order. *Duncan v. Knill*, 96 L. T. 911; 5 L. G. R. 620; 71 J. P. 287—D.

WILL.

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1. CAPACITY.

Instructions for Will.—If a person has given instructions for his will, and the will has been prepared in accordance therewith, it is sufficient to establish the validity of the will that the testator should, in executing it, accept the instrument as carrying out his instructions, even if he fail to follow all the dispositions of his property as they are read over to him. *Parker v. Felgate* (52 L. J. P. 95; 8 P. D. 171) approved. *Perera v. Perera*, 70 L. J. P.C. 46; [1901] A.C. 354; 24 L. T. 371—P.C.

Insane Delusions.—In an action for reduction of a will the pursuers averred that the testator was "subject to insane delusions," and that "he believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." That these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will:—*Held* (Lord DAVEY dissenting), that a relevant case for trial was averred. *Hope v. Campbell*, [1899] A.C. 1—H.L. (Sc.)

Testamentary capacity is not disproved by evidence of the testator's merely eccentric acts and conduct. *Pilkington v. Gray*, 68 L. J. P.O. 68; [1899] A.C. 401—P.C.

Estoppel.—See ESTOPPEL.

2. BY WHOM MADE.

Of English Subject made Abroad—No Specific Form Required by Lex Loci.—A will of a British subject made abroad is valid, according to the provisions of Lord Kingsdown's Act (24 & 25 Vict. c. 114), s. 1, if valid according to the law of the country or place where it is made, although no specific form or forms are prescribed for the making of wills by the law of such country or place. *Stokes v. Stokes*, 67 L. J. P. 55; 78 L. T. 50—Jeune, P.

Naturalised British Subject—English Domicil—Will made in Italy in Foreign Form—Validity to Pass Leaseholds—"Personal estate."—"Personal estate" in the Wills Act, 1861, includes leasehold property. A will made out of the United Kingdom by a British subject, whatever his domicile at the time of making it or at his death, and made according to the law of the place where it was made, or where he was domiciled when it was made, or where in the King's dominions he had his domicile of origin, is effectual to pass his beneficial interest in leaseholds. *Grassi, In re; Stubbsfield v. Grassi*, 74 L. J. Ch. 341; [1905] 1 Ch. 584; 92 L. T. 455; 53 W. R. 396; 21 T. L. R. 343—Buckley, J.

Will made by Englishwoman in England—Subsequent Marriage of Testatrix to Domiciled Scotsman.—A will dealing with movable property duly executed in England by a spinster domiciled in England at the date of its execution is not revoked by her subsequent marriage in England to a domiciled Scotsman. *Westerman v. Schwab*, 8 F. 132—Ct. of Sess.

Seaman's Will—"At sea"—Voyage not yet Begun.—A letter containing testamentary dispositions written on a ship lying in a river, and before the ship has actually sailed, may be a valid will as made by a seaman at sea. *Patterson, In the goods of*, 79 L. T. 123—Gorell Barnes, J.

Soldier "in actual military service."—

"Mobilisation" is a fair test of whether a soldier is or is not "in actual military service" with the exception contained in section 11 of the Wills Act, 1837, but mere warning for mobilisation is not sufficient. *Gattward v. Knee*; *May v. May*, 71 L. J. P. 34; [1902] P. 99, 103; 86 L. T. 119, 120—Jeune, P., and Gorell Barnes, J.

Where a letter written by a soldier "in actual military service" contains passages that are clearly testamentary, the general testamentary character of such letter will not be affected by the mere fact that it also shews the writer's intention to draw up some more formal document at a later date. *Id.*

This principle applies equally to any letter written by a soldier on active service, whether literate or illiterate; and the Court will not distinguish between a letter written by a private shewn to have been illiterate and a letter written under similar circumstances by an officer shewn to have been a man of business habits and exceptional ability, who must have known how to make a formal will, had he chosen to do so. *Id.*

— A sergeant in the Army Ordnance Corps, who was stationed at Woolwich, received, on August 15, 1899, orders from the War Office to proceed in marching order, on the 19th inst., to Fermoy, where he was to report himself to the commanding officer of the Munster Fusiliers, and proceed with the regiment to South Africa on the 24th inst., for special service. On August 17, while still at Woolwich, the sergeant wrote a letter to a friend of his fiancée, in which he stated that if anything happened to him she would come in for everything he had. He died while serving in South Africa:—*Held*, that the letter should be admitted to probate as a soldier's will. *Gordon, In the goods of*, 21 T. L. R. 653—Gorell Barnes, P.

— *Infant.*—A volunteer offered himself for service in South Africa. On February 3, 1900, he was accepted. On February 19 he left his home and went to reside in barracks. On March 2 he received his final orders to sail. On March 8 he made his will, and on March 10 he sailed for South Africa. In May he came of age, and on July 27 died of his wounds in South Africa:—*Held*, that from the moment he left his home and went into barracks on February 19 the testator had taken the first step in compliance with his orders to proceed to the front, and was therefore *in expeditione* or "in actual military service" within the meaning of section 11 of the Wills Act, 1837, and that his will was therefore entitled to probate, although he was an infant at the time he made it. *Drummond v. Parish* (3 Curt. 522) considered. *Bowles v. Jackson* (1 Spinks Ecc. & Adm. 294) followed. *Hiscock, In the goods of*, 70 L. J. P. 22; [1901] P. 78; 84 L. T. 61—Jeune, P.

— "Effects to be credited."—An oral declaration made by a soldier on active service that in the event of death he desired "all his effects to be credited" to a person named admitted to probate as a soldier's will, irrespective of the probable construction of the gift. *Scott, In the goods of*, 73 L. J. P. 17; [1903] P. 243; 89 L. T. 588—Jeune, P.

Mutual Wills—Agreement to Make Mutual Wills Departed from by Testator who Dies First—Notice to Survivor by Reason of the Death—No Relief to Survivor.—The testator who dies first of the two who have made mutual wills, dies with the promise of the survivor that the agreement effectuated by the execution of their wills shall stand, and if the survivor after taking any benefit of the agreement alters his will, although it will stand if validly executed, his personal representative will take the property on trust to perform the contract between the testators, because the will of the testator who dies first becomes irrevocable. *Stone v. Hoskins*, 74 L. J. P. 110; [1905] P. 194; 93 L. T. 441; 54 W. R. 64; 21 T. L. R. 528—Gorell Barnes, P.

An entirely different conclusion results where the testator who dies first has not stood by his bargain and has revoked his will. In such a case the survivor has notice of the alteration on the death of the testator who dies first, and cannot claim any relief against a later will of the testator who dies first either by way of declaration of trust or otherwise. *Id.*

Joint and Mutual Will—Part of Document Admitted to Probate.—A husband and wife duly executed a joint and mutual will. Upon the death of the wife in the lifetime of the husband, THE COURT, on his application, executor, made a grant to the husband of so much of the will only as had become operative in consequence of her decease. *Piazz-Smyth, In the goods of*, 67 L. J. P. 4; [1898] P. 7; 46 W. R. 426—Jeune, P.

3. EXECUTION.

Signature of Testator on First Page of Will only.—A will which was written on three pages of paper was signed by the testatrix and by the attesting witnesses on the first page only:—*Held*, that the first page of the will ought to be admitted to probate. *Millward v. Buswell*, 20 T. L. R. 714—Gorell Barnes, J.

Position of Signature.—Though certain pages of a testamentary document are materially subsequent to the signatures of the testator and witnesses, it may be held that the other pages of the document are substantially a part of the will, and that they can be construed for purposes of probate as anterior to the signatures. *Gilbert, In the goods of*, 78 L. T. 762—Jeune, P.

Part of Will Subsequent to Signature.—A testator executed a testamentary document, which consisted of two pages, and the whole of which was written before execution. The first page, which alone was signed by the testator and the witnesses, contained the major part of the will. It concluded with an unfinished sentence continued on the second page. The second page also contained bequests:—*Held*, that the first page only could be admitted to probate. *Gee, In the goods of*, 78 L. T. 843—Gorell Barnes, J.

Signature Made or Acknowledged in Presence of Witnesses—Variance between Attestation Clause and Affidavit—Notice to Next-of-Kin.—A will was holograph, written on one page and

signed and attested on another, the signatures being in the nature of an indorsement. The attestation clause stated that the will was "signed" by the testator in the presence of the witnesses, whereas the affidavit of one of them shewed that the will was "acknowledged" but not signed in their presence. THE COURT admitted the will to probate, but doubted whether the next-of-kin ought not to have had notice of the motion. *Moore, In the goods of*, 70 L. J. P. 16; [1901] P. 44; 84 L. T. 60—Jeune, P.

Attestation Clause—Presumption.—Where a will appears to be duly signed and witnessed, it is a presumption of law that the execution was duly carried out according to the requirement of the Wills Act, 1837, even though the witnesses may afterwards be in doubt as to what took place at the time of its execution. *Whiting v. Turner*, 89 L. T. 71—Buckmill, J.

No Attestation Clause—Signature of Two Witnesses followed by Signature of Deceased—Both Attesting Witnesses Dead—Handwriting of Deceased and of one Attesting Witness Proved by Affidavit.—A testamentary document in the handwriting of the deceased disposed of certain property and contained no attestation clause, but was signed by two persons, whose signatures were followed by that of the deceased. The three signatures purported to have been signed on the same day. The two persons were dead, but the handwriting of one of them and of the deceased herself were proved by affidavit. There was no other evidence of attestation:—*Held*, that, the document being testamentary, the Court was justified in assuming that all things were done rightly and in order, and that the document was signed first by the deceased and afterwards by the other two persons, and accordingly made a grant of administration with the will annexed. *Peeverett, In the goods of*, 71 L. J. P. 114; [1902] P. 205; 87 L. T. 143—Jeune, P.

Attestation.—"In the presence of the testator."—A testator signed his will in his bedroom, and the attesting witnesses added their signature in the adjoining dressing-room, the door between the two rooms being open at the time. On its being shewn that the testator could not have had the witnesses in sight when they attested the will, it was held that the will was not duly executed. *Carter v. Seaton*, 85 L. T. 76—Gorell Barnes, J.

Subscription and Attestation—Identification of Constituent Portions of Testamentary Document.—The question which portion or portions of a testamentary document have been duly executed is a matter for parol evidence, provided that it be clearly established, so as to avoid fraud, that the several portions were produced to the attesting witnesses at the time of execution or acknowledged in a state of attachment, and that they are identified. It is no objection to the admission to probate of any portion that it does not bear the signature of the testator. *Lewis v. Lewis*, 77 L. J. P. 7; [1908] P. 1; 98 L. T. 58—Bargrave Deane, J.

Presence of Attesting Witnesses.—Testatrix went into a shop and asked J., who was standing behind the left-hand counter, to witness her signature to her will. Testatrix produced the

will and signed it at the left-hand counter, J. meantime facing her and seeing her write. J. then attested her signature. Whilst this was going on, R. was standing in front of the right-hand counter, talking to a person on business. R. did not see what was passing between the testatrix and J., nor could he have done so without shifting his position. After J. had witnessed the signature of the testatrix, the latter walked over to R. and asked him to come round. He did so, and went behind the left-hand counter into the same place that J. had previously occupied. The testatrix then said to R., "This is my will. I have signed it, and J. has signed it. Will you sign it?" R. then signed the will:—*Held*, that the will was not signed in the presence of the second attesting witness within the meaning of 1 Vict. c. 26, s. 9. *Brown v. Skirrow*, 71 L. J. P. 19; [1902] P. 3; 85 L. T. 645—Gorell Barnes, J.

Signature of Witnesses in Body of Will.—The attesting witnesses to a will (already signed by the testator) signed their names in a blank space left for the names of the executors in the body of the will, the testator having acknowledged his signature in their presence, and directed them to sign in the space where their names appeared:—*Held*, on satisfactory proof that the witnesses had signed with the intention of attesting the testator's signature, that this was a valid subscription by the witnesses within section 9 of the Wills Act, but that there was no appointment of executors, as the testator had only acknowledged his signature in the will and had not re-signed it after the witnesses had signed their names in the body of the will. *Ellison, In the goods of*, [1907] 2 Ir. R. 480—Andrews, J.

Each Sheet of Will Signed and Attested—All Purporting to be Executed on same Date—First Two Sheets in reality Re-copied and Re-signed and Attested Eighteen Months after last Three Sheets.—A testator left a will contained in five sheets of paper. Each of such five sheets was signed by the testator and attested by two witnesses, and the last sheet bore the date of June 16, 1900. In reality the first two sheets of the will had been altered by the testator after June 16, 1900, re-engrossed for him by a firm of law stationers, and re-signed by him and the attesting witness on December 9, 1901:—*Held*, that, although the acts done by the testator had not been done by him with the intention of revoking the whole will, but that, on the contrary, he intended the will to stand as he had left it, the effect of his destruction of the original first two sheets on the last three was such that the last three sheets became unintelligible and unworkable; that such destruction of the part destroyed the whole; and that the whole will was therefore revoked, and must be pronounced against. *Leonard v. Leonard*, 71 L. J. P. 117; [1902] P. 243; 87 L. T. 145—Gorell Barnes, J.

Will and Codicil—Separate Constituent Parts of same Testamentary Paper—Effect to be Given to Form of Words Used and Place where Written.—In deciding as to the constituent parts of a testamentary paper, the form of words used and the place where they are written may be immaterial so long as the formalities of the Wills Act, 1837, as to execution are proved to have

been satisfied. Where the intention of the testator is clear, and is carried out in a properly executed holograph paper written at the same sitting, such matters as an unusual form of words or the insertion of part of what is written in an unusual place, having, for instance, the appearance of an interlineation in another testamentary paper, will not be regarded as having any technical effect in excluding from probate any part of the testamentary paper so executed. *Oldroyd v. Harvey*, 76 L. J. P. 161; [1907] P. 326; 98 L. T. 56; 23 T. L. R. 723—Bargrave Deane, J.

A testator, desiring to revoke certain legacies, purported to do so by a second codicil in which the words of revocation were in fact inserted in the middle of a first codicil, and above a formal heading of the second codicil, which was placed below the first codicil. On due proof of execution, the words so inserted were admitted to probate as part of the second codicil. *Ib.*

Separate Pieces of Paper Fastened by Pin—Arrangement of Pieces.]—A testatrix wrote her will on several sheets of paper pinned together. At the time of the application for probate, the testatrix's signature and the attestation clause was the first of these papers. The Court, being of opinion on the evidence that the sheet containing the signature and attestation clause was originally written last, and therefore at the end of the will, and might have been afterwards inadvertently misplaced, granted probate. Character of evidence to sustain an application on such grounds considered. *Madden, In the goods of*, [1905] 2 Ir. R. 612—Andrews, J.

Erasures.]—A testator left a will containing three bequests to legatees whose Christian names were written on erasures. THE COURT, being satisfied by expert evidence what were the names under the erasures, in making a grant of administration with the will annexed, ordered the original names to be substituted for those written on the erasures. *Brazier, In the goods of*, 68 L. J. P. 6; [1899] P. 36; 79 L. T. 472—Gorell Barnes, J.

Supplying Words from Context.]—A testator left his personal property for life to A, with a power of appointment in case of her death unmarried or without issue. There was no gift over in default of appointment; but the power of appointment was given "subject as hereinafter set forth," and in a later clause the testator provided "that in the event of my said daughter, under the circumstances before detailed, in case of non-marriage or no issue living at the time of her decease," all his property was to go to certain persons named:—*Held*, that it was clear that some word or words was or were omitted in the latter clause which provided for the event of the daughter doing or not doing something, but did not say what, and that the Court should supply the words "failing to exercise the said power of appointment" in order to effectuate the testator's intention, which had been imperfectly expressed, but was to be gathered from the context and the whole will. *Munro v. Henderson*, [1907] 1 Ir. R. 440—Barton, J.

Omission in Will Supplied by Inference—Mis-

copying.]—Where upon the construction of a will it is clear that words have been omitted from the will, owing to its having been mis-copied, the Court will supply the necessary words, where it can be inferred from other parts of the will what the testator intended should be inserted. *Dictum of KNIGHT-BRUCE, L.J.*, in *Key v. Key* (22 L. J. Ch., at p. 647; 4 De G. M. & G. 73) approved. *Phillips v. Rail*, 54 W. R. 517—Swinfen Eady, J.

Knowledge and Approval by Testator—Presumption of Law—Will Read over by Testator of Sound Mind, &c.—Words Inserted by Mistake of Solicitor.]—Although a will may have been read by or read over to a testator of sound mind, memory, and understanding, and in every way competent to comprehend the purport of it, it is nevertheless competent to the Court to hold that it was not properly read by or read over to the testator, and that he did not know and approve of its contents, if, on the consideration of all the facts and special circumstances of the case, the Court should be of opinion that it ought to do so. *Guardhouse v. Blackburn* (35 L. J. P. 116; L. R. 1 P. & D. 109); *Fullon v. Andrew* (44 L. J. P. 17; L. R. 7 H.L. 448) reviewed. *Garnett Botfield v. Garnett Botfield*, 71 L. J. P. 1; [1901] P. 335; 85 L. T. 641—Jeune, P.

Testator's Knowledge of Contents of Will—Benefit to Person Drawing the Will—Findings of Jury—New Trial.]—Where a jury are not satisfied that a will, mainly in favour of the person who prepared it, was read over to the testator, and have found that the testator did not know and approve of the legacy to such person, the jury's expression of opinion of the testator's intention is no ground for a new trial, or for revocation of the probate of the will excluding such bequest. *Farrelly v. Corrigan*, 68 L. J. P.C. 133; [1899] A.C. 563—P.C.

Re-execution or Republication of Will—Subsequent Codicil—Incorporation of Document.]—Where a will, if treated as executed on the date of a codicil and read as speaking from that date, contains language which may be taken to refer to a certain document, such document may be incorporated and admitted to probate, although it was not in existence at the date of the execution of the will, provided it came into existence before the date of the execution of the codicil. *Rendle, In the goods of*, 68 L. J. P. 125—Gorell Barnes, J.

A testatrix executed her last will March 28, 1888, together with four codicils thereto dated respectively August 20, 1890, March 17, 1891, June 7, 1893, and May 22, 1894. She died March 4, 1899. In her will of 1888 she referred to a certain "list of articles." After her death a "list of articles" was found in her tin box answering the description in the will of 1888. It was, however, executed as a will in several places, the dates of such executions being respectively December 15, 1890, April 21, 1892, March 21, 1893, and October 1, 1894:—*Held*, that the execution of the codicil of May 22, 1894, republished or re-executed the will of March 28, 1888, which must be taken to speak from the later date, and that the will and codicils must be admitted to probate, together with so much of the list of articles as upon

examination should be found to have been executed before the date of the last codicil, May 22, 1894. *Truro (Lady), In the goods of* (35 L. J. P. 89; L. R. 1 P. & D. 201), followed. *Ib.*

Inoperative Will—Intestacy.—Sec *Ford, In re*, 71 L. J. Ch. 778, col. 843.

4. UNDUE INFLUENCE.

What is.—The definition of undue influence given by *HANNEN, P.*, in *Wingrove v. Wingrove* (55 L. J. P. 7; 11 P. D. 81), that there must be "coercion," and not merely persuasion or inducement, however improper that may be, approved. *Baudains v. Richardson*, 75 L. J. P. C. 57; [1906] A.C. 169; 94 L. T. 290; 22 T. L. R. 333—P.C. And see col. 2616.

5. REVOCATION.

Several Papers—Intention—Dispositions of Property—"Last and only" Will.—In the absence of express words of revocation in a later testamentary paper, the admissibility to probate along with it of an earlier paper is a matter of intention to be sought from the dispositions of property made by the testator. *Simpson v. Foxon*, 76 L. J. P. 7; [1907] P. 54; 96 L. T. 473; 23 T. L. R. 150—Gorell Barnes, P.

The question which paper or what number of papers the testator desired or expected to be admitted to probate is not the true test. *Ib.*

A testator duly executed a formal will disposing of his entire estate and appointing executors. At a later date, on a printed form commencing with the words, "This is the last and only will," he purported to deal only with certain policy moneys and appointed an executor.—*Held*, that the words "last and only" effected no revocation of the earlier will. The principle of *Lemage v. Goodban* (35 L. J. P. 28, at p. 30; L. R. 1 P. & D. 57, at p. 62) followed. *Ib.*

Two Inconsistent Wills—No Clause of Revocation or Residuary Gift in Second Will—Intention—Extrinsic Evidence.—The question whether a later testamentary paper is so far inconsistent with an earlier paper as to revoke it is one of intention to be implied on the construction not of the form, but of the substance, of the later paper, and the earlier will be revoked by the later if it can be collected that by the later the testator intended to dispose of his property in a different manner from that in which he disposed of it by the earlier, although in fact the later will may not dispose of all the property of the testator. *Bryan, In the goods of*, 76 L. J. P. 30; [1907] P. 125; 96 L. T. 534—Gorell Barnes, P.

If the intention of the testator remains doubtful on the face of the document, evidence of the surrounding circumstances *dehors* the document may be admitted. *See Iquere*, whether this proposition goes further than to permit the Court to place itself by enquiry in the place of the testator when he sat down to write his will so that it may know to what he was applying his mind. *Ib.*

A testatrix, by a will made in 1864, bequeathed several legacies, appointed two executors, and formally bequeathed the residue of her estate. By a subsequent codicil she dealt with one of the legacies. By a still later will, executed in 1867, the deceased repeated the substance of the first will except as to the residue, which was now undisposed of, appointed the same executors, and omitted any clause of revocation of former wills. Both wills expressed the beneficial bequests to be subject to payment of debts.—*Held*, that, even without considering evidence, *dehors* the later will, of the circumstances under which it was executed, although such evidence was forthcoming and admissible, the second will revoked the first. *Ib.*

By Operation of Law—Devise of Real Estate—Subsequent Conveyance to Testator.—A testator, by his will made in 1832, devised certain freehold property which he had contracted to purchase, but the purchase of which had not been completed at the date of the will, and all other his real estate wheresoever and whatsoever, to his three sons in manner therein mentioned. In 1834 the property which the testator had contracted to purchase was conveyed to him in fee to uses to bar dower. In 1835 the testator died.—*Held*, that the conveyance of 1834 operated as a revocation of the devise in the will of the freehold property so conveyed. *Jacob v. Jacob*, 82 L. T. 270—H.L. (E.)

Will Made and not Forthcoming at Death—Presumption—Rebuttal—Declaration of Testator.—If a will duly executed was in the testator's possession when last seen, and is not forthcoming after his death, there is a presumption of law that he destroyed it *animo revocandi*, but that presumption may be rebutted by evidence of facts. A letter written by the testator after the will that he had cancelled it is not evidence of an effective revocation, but it is admissible in evidence as shewing the state of mind and intention of the testator. The evidence in the particular case *held*, by *FLETCHER MOULTON, L.J.*, and *BUCKLEY, L.J.* (*VAUGHAN WILLIAMS, L.J.*, dissenting), not to be sufficient to rebut the presumption. The *dictum* of *LORD PENZANCE* in *Finch v. Finch* (L. R. 1 P. 371), that "to support the presumption that Court must be satisfied that it (the will) was not in existence at the time of death," dissented from. *Sykes, In re; Drake v. Sykes*, 23 T. L. R. 747—C.A.

Destruction of Will after Execution of Codicil—Mistake.—A testator, having duly executed a codicil to his last will, destroyed the latter document under the impression that it was of no further use. The Court admitted the contents of the will as set forth in a draft thereof, together with the codicil, to probate. *Beardsley v. Lacey*, 67 L. J. P. 35; 78 L. T. 25—Jeune, P.

"Writing declaring intention to revoke"—Form of Grant.—Where a testatrix duly executed a paper writing, practically amounting to a declaration of intention to revoke her existing will, the Court, in pronouncing for revocation and intestacy, ordered a grant of administration to go *as in intestacy*, with a note thereon that the grant was so made in consequence of the execution of the aforesaid

paper writing, but without annexing the paper writing to the grant. *Toomer v. Sobinska*, 76 L. J. P. 19; [1907] P. 106; 96 L. T. 475—Bargrave Deane, J.

Will Torn up by Testator when Intoxicated—Pieces Pasted Together again by him when Sober—Grant on Motion—Infant Next-of-Kin Consenting.]—Where a will had been destroyed by the testator when drunk, and the pieces pasted together by him next day when sober, and it was evident he wished the will to stand,—**THE COURT**, the estate being worth 1,300*l.*, granted probate to the executrix and universal legatee named in the will, on motion, without requiring the will to be propounded, with the consent of the next-of-kin, although such next-of-kin were infants and were prejudicially affected by the will. *Apted, In the goods of* (68 L. J. P. 123; [1899] P. 272), followed. *Brassington, In the goods of*, 71 L. J. P. 9; [1902] P. 1; 85 L. T. 644—Gorell Barnes, J.

Directions to Destroy Will.]—A testatrix, in a letter addressed to her daughter, which was signed by her in the presence of two witnesses, directed her will to be destroyed:—*Held*, that the letter was a writing declaring an intention to revoke the will, though, not being of a testamentary character, it was not admitted to probate; but liberty was given to a next-of-kin to apply for a grant, as in the case of intestacy. *Eyre, In the goods of*, [1905] 2 Ir. R. 540—Andrews, J.

Revocation by Marriage.]—The rule of English law which makes a woman's will null and void on her marriage is part of the matrimonial, and not of the testamentary law. *Per VAUGHAN WILLIAMS, L.J. Martin, In re; Loustalan v. Loustalan*, 69 L. J. P. 75; [1900] P. 211; 82 L. T. 806; 48 W. R. 509—C.A.

—Execution According to Foreign Law by Foreigner Resident in England—Subsequent Marriage in England—Domicil.]—The provision of English law by which a will is revoked by the subsequent marriage of the testator is part of the testamentary and not part of the matrimonial law of England. *Loustalan v. Loustalan*, 68 L. J. P. 106; 81 L. T. 459—Jeune, P.

Where a Frenchwoman in 1870 executed in England a will valid according to French law, and subsequently (in 1874) married a Frenchman in England, and continued to reside in England up to the time of her death in January, 1895,—**THE COURT** (having first found that the domicile of the testatrix was French at the time of her death) *held*, that although it was a fair inference from the evidence that the parties at the time intended to marry according to English matrimonial law, and to be bound by the English *régime* rather than by the French law of *Communauté*, the will of the testatrix was not revoked by her subsequent marriage, and ought to be admitted to probate. *Id.*

Document Inoperative by Statute—Testamentary on Face of it.]—Section 25 of the Industrial and Provident Societies Act, 1893, enables a member of a registered society to sign a nomination paper stating to whom his property in the society shall pass at his death,

and under such document such property passes at once on his decease. This power of nomination is, however, subject to certain limitations, one of which is that such property must not exceed 100*l.* sterling. Where a member of such a society signed a nomination paper in the presence of two witnesses but his property was above the value of 100*l.* sterling,—*Held*, that, although the document was inoperative under the statute, nevertheless, being testamentary on the face of it, and having been duly executed in accordance with the provisions of the Will Act, 1837, it would take effect as a will and ought to be admitted to probate. *Baxter, In the goods of*, 72 L. J. P. 2; [1903] P. 12—Gorell Barnes, J.

Exercise of Appointment by Will—Words “give, devise, bequeath and appoint” —No further or other Reference to Power.]—A testator executed a will in 1894 wherein he purported to exercise a power of appointment over certain property in which he took a life interest under the terms of his father's will. In 1896 he executed a second will, whereby he did not in terms revoke the will of 1894, and which did not in terms allude to the power of appointment or purport to execute it. The second will, however, contained the words, “I give, devise, bequeath and appoint all my real and personal estate whatsoever unto my trustees upon trust. . .” **THE COURT**, following *Mayhew, In re; Spencer v. Outbush* (70 L. J. Ch. 428; [1901] 1 Ch. 677), *held* that the use of the word “appoint,” taken with the context and surrounding circumstances, was a sufficient exercise of the power, and that the will of 1894 was revoked. *Kent v. Kent*, 71 L. J. P. 50; [1902] P. 108; 86 L. T. 536—Jeune, P.

Trusts Containing Power of Appointment—Codicil—Intention to Vary—Trusts Declared Afresh—No Reference to Power.]—By his will dated February 6, 1892, the testator declared (*inter alia*) that, as to one-eighth share of his residuary estate, it should be held by executors on certain trusts. These trusts provided that the income of the said share should be paid to the testator's son T. W. until “he should become bankrupt or do or suffer something whereby the said income if belonging absolutely to him or some part thereof would become payable to or vested in some other person”; and, on determination in the lifetime of T. W. of the above trust, that the income should be applied during the remainder of T. W.'s life in favour of certain other specified persons; and after the decease of T. W., that the share should be divided among his children; “provided always that the said T. W. might by deed or will appoint that the whole or any part of the income of the said share should after his death be paid to his widow (if any) during her life or for any less period.” T. W. became bankrupt early in 1893. By a codicil dated July 27, 1893, the testator declared his intention to vary the trusts of the share of T. W., and in pursuance thereof declared that such share should be held by his trustees upon the trusts thereafter recited. The trusts so recited made provision in the event of T. W. being prevented by reason of antecedent bankruptcy or by the happening of any other event from enjoying the life interest if it were given to him. In other respects, the trusts so cited followed the trusts in the will, except that

do mention whatever was made of the power given by the will to T. W. to appoint to his widow. The trusts in the will were not expressly revoked by the codicil:—*Held*, that the power of appointment still subsisted. *Wood, In re; Wood v. Wood*, 83 L. T. 157—Farwell, J.

Dependent Relative Revocation.]—Testator duly executed a will on December 16, 1887, whereby he left all his property to his wife, subject to a legacy of 2,000*l.* to a niece whom they had brought up. On May 1, 1897, he executed a second will, whereby he left his property to his wife for life, with remainder to a sister-in-law. On April 6, 1899, he executed a third will, revoking all previous wills. This will benefited his wife to a greater extent than the will of May 1, 1897, but not to the same extent as the will of December 16, 1887. On May 24, 1899, it being his wedding day, testator told his wife it should not pass without the destruction of the will of April 6, 1899, in which he said he had been unjust to her; and he said he wished his property to go by the will of December 16, 1887. The servant was ordered to come into the room that she might be present when the will was destroyed, and in her presence the testator tore it up and gave her the pieces to burn, repeating to her first what he had previously said to his wife:—*Held*, that testator destroyed the will of April 6, 1899, with the sole intention, wish, and expectation, and in the belief that the result of such destruction would be to revive and set up the will of December 16, 1887, and that therefore the doctrine of dependent relative revocation applied, and the Court pronounced for the will of April 6, 1899, as contained in a draft propounded by the plaintiff. *Powell v. Powell* (85 L. J. P. 100; L. R. 1 P. & D. 209) followed. *Cossey v. Cossey*, 69 L. J. P. 17; 82 L. T. 203; 64 J. P. 89—Bucknill, J.

Unfulfilled Intention to Execute Fresh Testamentary Paper—Interval of Time.]—In order to apply the doctrine of dependent relative revocation, it is not necessary that at the time of the actual revocation there should be in existence an earlier valid document which the testator intends to revive. The doctrine may extend to cases where there is an intention not in fact fulfilled to execute a fresh testamentary paper. The question of intention is one of fact to be determined on the circumstances of each individual case. *Dixon v. Treasury Solicitor*, 74 L. J. P. 33; [1905] P. 42; 92 L. T. 427; 21 T. L. R. 145—Gorell Barnes, J.

Quere—In the case of intention to execute a fresh paper, what interval (if any) of time elapsing between the date of actual revocation and death ensuing without any further testamentary act will debar a testator from the benefit of the doctrine and cause him to die intestate? *Id.*

Settlement—Mistake.]—A testator, in 1882, after his second marriage, made a will whereby, among other things, he appointed certain funds comprised in a settlement made on his first marriage amongst the issue of such marriage. Subsequently, in 1895, he executed a fresh will containing no allusion to the settlement, or dealing in any way with the property comprised therein, and at the same time he revoked the

will of 1882. THE COURT, being satisfied by evidence that at the time the testator revoked the will of 1882 he only did so under the erroneous impression that the settlement would by its own force and effect give the property to the children of his first marriage, and that therefore the will of 1882 was useless, and that he all along intended his children by his first wife to be benefited substantially as they were benefited by the will of 1882, and thought they would be so benefited by the effect of the settlement itself, held it was a case of dependent relative revocation, and admitted the will to probate. *Stamford v. White*, 70 L. J. P. 9; [1901] P. 46; 84 L. T. 269—Jeune, P.

Three Testamentary Documents—Power of Appointment—Exercise by Will.]—A testatrix who, besides other property, was entitled to a sum of 4,000*l.* under the will of her father for life, with power of appointment by will among her children, left three testamentary documents, dated respectively 1890, 1894, and 1895. By the will of 1890 she bequeathed to her daughter G. the sum of 4,000*l.* absolutely, for her use and benefit, "being the sum left me by my late father, &c." By the will of 1894 she left 4,000*l.* to her daughter G. without specifying any fund. By the will of 1895 she left all her property to her daughter G., with remainder over in case she should predecease her. Neither the will of 1894 nor the will of 1895 contained any words of revocation:—*Held*, first, that the will of 1890 was a sufficient execution of the power; and secondly, that in the absence at least of a general revocatory clause, the fact that the will of 1895 disposed of the whole property was not by itself sufficient to revoke the execution of the power effected by the will of 1890. *Cadell v. Wilcocks*, 67 L. J. P. 8; [1898] P. 21; 78 L. T. 83; 46 W. R. 394—Jeune, P.

Lost Will.]—See col. 2773.

6. WILL AND CODICIL.

Inconsistency—Intention—Consent.]—Where there are two inconsistent testamentary documents, and the Court is satisfied that the second document, though purporting to be a last will and testament, was only intended to operate as a codicil of the former will, and there is no objection raised on the part of other parties interested, probate will be granted of both documents, the second being considered to be a codicil only. *Summers, In the goods of*, 84 L. T. 271—Gorell Barnes, J.

Two Codicils of Same Date—No Evidence as to Priority of Execution—Inconsistency.]—*Prima facie*, every document purporting to be testamentary and executed in accordance with the provisions of the Wills Act ought to be admitted to probate. This presumption may be displaced where there is more than one document if there is a sequence in the dates of the documents which, coupled with the words of the later, leads to the inference that the later was meant to be a revocation in whole or in part of the earlier, or if the documents are proved to have been executed on the same date and occasion, or are undated, and it is impossible to say which was

executed first, and they are so inconsistent that they cannot stand together. *Townsend v. Moore*, 74 L. J. P. 17; [1905] P. 66; 92 L. T. 335; 53 W. R. 338—C.A.

Where, however, two testamentary documents are duly executed on the same day and occasion, and practically simultaneously, and the circumstances are such as to lead to the inference that they were both intended to be effective, then though there are apparent inconsistencies both will be admitted to probate, unless they are so inconsistent that they cannot stand together; and in determining that question the Court will, so far as possible, read the words of the documents so as to support the admissibility of both to probate, even though the construction should be one which the Court would not have otherwise arrived at. The statement of the law in 1 *Williams on Executors* (7th ed. p. 162; 8th ed. p. 138) approved. *Ib.*

Codicil—Revocation—Revival.—A testatrix made a will dated January 31, 1888. By a subsequent codicil dated August 1, 1893, and headed: "Memorandum for my trustee A. W. G.," the sole surviving executor and trustee of the will, she disposed of the whole of her property without any specific appointment of an executor. By another will made abroad she confirmed her will "made in England in or about the year 1889," and thereby disposed only of her property situate abroad, of which latter will she appointed another executor:—*Held*, that probate of all three documents might be granted to A. W. G. as executor, with liberty to the foreign executor to come in. *Green, In the goods of*, 79 L. T. 738—Gorell Barnes, J.

Mistaken Reference to Will Already Destroyed—Revival.—Where a testator refers by mistake in a codicil to a will, which has not only been revoked but actually destroyed at the time of the execution of such codicil, the Court may, if satisfied that such reference is a pure mistake and that the testator intended to refer to an existing will, grant probate of the codicil, omitting the words of reference which have been inserted by mistake. But it is otherwise if the will referred to by mistake is in existence at the time of the execution of the codicil. *Reade, In the goods of*, 71 L. J. P. 45; [1902] P. 75; 86 L. T. 258—Gorell Barnes, J.

A testator executed a will on January 10, 1895, with two codicils thereto later on in the same year. In 1898 he executed his last will, with one codicil thereto in 1899 and another in 1900. In the codicil of 1900 he referred to his will "dated January 10, 1895." There was evidence—first, that this was a mistake, and that the reference should have been to the will of 1898; and secondly, that the wills and codicils of 1895, which had been duly revoked by the will of 1898, had been destroyed by the testator at the time of its execution. THE COURT admitted the will of 1898 and the two codicils thereto to probate, omitting from the second codicil the reference to the will of January 10, 1895. *Rogers v. Goodenough* (31 L. J. P. 49; 2 Sw. & Tr. 342) followed. *Ib.*

Semble, that if the will of January 10, 1895, had been in existence and not destroyed at the

time of the execution of the codicil of 1900, the reference to it in that codicil, although inserted by mistake, would have operated as a revival. *Ib.*

Republication of Will Referred to by Date—Codicil not Mentioned.—The testator made a will dated October 21, 1895, and a codicil thereto dated October 31, 1895. He made a new will, revoking all previous testamentary instruments on November 18, 1896, but he revoked this will by tearing it on January 7, 1897. He then on January 15, 1897, made two codicils, one republishing the will of October 21, 1895, written on the same sheet of paper as that will, and referring to it as "my above written will," and the other stated to be a codicil to the will of October 21, 1895, making a few different bequests, but in all other respects confirming the same:—*Held*, that the codicil of October 31, 1895, was not republished, and that probate should be granted only of the will of October 21, 1895, and the two codicils of January 15, 1897. *Burton v. Newbery* (1 Ch. D. 234) explained. *Gordon v. Reay* (Lord (5 Sim. 274) questioned. *French v. Hoey*, [1899] 2 Ir. R. 472—Andrews, J.

Unsigned and Unattested Cancellation of Three Legacies—Subsequent Codicil Revoking only One—Effect.—Where a testator after execution of his will makes alterations without further signature or attestation and then by codicil confirms "his will," it is in every case a question of construction what the instrument is which the testator by his codicil intends to confirm—whether it is his will as originally executed or his will as subsequently altered by him. *Hay, In re*; *Kerr v. Stinmean*, 73 L. J. Ch. 33; [1904] 1 Ch. 317; 52 W. R. 92—Buckley, J.

A testatrix by her will gave certain legacies to A, B, and C. Subsequently her maid, at her direction, drew her pen through the names of the three legatees. Two days later the testatrix executed a codicil to her will, by which she revoked the legacy to A, and concluded by stating that in all other respects she ratified and confirmed her will:—*Held*, that the instrument which she confirmed by the codicil was her original will without the alterations, and that the legacies to A, B, and C were therefore good under the will, but that one of them having been revoked by the codicil the remaining two only were payable. *Ib.*

Will and Two Codicils—Erasures and Alterations—One Codicil Undated—Will and Codicils Admitted to Probate on Motion.—A deceased person left a will and two codicils thereto. The will was in every way formal. The first codicil, which was entirely in the handwriting of the deceased, was duly executed but contained certain erasures. The second codicil, which was also entirely in the handwriting of the deceased, was duly executed in the presence of two witnesses, but was undated. The interests of six infants were affected by the codicils. THE COURT, being satisfied of the due execution of the codicils, and that it was in reality to the interest of the infants that they should be established without further expense, admitted all three documents to probate on motion. *O'Brien, In the goods of*, 69 L. J. P. 55; [1900] P. 208—Jeune, P.

Separate Constituent Parts of same Testamentary Paper—Effect to be Given to Form of Words Used and Place where Written.]—In deciding as to the constituent parts of a testamentary paper, the form of words used and the place where they are written may be immaterial so long as the formalities of the Wills Act, 1837, as to execution are proved to have been satisfied. Where the intention of the testator is clear, and is carried out in a properly executed holograph paper written at the same sitting, such matters as an unusual form of words or the insertion of part of what is written in an unusual place, having, for instance, the appearance of an interlineation in another testamentary paper, will not be regarded as having any technical effect in excluding from probate any part of the testamentary paper so executed. *Oldroyd v. Harvey*, 76 L. J. P. 161; [1907] P. 326; 23 T. L. R. 728—Bargrave Deane, J.

A testator, desiring to revoke certain legacies, purported to do so by a second codicil in which the words of revocation were in fact inserted in the middle of a first codicil, and above a formal heading of the second codicil, which was placed below the first codicil. On due proof of execution, the words so inserted were admitted to probate as part of the second codicil. *Ib.*

English Will and Codicil—American Will Dealing Solely with American Property—Copy of American Will to be Lodged.]—In a probate action the jury found for the will and codicil propounded by the plaintiffs, and the Court had accordingly pronounced for them. At the Probate Registry the officials refused to deliver out probate until either an American will, which the testator had made dealing solely with his American property, or an exemplification of probate thereof was lodged:—*Held*, that probate of the English will and codicil should issue on the plaintiffs' lodging a copy of the American will. *Paul, In re; Gilmer v. Overman*, 23 T. L. R. 716—Bucknill, J.

7. PROBATE.

(a) Grant of.

Document partly Testamentary admitted to Probate.]—Where a document, duly executed as a will, is partly testamentary and partly not testamentary, the Court has jurisdiction to admit the testamentary part of the document to probate. *Wolfe v. Wolfe*, [1902] 2 Ir. R. 246—Andrews, J.

Colonial Grant of Probate—Re-sealing—Jurisdiction.]—On being satisfied that a Colonial grant has been properly made, the Court has jurisdiction under the Colonial Probates Act, 1892, to direct re-sealing. *Smith, In the goods of*, 73 L. J. P. 28; [1904] P. 114; 90 L. T. 169; 20 T. L. R. 119—Bucknill, J.

Foreign Domicil—Marriage—English Domicil subsequently Acquired.]—Section 3 of the Wills Act, 1861, the title of which is, "An Act to amend the law with respect to wills of personal estate made by British subjects," is not limited in its operation to the wills of British subjects, but extends to the will of a foreign testatrix,

made before her marriage, and in strict conformity with the law of her foreign domicil at that time, according to which, marriage does not revoke a will. *Groos, In the goods of*, 73 L. J. P. 82; [1904] P. 269; 9 L. T. 322—Gorell Barnes, J.

Foreign Will—Revoked Codicil—Foreign Grant—Exemplification.]—A testator died domiciled in India, leaving a will and two codicils, one of which had been revoked. The Indian Court granted probate of the will and both codicils:—*Held*, that probate might be granted here of the exemplification probate granted in India, notwithstanding that it comprised a revoked codicil. *Gubbey, In the goods of*, 80 L. T. 808—Gorell Barnes, J.

Property in England—Extracts from Will.]—Where the will of a foreigner resident abroad was proved by the executor in the foreign Court, and the testatrix died possessed of property in England, the Court refused to make a grant to the executor of administration with extracts from the will annexed, such extracts relating to the English property and being furnished by the foreign Court to enable the application to be made. *Von Faber (Baroness), In the goods of*, 20 T. L. R. 640—Jeune, J.

Alien—Marriage Subsequent to Execution of Will and Prior to Acquiring English Domicil—Grant of Probate, Limited in Time.]—A Dutch subject domiciled in Holland made her will and afterwards married, which, by the law of the domicil, effected no revocation of her will. She subsequently became domiciled here, whilst retaining Dutch allegiance, and died here:—*Held*, her will entitled to probate in England, in spite of the marriage subsequent to its execution but before the change of domicil. *Ib.*

By the law of her foreign domicil the powers of the executor were limited in time. The Court, following that law, made a grant of probate here, limited in time. *Ib.*

Will in Custody of Foreign Court—Notarial Copy—Exemplification.]—Even where a will is in the possession of a foreign Court merely for purposes of custody and not for purposes of probate, the Court here will not admit a notarial copy to probate, but will require the original will or a copy authenticated by the foreign Court. *Brown, In the goods of*, 80 L. T. 360—Jeune, P.

Incorporation of Documents—Unattested Memorandum.]—In order that an executed testamentary paper may incorporate an unattested document two factors are necessary. First, the document must be shown to have existed at the time of the execution of the executed paper, for which purpose parol evidence is clearly admissible; and secondly, the document must be referred to in the executed paper in such terms as contemplate a then existing document and identify the particular document in question. This latter proposition is a matter involving the proper construction of the language used in the executed paper; and, in deciding that, extrinsic evidence is admissible to such an extent and of such circumstances as will enable the Court to place itself in the

situation of the testator, the meaning of whose language it is called upon to decide. *University College of North Wales v. Taylor*, 76 L. J. P. 49; [1907] P. 228; 96 L. T. 587; 23 T. L. R. 395—Gorell Barnes, P. Reversed in C.A., 24 T. L. R. 29.

— **Probate of Codicil to Non-existent Will.]**

—The substance of the draft of a will which is not proved to have been executed or to exist is not incorporated by the execution of a subsequent codicil, referring in terms to a will supposed by the person who draws the codicil to have been validly executed in accordance with what is expressed in the draft will. Such a codicil, however, may be admitted to probate as a valid testamentary paper in itself, though its expressed dependence upon the will, which is not shown to have been executed or to exist, may necessitate resort to a Court of construction. *Eyre v. Eyre*, 72 L. J. P. 45; [1903] P. 131; 88 L. T. 567; 51 W. R. 701—Bucknill, J.

— **Evidence—Inadmissibility of Statements of Testator to Prove Execution of Will.]**

—The acquiescence by a testator in the preparation of such a codicil and the execution of it by him, and his statements at the time, are not admissible evidence to prove the existence or execution of a will in accordance with the draft. *Ib.*

— **Reference to Document to be afterwards Executed.]**—A book or other document referred to in a testamentary paper cannot be incorporated unless it is in existence at the time of the execution of such testamentary paper, and is actually referred to as an existing and not as a future document. *Smart, In the goods of*, 71 L. J. P. 123; [1902] P. 238; 87 L. T. 142—Gorell Barnes, J.

So, where a will contained the following words, "I direct my trustees to give such of my friends as I may designate in a book or memorandum that will be found with this will, the different articles specified for such friends in such book or memorandum," and subsequently the testatrix did write up such book or memorandum, and after she had so written it up executed a codicil which did not refer in any way to such book or memorandum, but confirmed the will with certain alterations,—*Held*, that, although the will was republished by the codicil and must be taken to speak from the date of such codicil, the allusion therein to the "book or memorandum" was still to a "future" and not to an "existing" document, and that therefore such "book or memorandum" was not incorporated, and could not be included in the probate. *Ib.*

— **Unattested Document — Admission of Parol Evidence.]**—Testator, by will made in June, 1905, bequeathed a legacy of 10,000*l.* to each of the plaintiff institutions upon trust to apply the same in founding scholarships to be held upon such terms and subject to such rules "as are contained in any memorandum amongst my papers written or signed by me relating thereto." There was then in existence a memorandum of March, 1905, containing terms and rules addressed to the executors of his will, which had been written by the testator shortly after making a former will bequeathing similar legacies, and the executors sought to include

this memorandum in the probate of the will of June, 1905, and adduced parol evidence to shew that it was in fact the document referred to by the testator:—*Held*, that, on the true construction of the will, the testator intended to include any future memorandum; that parol evidence was not therefore admissible to shew that the testator was referring to the memorandum of March, 1905; and that this document ought not to be included in the probate of the will. *University College of North Wales v. Taylor*, 77 L. J. P. 20; [1908] P. 140; 24 T. L. R. 29—C.A.

— **Two Paper Writings—Grant to Executors Named in the Two Instruments.]**

—Where probate was granted of two testamentary papers as together constituting the last will of a testator, the grant was made to the two executors named in the first instrument and one executor named in the second instrument, the second executor named in the latter document having renounced. *Strahan, In the goods of*, [1907] 2 Ir. R. 484—Andrews, J.

— **Two Wills — English and Foreign Wills — Incorporation.]**

—The testatrix, who was an American by birth, but had married an English subject, executed in 1898 an English and an American will dealing with different properties. There were separate sets of executors appointed under each will. In 1903 the testatrix executed an English will in which reference was made to a French will and to the American will of 1898. This last English will revoked the earlier English will of 1898, but contained a specific declaration that it did not extend to her property in the United States nor to her property in France. The French will could not be found:—*Held*, that probate should be granted of the English will of 1903 without incorporating either the American or the French will. *Schenley, In the goods of*, 20 T. L. R. 127—Bucknill, J.

— **Clerical Error—Striking out Word Inserted in Will by Mistake.]**

—Where it is clear that a word has been inserted in a will by mistake, the Court will order it to be struck out, but will not, under any circumstances, order another word to be substituted for it. *Bushell, In the goods of* (57 L. J. P. 16; 13 P. D. 7), and *Huddleston, In the goods of* (63 L. T. 255), not followed. *Schott, In the goods of*, 70 L. J. P. 46; [1901] P. 190; 84 L. T. 571—Jeune, P.

— — When it is clear that a word has been inserted into a will by mistake in the process of copying, the Court will cause such word to be struck out. *Vaughan v. Clerk*, 87 L. T. 144—Jeune, P.

— **Omission of Words from Probate—Words Inserted by Mistake of Solicitor.]**

—Certain words introduced into a will by mistake of the solicitor who prepared it, he being under the impression that the testatrix was possessed only of an "undivided moiety" of an estate, whereas she was possessed of the whole interest therein, completely altered the testamentary intentions of the testatrix. THE COURT, there being no direct evidence that the will or the draft had been read by the testatrix or had been read over to her, and the inference from such evidence as there was being all the other way, granted

probate of the will with the omission of the words inserted by mistake. *Brisco v. Baillie Hamilton*, 71 L. J. P. 121; [1902] P. 234; 87 L. T. 746—Jeune, J.

Ambiguity—Partial Blank in Description of Legatee and Executrix—More than one Individual Answering Description Given—Parol Evidence Admitted in Explanation.—Where the meaning of the will is neither ambiguous nor obscure, and a gift or appointment of an executor in it is on the face of the document perfect and intelligible, but from circumstances admitted in proof an ambiguity arises as to which of two or more persons, each answering the description, is intended, parol evidence is admissible in explanation. A complete blank in a will cannot be filled up in this way, but parol evidence may be resorted to in order to explain, with reference to a partial blank, words which of themselves have a reasonable meaning. The words in a will, "my granddaughter," followed by a blank, in the description of a legatee and executrix, in a case where the testatrix had in fact three granddaughters, explained by evidence *dehors* of intention. *Hubbuck, In the goods of*, 74 L. J. P. 58; [1905] P. 129; 92 L. T. 665; 54 W. R. 16; 21 T. L. R. 333—Gorell Barnes, P.

Married Woman—Assent of Husband—Probate—Probate Registrars Rules, 15 and 18.—Since the amended rules (15 and 18) for the Probate Registrars in non-contentious business took effect—namely, on April 19, 1887—a grant to a husband of probate of the will of his wife does not necessarily operate as an assent to the will as a disposition of property which she had no right to dispose of by will without his assent. *Held, further*, that upon the true construction of the will the property in dispute was not included in the bequest, and the question of assent did not arise. *Atkinson, In re; Waller v. Atkinson*, 68 L. J. Ch. 404; [1899] 2 Ch. 1; 80 L. T. 505; 47 W. R. 469—C.A.

Personalty Abroad—Certified Copy.—Where a later will confirms an earlier will, dealing only with assets out of the jurisdiction, both wills must be proved. Where a will has been filed in a Court in the colonies for probate, but has not yet been proved, a certified copy issuing from that Court will be admitted to probate. *Western, in the goods of*, 78 L. T. 49—Gorell Barnes, J.

Lost Will—Evidence—Presumption of Destruction by Testator.—The presumption arising from the facts of a will being traced to the testator's possession and its non-production at his death that it was destroyed by him *animo cancellandi* can only be rebutted by such evidence as produces moral conviction that it was not so destroyed. *Allan v. Morrison*, 69 L. J. P.O. 141; [1900] A.C. 604—P.C.

—Motion to Establish Copy—Consent of Next-of-Kin.—Notwithstanding the decision in *Pearson, in the goods of* (66 L. J. P. 8; [1896] P. 289), the Court may under special circumstances, in a very clear case, admit a copy of a lost will to probate or administration with the will annexed, on motion, without requiring the consent of all the persons interested in intestacy. *Apted, In the goods of*, 68 L. J. P. 123; [1899] P. 272; 81 L. T. 459—Gorell Barnes, J.

H. died, leaving a will, whereof she appointed A. sole executrix and universal legatee. A. died without having proved the will of H., leaving a will whereby she appointed B. sole executrix and universal legatee thereof. B. lost or mislaid the will of H. The estate of H. consisted of personalty 5l. 2s. 6d., and realty 192l. There were several persons entitled in distribution to the personalty. The heir-at-law consenting, and all the other persons interested in intestacy having had due notice of the application, the Court made a grant of administration with a copy of the original will of H. annexed, on motion, without requiring the consent of all the other persons interested in intestacy. *Ib.*

—Draft—Probate—Testatrix Confined in a Lunatic Asylum.—After making her will a testatrix became of unsound mind, and was confined in a lunatic asylum. The will was seen after the date of the removal to the asylum, but was missing after the death of the testatrix. With the consent of the Master in Lunacy and of the receiver of the deceased's property, appointed under the Lunacy Act of 1890, the Court granted probate of the draft of the will made by the testatrix to her next-of-kin. *Crandon, In the goods of*, 84 L. T. 330—Gorell Barnes, J.

Statutory Nomination—Document Inoperative by Statute—Testamentary on Face of it.—Section 25 of the Industrial and Provident Societies Act, 1893, enables a member of a registered society to sign a nomination paper stating to whom his property in the society shall pass at his death, and under such documents such property passes at once on his decease. This power of nomination is, however, subject to certain limitations, one of which is that such property must not exceed 100l. sterling. Where a member of such a society signed a nomination paper in the presence of two witnesses, but his property was above the value of 100l. sterling, *Held*, that although the document was inoperative under the statute, nevertheless, being testamentary on the face of it and having been duly executed in accordance with the provisions of the Wills Act, 1837, it would take effect as a will and ought to be admitted to probate. *Baxter, In the goods of*, 72 L. J. P. 2; [1903] P. 12; 87 L. T. 748; 51 W. R. 302—Gorell Barnes, J.

Incapacity of One of Several Executors—Revocation of Grant—Fresh Grant.—Where one of several executors, who have taken probate, becomes incapable, the former grant will be revoked on motion and a fresh grant issued to the remaining executors, with power reserved to the executor who has become incapable to come in and prove if and when again capable. *Shaw, In the goods of*, 74 L. J. P. 39; [1905] P. 92; 92 L. T. 427—Gorell Barnes, J.

Attesting Witness—Absolute Gift to Wife of—Alternative Contingent Gift to her Children.—Where there is an absolute gift to the wife of an attesting witness to the execution of a will with an alternative contingent gift to her children in the event of her being dead at the period of distribution, there is an intestacy if the wife is living at the period of distribution. *Jull v. Jacobs* (3 Ch. D. 703), *Clark, in re*;

Clark v. Randall (55 L. J. Ch. 89; 31 Ch. D. 72), *Townsend, In re; Townsend v. Townsend* (56 L. J. Ch. 227; 34 Ch. D. 357), considered. *Aplin v. Stone*, 73 L. J. Ch. 456; [1904] 1 Ch. 543; 90 L. T. 284—Swinfen Eady J.

— **A Beneficiary under Secret Trust.**—By his will the testator gave all his estate to O. "to be distributed as he thinks right." O. was verbally informed by the testator at the time of the execution of the will that he wished the property to be divided as he thought fit among five named persons, of whom B. (one of the next-of-kin) was one. B. was one of the attesting witnesses to the will—*Held*, that she was not thereby incapacitated from taking a benefit under the secret trust. *Fleetwood, In re* (49 L. J. Ch. 514; 15 Ch. D. 594), not followed. *O'Brien v. Condon*, [1905] 1 Ir. R. 51—M.R.

(b) *Appointment of Executor.*

— **Erroneous Description of.**—Where it is shown that a testator has misdescribed the name and residence of an executor, probate may be granted to the executor in his real name and as of his real residence, described in the will as of another name and another residence. *Baskett, In the goods of*, 78 L. T. 843—Gorell Barnes, J.

— **Omission of Surname.**—A testator bequeathed all his estate on certain trusts to his wife "M. C.," his friend "T. S.," and his son "W. C." T. S. was mentioned twice in the will, which continued: "I appoint my said wife, the said 'T. C.,' and my said son 'W. C.,' executors of this my will." THE COURT being satisfied on the evidence that the testator intended to appoint T. S. one of his executors, struck the "C" out after the "T" in the clause appointing executors, and granted probate to "T. S." as one of the executors named in the will. *De Rosas, In the goods of* (46 L. J. P. 6; 2 P. D. 66), followed. *Cooper, In the goods of*, 68 L. J. P. 65; [1899] P. 193; 80 L. T. 632—Jeune, P.

— **Will Appointing no Executor—Universal Devisee and Legatee—Real Estate—Land Transfer Act, 1897.**—The practice of the Court in cases where some one is not named as executor in a will and no duties are indicated in the will as would constitute him executor thereof according to the tenor, but who has such an interest that in spite of not being named as executor he might be looked to to act as such, is to grant to such person letters of administration with the will annexed, and not probate. This practice is applicable in the case of the will dealing with real estate of a person dying after the commencement of the Land Transfer Act, 1897. *Pryse, In re*, 73 L. J. P. 84; [1904] P. 301; 90 L. T. 747—C.A.

— **Executor according to the Tenor.**—A will contained the following words: "I will that E. M. C. . . . shall be one trustee and H. E. . . . the other trustee to hold and administer my estate, well known to the said H. E." Also "I wish to give the said trustees the same power as I have now myself." THE COURT held that the effect of the above words was to constitute the trustees executors according to

the tenor, and, E. M. C. having predeceased the testator, granted probate to the said H. E. *Way, In the goods of*, 71 L. J. P. 13; [1901] P. 345; 85 L. T. 643—Gorell Barnes, J.

— **"Administer"—Construction of Will.**—A testator, by his will, appointed H. E. "to hold and administer in trust all my estate well known to the said H. E."—*Held*, that as this person had duties to perform, the word "administer" was, without any express instruction to pay debts, sufficient to constitute him executor according to the tenor. *Way, In the goods of*, [1901] P. 345—Gorell Barnes, J.

— **Direction to Person to Pay Debts without Specific Gift or Bequest.**—A will contained the following words, "I desire J. G. of . . . to pay all my just debts," but bequeathed nothing to the said J. G., either by way of legacy, gift, remuneration, or otherwise:—*Held*, that such direction constituted J. G. executor according to the tenor of the will. *Cook, In the goods of*, 71 L. J. P. 49; [1902] P. 114; 86 L. T. 537—Jeune, P.

— **Reference in Marginal Note.**—A reference in a marginal note to certain persons as executors, whose express appointment as executors has been cancelled, but who are left trustees of the will, may have the effect of appointing them executors, and not only according to the tenor. *Nussey, In the goods of*, 78 L. T. 169—Gorell Barnes, J.

— **Intermeddling by an Executor—Executor Compelled to take up Probate.**—If an executor have intermeddled with an estate, he may be compelled on the application of a legatee to take up probate, though from his conduct he appears an undesirable person to fill the office of executor. *Coates, In the goods of*, 78 L. T. 820—Jeune, P.

— **Grant to Corporate Body and to Individuals.**—The Court will not make a grant of probate to a body corporate and to one or more individuals, all of whom have been appointed executors by a will. *Martin, In the goods of*, 90 L. T. 264; 20 T. L. R. 257—Jeune, P.

— **Appointment of "Trustees."**—A testator by his will, which was drawn for him by a friend, and executed nearly two years before his death, directed all his just debts "to be paid by my executors hereinafter named." The word "executor" did not occur again in the will. The will also contained a direction that his younger children should be sent to a boarding school "where the trustees shall think fit." The testator then appointed his wife and two of his sons "trustees," and directed that the expense of maintaining and educating the younger children should be paid out of the estates bequeathed to them, and he also bequeathed certain leasehold houses to his two sons as remuneration for their services as trustees, but no trust property was vested in the trustees by the will. There was evidence that the testator intended his wife and the two sons named to act as his executors, and that he had intended to execute a more formal document, but had died without carrying his intention into effect. THE COURT made a grant of probate to the trustees named, as executors according to the

ignor of the will. *Kirby, In the goods of*, 71 N. J. P. 116; [1902] P. 188; 87 L. T. 141—Jeune, P.

(c) *Practice in Probate Actions.*

(See New Rules Annual Practice, 1909.)

Attachment—Conduct—Money.—On proceeding for an order under section 26 of the Court of Probate Act, 1857, for the examination in Court of a person believed to have knowledge of a testamentary paper, the tender to such person of conduct-money is a necessary preliminary to a motion to attach him in the event of non-compliance with the order. *Harvey, In the goods of*, 76 L. J. P. 61; [1907] P. 289; 23 T. L. R. 433. —Gorell Barnes, P.

Notice to Cross-examine only—Costs.—Order XXI. rule 18, as amended in July, 1898, which came in force October 24, 1898, gives the Court a discretion enabling it to condemn a defendant in a probate action in costs who has given notice to cross-examine only. Where defendants, who had given notice under the above rule, elicited nothing by their cross-examination, and it did not appear that the will ought ever to have been disputed, the Court condemned them in the costs of the action. *Spicer v Spicer*, 68 L. J. P. 19; [1899] P. 38; 79 L. T. 707; 47 W. R. 271—Jeune, P.

Several Defendants—Right of Two Sets of Counsel to be Heard.—Where several defendants are opposing a will and have filed separate defences, but the defences are substantially the same, the Court will not, at the trial of the action, hear more than one counsel on behalf of the defendants. *Bagshaw v. Pimm*, 80 L. T. 360—Gorell Barnes, J.

Evidence—Witness Examined as to Knowledge of Contents of Testamentary Document—Conduct—Money—Costs.—Where a witness is examined as to knowledge of a testamentary document under an order made by virtue of the powers conferred by section 26 of the Court of Probate Act, 1857, such witness is not entitled to claim conduct-money before giving evidence. Order XXXVII. rule 9 of the Rules of the Supreme Court does not apply to such a case. *Wyatt, In the goods of*, 67 L. J. P. 7; [1898] P. 15; 78 L. T. 80; 46 W. R. 425—Jeune, P.

Where a witness, who had been examined as above, denied all knowledge of the will in question, and on the completion of examination applied for costs, THE COURT refused to make any order as to costs until more fully informed as to the facts of the case; but added that the witness might make an immediate application for costs if the action to prove the will was not proceeded with. *Ib.*

Denial by Attesting Witness Ten Years Afterwards of his Signature—Evidence.—Probate in common form on the oaths of the attesting witnesses was granted of a will made in Bermuda in 1883. In an action brought in consequence of suspicions suggested as to the validity of the will, one of the witnesses denied, in 1893, that he saw the testator sign and the genuineness of his own signature. The other witness

declined to give evidence except for an amount of remuneration in excess of what the executors (the respondents) thought just. The barrister who prepared the will, and was an executor and trustee and received a legacy in addition to professional charges, gave evidence of due execution and testamentary capacity:—*Held*, that the evidence of the witness examined was incredible, and that the absence of the other witness was satisfactorily accounted for, and probate confirmed. *Pilkington v. Gray*, 68 L. J. P. C. 63; [1899] A.C. 401—P.C.

Secondary Evidence—Neither Attesting Witness to be Found—Affidavit of an Attesting Witness for Probate in Common Form Admitted at the Trial.—In a suit for probate in solemn form, where it appeared that after every effort to trace the attesting witnesses neither of them could be found, the Court admitted, as secondary evidence of execution, an affidavit of one of them, sworn to support an application for probate in common form. *Hayes v. Willis*, 75 L. J. P. 86—Gorell Barnes, P.

Notice Given by Plaintiff to Cross-examine only.—The protection of rule 18 of Order XXI. is confined to parties opposing probate in the first instance—namely, defendants—and *semble* also interveners delivering a defence, and does not extend to plaintiffs claiming to revoke probate already granted. The notice cannot be given by such a plaintiff with his reply. *Tomalin v. Smart*, 73 L. J. P. 37; [1904] P. 141; 90 L. T. 171; 20 T. L. R. 197—Jeune, P.

Notice to Cross-examine Witnesses only—Costs—Trustee.—Where a defendant in a probate action has given notice that he desires only to cross-examine the witnesses to a will, the Court will, in deciding the question of costs if it pronounces for the will, give weight in case of doubt to the fact that the defendant is a trustee and protecting the interests of the *cestuis que trust*. *Perry v. Dixon*, 80 L. T. 297—Jeune, P.

Costs.—Under the provisions of Order XXI. rule 18 (Rules of the Supreme Court), as amended July, 1898, any defendant in a probate action giving the notice required by that rule, "that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced," shall, even where he has required the case to be tried by a jury, and notwithstanding any former practice to the contrary, be exempt from any liability to pay the costs of the other side, "unless the Judge shall be of opinion that there was no reasonable ground for opposing the will." *Davies v. Jones*, 68 L. J. P. 69; [1899] P. 161; 80 L. T. 631—Jeune, P.

Costs—Onus of Proof—Principles as to Costs—Plea of Undue Influence.—Unless costs in a probate action tried before a jury are to follow the event, the facts must generally be such as to justify the application of one of two substantial principles. Either—first, the testator, or those interested in the residue, must have been responsible for the litigation, when the costs will be ordered to come out of the estate; or secondly, the circumstances must call for investigation, and the party opposing probate must have acted reasonably, when no order will be made as to costs. Neither of these principles

justifies an unsuccessful plea of undue influence unless there were reasonable grounds for putting it forward. *Wilson v. Basil* (72 L. J. P. 89; [1903] P. 239) commented on. *Spiers v. English*, 76 L. J. P. 28; [1907] P. 122; 96 L. T. 582—Gorell Barnes, P.

— **“Testamentary expenses”**—**Charge on Real Estate.**—“Testamentary expenses” charged by will upon a testator’s real estate do not include costs of an unsuccessful plaintiff in an action brought to obtain a revocation of a grant of probate of the will, but do include costs of the executors in defending the action. *Prince, In re; Godwin v. Prince*, 67 L. J. Ch. 531; [1898] 2 Ch. 225; 78 L. T. 790; 47 W. R. 25—Stirling, J.

— **Out of the Estate—Real Estate—Land Transfer Act.**—Where in a probate action the costs are ordered to be paid “out of the estate,” such costs may in the course of administration be paid out of real estate where the personal estate is insufficient. *Vickerstaff, In re; Vickerstaff v. Chadwick*, 75 L. J. Ch. 419; [1906] 1 Ch. 762; 94 L. T. 463; 54 W. R. 414—Keke-wich, J.

— **Costs of both plaintiff and defendant ordered to be charged on and paid out of the corpus of devised estate bequeathed to successive life tenants (one of them being the defendant in the action), and subject thereto to the residuary legatees of the testator, one of whom was plaintiff.** *Dean v. Bulmer*, 74 L. J. P. 12; [1905] P. 1; 92 L. T. 426—Jeune, P.

— **Failure of Pleas of Undue Influence and Fraud—Costs out of the Estate.**—The rule of practice that a party opposing probate who pleads unsuccessfully undue influence and fraud is to be condemned in costs, is not without exception. Where circumstances of suspicion attend the execution of the will, and the onus of removing them and of proving due execution and capacity is cast upon the party propounding, according to the rule laid down in *Orton v. Smith* (42 L. J. P. 50; L. R. 3 P. & D. 23), a party pleading undue influence and fraud, although unsuccessful, is nevertheless entitled to party-and-party costs out of the estate, subject to the solicitor-and-client costs of the party succeeding, unless the circumstances of the case render it unreasonable to raise such issues. *Wilson v. Basil or Bassett*, 72 L. J. P. 89; [1903] P. 239; 89 L. T. 586; 52 W. R. 271—Walton, J.

— **Defendant Disputing Will.**—A plaintiff in a probate action, who was principally interested in a will, took instructions for its preparation from the testator personally, and transmitted them to a solicitor, who prepared the will upon those instructions and handed it to the plaintiff. The solicitor never saw the deceased. THE COURT held that, under the circumstances, the defendant, who was the adopted daughter of the testator and interested in a will previously made by him, was so far justified in disputing the last will that she ought not to be condemned in the costs of the action. *Aylwin v. Aylwin*, 71 L. J. P. 130; [1902] P. 203; 87 L. T. 142—Jeune, P.

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Costs out of Estate.—Where, in a probate suit tried before a Judge and jury, the Judge at the trial made a special order allowing the unsuccessful defendant, who had pleaded undue influence on the part of the plaintiff, his costs out of the estate,—*Held*, that, provided there are any grounds on which the Judge can base such special order, there is no jurisdiction to interfere with an order so made in exercise of his discretion. Probate suits are on a special footing in this respect. *Cummins v. Murray*, [1906] 2 Ir. R. 509—K.B. D.

Executors Propounding Will—Costs.—Where the executors of a deceased testatrix of advanced age propounded her will, but the jury found that at the time of the execution of the said will the testatrix was not of sound mind, memory, and understanding, and did not know and approve of the contents thereof, there being no suggestion of improper conduct on the part of the executors, but it being established that they had the opportunity of ascertaining the true state of mind of the deceased at the time of the execution of the said will, and that it could not be reasonably alleged that they were led into the litigation by the fact that the testatrix seemed to all outward appearance to be capable of managing her own affairs,—*Held*, first, that they were not entitled to costs out of the estate; and secondly, that they must be condemned in the costs of the defendant. Applications for costs by the heir-at-law and parties cited were, however, refused, on the ground that their interests were identical with those of the defendant, and that they ought not to have been separately represented, and therefore one set of costs only could be allowed. *Boughton v. Knight* (42 L. J. P. 25; L. R. 3 P. & D. 64) distinguished. *Twist v. Tye*, 71 L. J. P. 47; [1902] P. 92; 86 L. T. 259—Gorell Barnes, J.

— **Testatrix not of Sound Disposing Mind.**—Where executors have had an ample opportunity of examining into the state of mind of a testator or testatrix and of getting a clear knowledge of the whole state of affairs, and yet take upon themselves the responsibility of propounding a will, they do so at their own risk, and if they are defeated on the trial of the action the Court will not, except under special circumstances, interfere with the general rule that costs should follow the event. *Page v. Williamson*, 87 L. T. 146—Gorell Barnes, J.

Security for—Defendant Caveator—Permanent Residence Out of Jurisdiction—Temporary Residence Within Jurisdiction.—A defendant caveator who is ordinarily resident out of, but is temporarily resident within, the jurisdiction, cannot be called upon to give security for costs under the Irish Order XXIX. rule 4 (which corresponds to Order LXV. rule 6A); he is not a “plaintiff” within the meaning of that rule. *Twomey, In the goods of*, [1900] 2 Ir. R. 560—Andrews, J.

(d) *Revocation of Probate.*

Forged Will—Letters of Administration—Partnership Action for Account—Statute of Limitations.—The grant of probate of a forged will is made void *ab initio* by its subsequent

revocation by the Court; and the established rule is that no action can be maintained in respect of a deceased person's estate except by a duly constituted administrator or executor. *Chan Kit San v. Ho Fung Hang*, 71 L. J. P.C. 49; [1902] A.C. 257; 86 L. T. 245; 51 W. R. 18—P.C.

Thus in a partnership action for account by the administrator of a deceased partner the Statute of Limitations begins to run not from the grant of probate of a will subsequently declared to be a forgery, but from the grant of administration made after and in consequence of the revocation of such will. *Ib.*

Action to Set Aside Judgment—Fraud—Motion to Dismiss—Res Judicata—Evidence.—In June, 1900, a decree was made in an action granting probate of a will in solemn form. In June, 1901, another action was brought by one of the defendants in the previous action to set aside the decree obtained in June, 1900, on the ground that the will of which probate had been granted was a forgery, and that the decree had been obtained by the fraud of a third person, who was not a party to the suit, but only the husband of one of the parties, and others acting with him. No suggestion of fraud or guilty knowledge was made against any of the parties to the first action. On a motion by the defendants to dismiss the second action on the ground that the subject matter of it was *res judicata*.—*Held*, that, as on the evidence before the Court there was no reasonable probability of the action succeeding, it ought to be dismissed as frivolous and vexatious. *Birch v. Birch*, 71 L. J. P. 58; [1902] P. 130; 86 L. T. 364; 50 W. R. 437—C.A.

An action to set aside a judgment on the ground of fraud ought not to be allowed to proceed unless the plaintiff can produce evidence shewing a reasonable probability of the alleged fraud being established; but (*per* VAUGHAN WILLIAMS, L.J.) such evidence need not necessarily be of such a character that it would be evidence in the action itself. *Ib.*

The general rule that a judgment can only be set aside on the ground of fraud against those of the parties who obtained it by fraud, has no application to a probate action in which the will is good or bad against all the world. *Ib.*

Retraction of Renunciation of Probate.—See EXECUTOR AND ADMINISTRATOR, col. 832.

Testamentary Expenses—Estate Duty.—See REVENUE, col. 2087.

8. LETTERS OF ADMINISTRATION.

(a) *Administration Pendente Lite.*

Citing Heir-at-Law.—Where the deceased has died possessed of real and personal estate, an administrator and receiver *pendente lite* will not be appointed without notice to the heir-at-law. *Wiggins v. Hudson*, 80 L. T. 296—Jeune, P.

Appointment of Receiver—Application by Creditors not Parties to Action—Security.—

Creditors commenced an action in the Chancery Division for administration of the estate of a deceased person. In the Probate Division an action was commenced by the executors of a later will of the same deceased person, to establish it against the executors of an earlier will. The creditors in the Chancery proceedings had obtained an order for the appointment of the plaintiffs in the probate proceedings as receivers of the estate. The Court granted administration *pendente lite* in the probate proceedings to the same persons at the instance of the creditors in the Chancery proceedings, though the latter were not parties to the probate proceedings. The Court also approved of the same sureties already accepted in the Chancery Division. *Tichborne v. Tichborne* (38 L. J. P. & M. 70) followed. *Cleaver, In the goods of*, 74 L. J. P. 164; [1905] P. 319; 94 L. T. 99—Gorell Barnes, B.

(b) *Administration with Will Annexed.*

Executor Dying without taking Probate—Grant Ad Colligendum to his Personal Representative—Real Estate—Citation of Heir-at-Law.—A married woman made a will whereby she left her real estate to her husband for life, with the remainder to her natural daughter. She left all her personal estate to her husband absolutely, and appointed him sole executor of her will. The natural daughter of the testatrix predeceased her, and the husband of the testatrix survived her only a few weeks, dying a widower and intestate, without having taken probate of his wife's will. Administration to his estate was granted to his sister, who now applied for a grant of administration, with the will annexed, to the estate of the testatrix. The realty was valued at 7,638*l.* 11*s.* 8*d.*, and the personalty at 45*l.* 4*s.* 11*d.* only. The heir-at-law could not be ascertained with certainty, and proceedings in Chancery were necessary to determine the question. He could not therefore be cited. Meantime a personal representative was required (among other things) for the purpose of letting certain farms. THE PRESIDENT, after remarking that if the will had dealt only with personalty the applicant would be entitled to a general grant, but that since the passing of the Land Transfer Act, 1897, she could not be so entitled where a will disposed of realty until the heir-at-law had been cited, which in the present case was not at the moment possible, gave the applicant a grant *ad colligenda bona*, with power to deal with the realty, until such time as the heir-at-law could be cited. *Roberts, In the goods of*, 67 L. J. P. 71; [1898] P. 149; 78 L. T. 390—Jeune, P.

Joint Grant to Nominees of Sole Executrix Incapable of Acting.—Where a sole executrix and universal legatee was incapable of taking probate owing to ill-health, the Court on the facts allowed a joint grant to her nominees. *Davis, In the goods of*, 75 L. J. P. 94; [1906] P. 330—Bargrave Deane, J.

Grant to Nominee of all Parties Interested in the Estate—On Death of such Nominee Grant "de bonis non" to his Partner.—The Court having, with the consent of all parties interested in the estate of a deceased testator, made a grant of administration with the will annexed to

a stranger, as the nominee of such parties, on the ground (*inter alia*) that he had a special knowledge of the business of the deceased, subsequently, on the death of such administrator, made a grant *de bonis non* to his partner. *Potter, In the goods of*, 69 L. J. P. 53—Jeune, P.

Grant Passing over Executor—Residence Abroad.]—A testator appointed a sole executor. The executor, shortly before the testator's death, disappeared, and a warrant for his arrest had been issued, but he could not be found:—*Held*, that, though residence abroad could not be presumed, the executor might be passed over without citation, and administration with the will annexed might be granted. *Wright, In the goods of*, 79 L. T. 473—Jeune, P.

Will of Married Woman Domiciled Abroad—Appointment of Executor—Consent of Husband.]—Where a married woman died domiciled in Italy, leaving a will valid according to English law, whereby she appointed an executor, THE COURT—although the husband consented to and approved of such application—refused an application for a grant of probate to the executor named in the will, but made a grant to him of administration with the will annexed. *Hallyburton, In the goods of* (35 L. J. P. 122; L. R. 1 P. & D. 90), and *Tréfond, In the goods of* (68 L. J. P. 82; [1899] P. 247), discussed. *Vannini, In the goods of*, 71 L. J. P. 7; [1901] P. 330; 85 L. T. 639—Jeune, P.

Testatrix Deserted by her Husband—Grant to Daughter—Husband not Cited.]—The Court passed over the husband of a testatrix without citation, and granted administration with the will annexed to her daughter where it appeared that the husband of the testatrix had left her many years before her death, and had never since been heard of, the daughter swearing that she believed herself to be the sole next-of-kin. *Byrne, In the goods of*, 84 L. T. 570—Jeune, P.

Absolute Gift to Executrix Cut Down to Life Interest—Gift of Residue to Another Person—Residuary Legatee Preferred to Executor of Executrix.]—A testator by his will, made upon a printed form with holograph additions, bequeathed to his wife "all his messuages, lands, tenements and hereditaments and all his household furniture ready money goods and chattels and all other his real and personal estate and effects whatsoever and wheresoever to and for her own absolute use and benefit and after her death to come absolutely" to another person "to her and her heirs for ever," and proceeded to appoint his wife executrix:—*Held*, that, having regard to the terms of the whole will, the later words must prevail, and that the intention of the testator was to give his wife a life interest only, and that the later named person was, on the true construction of the will, residuary legatee, and as such entitled to a grant of administration with the will annexed as against the executor of the wife, who, although appointed executrix by the will, had died without taking probate. *Lupton, In the goods of*, 74 L. J. P. 162; [1905] P. 321—Gorell Barnes, P.

Specific Legacy—No other Legacies or Dispositions—No Executor Appointed—Next-of-Kin not Cited—Grant Limited to Specific Property.]—

Where a testatrix executed a will whereby she bequeathed certain property to an aunt, and the will disposed of no other property, appointed no executor, and contained no other bequests or directions, THE COURT made a grant of administration with the will annexed to the legatee, under section 73 of the Court of Probate Act, 1857, limited to the property described in the will, without requiring the next-of-kin to be first cited. *Watson, In the goods of* (1 Sw. & Tr. 110), followed. *Baldwin, In the goods of*, 72 L. J. P. 23; [1903] P. 61; 88 L. T. 565—Gorell Barnes, J.

Foreign Grant—Grant Subject to Order of Foreign Court—Renunciation by Executor of Foreign Will.]—Where administration with the will annexed has been granted abroad by a foreign Court subject to such orders as may from time to time be made by that Court, the Court here need not before granting such administration to an attorney of the foreign administrator enquire whether orders have been made by the foreign Court modifying or cancelling the foreign grant. Where a testator domiciled abroad has disposed by his will of all his property without qualification as to its situation, and the executor of the will has renounced probate abroad, the Court here may grant letters of administration with the will annexed to an administrator appointed by the foreign Court without requiring express renunciation by the executor of probate in this country. *Scarr, In the goods of*, 80 L. T. 296—Jeune, P.

Gift to Charity—Residuary Legatee—Court of Probate Act, 1857, s. 73.]—A testator, a Roman Catholic canon, bequeathed a legacy to the then Roman Catholic bishop of his diocese—by name—for the benefit of the library of a certain educational institution, the legal ownership and custody of which was vested in the said bishop *ex officio*. He also appointed the said bishop his residuary legatee, and bequeathed the residue of his estate, subject to a certain legacy, to the said bishop—again by name—for the same objects as above. The testator survived the execution of his will about eleven years, during which time there had been three successors to the said bishop, but the ownership &c. of the institution was still vested in the bishop for the time being *ex officio*. THE COURT granted administration with the will annexed to the bishop for the time being, under section 73 of the Court of Probate Act, 1857, but without prejudice to any rights of the next-of-kin. *Lalor, In the goods of*, 71 L. J. P. 17; 85 L. T. 643—Gorell Barnes, J.

Will and Codicil Annexed—Executor Absent from England—Grant to Nominees of Assignees of Residuary Legatee—Citation of Executor Dispensed with.]—The testator died March, 1890, having by his will and codicil appointed two executors and trustees, and a residuary legatee. The said will and codicil were duly proved in October, 1890. One executor died in June, 1891, and in December, 1891, the other left England, intimating that he did not intend to return or to act any further in the executorship, but he did not formally renounce. The testator's estate at the time of his death consisted almost entirely of reversionary interests, and in May, 1898, became entitled to a large

sum in consequence of the death of his father. The residuary legatee, in 1895, assigned all his interest in the estate to a company dealing in reversions:—THE COURT made a grant of administration *de bonis non* with the will and codicil annexed to the nominee of the assignees, without requiring the absent executor to be cited. *Campion, In the goods of*, 69 L. J. P. 19; [1900] P. 13; 81 L. T. 790; 48 W. R. 288—Gorell Barnes, J.

Special Circumstances.—A testatrix died leaving personalty estimated at about 2,000*l*. By her will she appointed two executors, one of whom was a solicitor, and bequeathed the residue of her estate to her two sons. The solicitor-executor took some preliminary steps towards obtaining probate, and drew 25*l*. out of the estate for expenses. Shortly afterwards, being in financial difficulties, he left England with his family for America, leaving no address, and without having obtained probate of the will. The other executor renounced. THE COURT made a grant, with the will of the testatrix annexed, to one of her sons, who was also a residuary legatee, under section 73 of the Court of Probate Act, 1857. *Massey, In the goods of*, 68 L. J. P. 127; [1899] P. 270; 81 L. T. 493—Gorell Barnes, J.

Erasures.—A testator left a will containing three bequests to legatees whose Christian names were written on erasures:—THE COURT, being satisfied by expert evidence what were the names under the erasures, in making a grant of administration with the will annexed, ordered the original names to be substituted for those written on the erasures. *Brazier, In the goods of*, 68 L. J. P. 6; [1899] P. 36; 79 L. T. 472; 47 W. R. 272—Gorell Barnes, J.

Lunacy of Administratrix — Appointment of Foreign Administrateur Provisoire.—Where the wife of a domiciled foreigner obtained letters of administration with the will annexed to his assets in England and became insane abroad, THE COURT granted letters of administration to an *administrateur provisoire* appointed by a foreign Court for the use and benefit of the lunatic so long as the applicant remained *administrateur provisoire*. *Goldschmidt, In the goods of*, 78 L. T. 763—Jeune, P.

(c) To whom Granted.

Grant ad Colligendum — Next-of-Kin Abroad — Immediate Grant Necessary — Form of Grant.—Where a deceased intestate had no relations in England, and his only next-of-kin, if alive—as to which there was some uncertainty—were in Monte Video, and could not be communicated with under two months, the Court, on being satisfied that an immediate grant was necessary, made a grant *ad colligendum* to a creditor, the grant to follow the form in *Schwerdtfeger, In the goods of* (45 L. J. P. 46; 1 P. D. 424), and the administrator to give justifying security. *Bolton, In the goods of*, 68 L. J. P. 68; [1899] P. 186; 80 L. T. 631—Gorell Barnes, J.

Nominee of all Parties Interested in Estate—Special Circumstances — Lis Pendens — Desirability of Compromise — Special Knowledge by Administrator of Business of Deceased Person.—

Where an action was pending respecting the will and codicils of a deceased person, and terms of compromise had been agreed upon, which were embodied in a deed of arrangement, executed by all the parties interested in the estate, whereby it was agreed that the Court should be asked to make a grant of administration with the will and the two codicils annexed to B., an accountant who had already been appointed administrator and receiver *pendente lite*, and that all contentious proceedings should thereupon come to an end,—THE COURT made the grant as prayed to the nominee of the parties interested, under section 73 of the Court of Probate Act, 1857, by reason of “special circumstances,” such special circumstances being—first, that it was desirable in the interests of all parties that further litigation should be avoided; and secondly, that the proposed administrator had a special knowledge of the estate which made him the fittest person to administer it; but it was ordered that the grant should be made subject to the consents of all parties interested, together with an affidavit of the fitness of the administrator being duly filed in the Registry. *Farrell v. Brownbill* (83 L. J. P. 185; 3 Sw. & Tr. 467) followed. *Potter, In the goods of*; *Potter v. Potter*, 68 L. J. P. 97; [1899] P. 265; 81 L. T. 234—Gorell Barnes, J.

Administrator of Widow who had not taken out Administration.—A widow died without having taken out administration to her husband's estate, of which she had taken possession, he having died intestate and without issue. The widow by her will disposed of all her property (including her husband's assets), but appointed no executor. His assets were of small amount, but there was a possibility that they might prove to be of greater value than 500*l*. THE COURT granted administration of the husband's personal estate to the administratrix of the widow under section 78 of the Probate Act, 1857. *McDonagh, In the goods of*, [1898] 2 Ir. R. 79—Andrews, J.

Person Authorised to Take out Administration — Distribution.—The widow (who lived abroad) of an intestate authorised W. to take out letters of administration of the intestate's estate in this country. W. got in all the estate, and after paying debts had a sum in hand:—*Held*, that W. was the proper person to distribute the estate among the next-of-kin. *Rendell, In re*; *Wood v. Rendell*, 49 W. R. 131—Cozens-Hardy, J.

Widow—Application to Pass Over—Sufficient Cause.—The Court will not exercise its discretion, given by 21 Hen. 8, c. 5, s. 3, to pass over the widow of the deceased and grant administration to the next-of-kin, unless a very strong case of unfitness is made out against her. *Cory, In the goods of*, 84 L. T. 270—Gorell Barnes, J.

Widow and Children — Joint Grant to.—A. H. T., who had been bankrupt in 1887 and subsequently obtained his discharge, died in 1896 again a bankrupt and intestate, leaving a widow and children. In 1897 a grant of administration was made to his trustee in bankruptcy, who was also official receiver of the local County Court, on renunciation by the

widow and children of A. H. T. L. T., the first wife of A. H. T., died in 1887, during her husband's first bankruptcy, and a grant of administration had been made to his trustee. This grant was revoked in 1892, and a fresh grant made to A. H. T. as the lawful husband of L. T. The official receiver having paid off all debts due from the estate of A. H. T., and having a balance in hand to divide amongst his widow and children, THE COURT ordered that they be allowed to retract their previous renunciations, revoked the existing grants, and made a joint grant of administration to the widow and two of the children of the first marriage to the unadministered personal estate and effects of A. H. T., his representatives being entitled as a matter of course to represent the first wife's estate. *Thacker, In the goods of*, 69 L. J. P. 1; [1900] P. 15; 81 L. T. 790—Gorell Barnes, J.

Widow Dying Intestate—Intestate's Estate of Less Value than 500*l.*—A widow died intestate, without taking out letters of administration to her deceased husband's estate, which was of the net value of less than 500*l.* The husband having died without issue, the whole of his estate belonged absolutely and exclusively to his widow under section 1 of the Intestates' Estates Act, 1890:—*Held*, that letters of administration would be granted to the administratrix of the widow under section 73 of the Court of Probate Act, 1857, without citing the next-of-kin. *Green, In the goods of*, 84 L. T. 61—Gorell Barnes, J.

Son of Deceased Intestate, Passing over Widow—Security.—Where it appeared that the widow of a deceased intestate had eloped, sixteen years before his death, with another man, and that her whereabouts was unknown, or whether she was alive or dead, THE COURT (the estate being a small one) made a grant to the son and only next-of-kin and heir-at-law of the deceased, passing over the widow, but ordered that justifying security should be given to the extent of the value of her share in the personality. *Anderson, In the goods of* (33 L. J. P. 149; 3 Sw. & Tr. 489), followed. *Stevens, In the goods of*, 67 L. J. P. 60; [1898] P. 126; 78 L. T. 389—Jeune, J.

Grandson—Disappearance of Grandfather—Affidavit as to Advertisements.—On a motion on behalf of a grandson for a grant of letters of administration to his grandmother's estate it appeared that the grandfather had left the country about 1843, and had not been heard of since, and if now alive would be over a hundred years of age. Advertisements had been inserted in various newspapers for the grandfather, but no information had been received in reply. The COURT made a grant subject to an affidavit that there had been no further replies to the advertisement. *Bonden, In the goods of*, 21 T. L. R. 13—Jeune, P.

Lawful Son and Next-of-Kin of Deceased not Heard of for Many Years—Citation of Missing Next-of-Kin Dispensed with—Administration Oath—Justifying Security.—Where a deceased person died in 1898 a widower and intestate, having had three children, two of whom had died in his lifetime and the third had left England in 1872 and had never since been heard of, and his only surviving next-of-kin was

believed to be a grandson, THE COURT (following *Reed, In the goods of*, 29 L. T. 932) made a grant of administration to the grandson, under section 73 of the Court of Probate Act, 1857—without requiring the missing son to be cited by advertisement—upon his giving justifying security and swearing the usual administration oath in the form that he "believed himself to be" the sole next-of-kin of the deceased. *Shoosmith, In the goods of* (63 L. J. P. 64; [1894] P. 23) distinguished. *Callicott, In the goods of*, 68 L. J. P. 67; [1899] P. 189; 80 L. T. 421—Jeune, P.

Married Women's Property Act.—Where, upon the death of a woman who had married before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it appeared that, before her marriage, she had acquired a mortgage debt, which her husband had not reduced into possession, and had since her marriage made a will purporting to dispose of all her real and personal property, THE COURT made a grant to her husband of administration to such of her property as she had no power to dispose of by will. *Leman, In the goods of*, 67 L. J. P. 100; [1898] P. 215; 78 L. T. 764—Jeune, P.

Separation Order—General Grant without Citing Husband—Justifying Sureties.—When a married woman has obtained an order under section 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, a general grant with justifying sureties may be made to her estate passing over her husband without citing him. *Elizabeth Jones, In the goods of*, 74 L. J. P. 27—Jeune, P. Grant taken in restricted form, 74 L. J. P. 164.

Divorce—Surviving Spouse Passed over without Citation—Justifying Security.—A husband or wife surviving the other spouse has, after the dissolution of the marriage, no such interest in the estate of the other spouse as to entitle him or her to a grant of administration, and will be passed over without citation. The same principle applies whether the party to be passed over has been petitioner or respondent in the proceedings for dissolution of marriage. In such a case there must, however, be justifying security. *Wallis, In the goods of*, 75 L. J. P. 8; [1905] P. 326; 94 L. T. 102; 54 W. R. 172—Bargrave Deane, J.

Grant to Superior of Convent as Residuary Legatee.—Where a testatrix appointed an executor, and, after giving a legacy, bequeathed the residue to the legatee to be disposed of at her discretion for the benefit of a specified convent, both the executor and the legatee having died in the lifetime of the testatrix, the Court granted administration with the will annexed to the superior of the convent, being the head of the council in which the property of the convent was vested. *Walsh v. Glubstone* (1 Phill. 290) followed. *McAuliffe, In the goods of*, 64 L. J. P. 126; [1895] P. 290—Jeune, P.

All Relations of Intestate Dead except One Brother—Father Deserted Mother and not Heard of since 1866—Father ordered to be Cited before Administrator granted to Surviving Brother.—An intestate died a lunatic, leaving one brother him surviving. His mother and all the other brothers and sisters had predeceased him. His

father had deserted his mother in 1866 and had not been heard of since. THE COURT ordered the father to be cited before granting administration to the surviving brother. *Harper, In the goods of*, 68 L. J. P. 48; [1899] P. 59, 80 L. T. 294—Gorell Barnes, J.

Heir-at-Law—No Personality—Citation of Next-of-Kin Dispensed with.]—Where the nephew and heir-at-law of an intestate applied for a grant of administration to his estate under the Land Transfer Act, 1897, Part I., s. 2, sub-s. 4, and there was no personal estate, THE COURT made the grant in general terms without giving notice to the next-of-kin, but subject to the filing of an affidavit showing that there was no issue by any former marriage of the intestate's father that would be entitled as heir-at-law in preference to the applicant, and with the further intimation that in cases where the title of the applicant is doubtful or the amount of the personality is large as compared with the realty, notice to the next-of-kin should be given. *Barnett, In the goods of*, 67 L. J. P. 85; [1898] P. 145; 78 L. T. 391—Gorell Barnes, J.

Guardian of Infant—Husband Passed Over.]—Where a married woman died intestate, possessed of real estate of the value of about 2,500l. and personality of the value of about 250l., and left surviving her a husband and two infant children by a former marriage, the elder of whom was entitled to the realty as heir-at-law, THE COURT, on proof that the husband was in possession of the realty, which he was mismanaging, and had taken no step to obtain letters of administration and declined to say whether he would do so or not, under the Land Transfer Act, 1897, s. 2, sub-s. 4, and the Court of Probate Act, 1857, s. 73, made a grant to the guardian of the infant for his use and benefit till he should attain the age of twenty-one years and passed over the husband. *Arderm, In the goods of*, 67 L. J. P. 70; [1898] P. 147; 78 L. T. 336—Gorell Barnes, J.

Residuary Legatee—No Appointment of Executor—No Specific Gift of Residue.]—There should be no absolute technical meaning given to such a word as "money" when it occurs in a will, but its meaning in every case must depend upon the context, if there is any which can explain it, and upon the surrounding circumstances, which the Court is bound to take into consideration. Therefore, where a testator by his will left 100l. "to my brother A B, and the rest of my money is to be equally divided between" (naming four legatees), but the will contained no direction to pay debts, or appointment of executors, or—except as above—any bequest of the residue, THE COURT held, that the above words constituted the four persons named residuary legatees of the whole of the testator's personal estate, and, with the consent of the other three, made a grant of administration with the will annexed to one of them. *Cadogan, In re; Cadogan v. Palagi* (53 L. J. Ch. 207; 25 Ch. D. 154), approved. *Bramley, In the goods of*, 71 L. J. P. 32; [1902] P. 106; 85 L. T. 645—Gorell Barnes, J.

Preferred to Executor of Executrix.]—A testator by his will, made upon a printed form with holograph additions, bequeathed to his wife "all his messuages lands tenements and hereditaments and all his household furni-

ture ready money goods and chattels and all other his real and personal estate and effects whatsoever and wheresoever to and for her own absolute use and benefit and after her death to come absolutely" to another person "to her and her heirs for ever," and proceeded to appoint his wife executrix:—*Held*, that, having regard to the terms of the whole will, the later words must prevail, and that the intention of the testator was to give his wife a life interest only, and that the later-named person was, on the true construction of the will, residuary legatee, and as such entitled to a grant of administration with the will annexed as against the executor of the wife, who, although appointed executrix by the will, had died without taking probate. *Lupton, In the goods of*, 74 L. J. P. 162; [1905] P. 321; 94 L. T. 100—Gorell Barnes, P.

Lunatic—Grant to Nominee of Guardians—Creditor—Statute of Limitations.]—A creditor may be entitled to administration to the estate of a deceased person, even though his debt is barred by the Statute of Limitations, but he certainly cannot under any circumstances obtain such a grant without due notice to the next-of-kin. Therefore where a deceased person at the time of his death was an inmate of a county lunatic asylum, and indebted to the guardians for his maintenance, THE COURT refused to grant administration to the nominee of the guardians, without due notice to the next-of-kin of the deceased, although his only next-of-kin was a daughter who had herself been confined as a hopeless lunatic, in the same asylum, for fifteen years, and was likewise personally indebted to the guardians for maintenance. *Druce, in the goods of*, 68 L. J. P. 120; 81 L. T. 458—Gorell Barnes, J.

Alleged Illegitimacy of Intestate—No Official Evidence of Marriage of Intestate's Parents—Secondary Evidence Accepted.]—C. died intestate, aged seventy-three years or thereabouts. There was no official record in existence of C.'s birth, or of the marriage of C.'s parents. The Court accepted an extract from a certificate, in the Scotch form, of the marriage of C.'s brother, which took place in Scotland in 1868 (such extract containing a full description of both C.'s parents), as evidence of C.'s legitimacy, and granted administration to his cousin as one of his next-of-kin. *Wigley v. Solicitor to Treasury*, 71 L. J. P. 115; [1902] P. 233; 87 L. T. 745—Jeune, P.

Land Transfer Act—Heir-at-Law not Cited.]—Notwithstanding the provisions of section 2, sub-section 4 of the Land Transfer Act, 1897, and the fact that the heir-at-law of an intestate had not been cited, the Court granted administration under section 73 of the Probate Act, 1857, to one of the next-of-kin, the heir-at-law being abroad and his address being unknown. *Blenkinsop, In the goods of*, 49 W. R. 336—Gorell Barnes, J.

Next-of-Kin—Guardian of—Absence out of the Jurisdiction of Administrator.]—The guardian of the person and fortune of a minor next-of-kin is entitled to apply for a grant of administration during the absence out of the jurisdiction of the administrator of the deceased, who had left without administering the assets. *Lee, In the goods of*, [1898] 2 Ir. R. 81—Andrews, J.

— **Persons Interested in Alleged Will Refusing to Prove or not Appearing to Citation.]**

—Where an alleged will was in existence, but the parties interested therein declined to take any steps to establish the validity of the same, THE COURT, with the consent of all parties interested in an intestacy, made a grant of administration to the next-of-kin. *Quick, In the goods of*, 68 L. J. P. 64; [1899] P. 187; 80 L. T. 800—Gorell Barnes, J.

— **Renunciation—Grant to Person having no Interest in Estate.]**—Where the lawful sister and sole next-of-kin and only person entitled in distribution to the estate of a deceased intestate renounced her right to administration, THE COURT, with her consent, on its being shown it would be for the benefit of the property, made a grant to a person having no interest in the estate of the deceased. *Johnson, In the goods of* (2 Sw. & Tr. 595), followed. *Trigg, In the goods of*, 69 L. J. P. 47; [1901] P. 42; 82 L. T. 626—Gorell Barnes, J.

— **Special Circumstances.]**—The whole estate of a deceased intestate consisted of a share in leasehold tenements to which she was entitled under the will of her grandfather, who died in 1834. She herself died in 1873, leaving two daughters the only persons entitled in distribution to her estate. One of these daughters died in 1892 without having taken administration to her mother, leaving her husband her surviving. No grant of administration having been taken out to the estate of the mother by the other daughter, in 1901 it became important that a grant should be made in order to complete the title to the houses in question. The only persons entitled to the grant—namely, the surviving daughter and the husband of the deceased daughter—renounced in favour of a brother of the deceased who was trustee under the will of the grandfather and administrator *de bonis non* to his estate, and also entitled to one third share of the houses in question, and had managed them for some years:—*Held*, that there were not sufficient "special circumstances" to warrant making a grant to the brother under section 73 of the Court of Probate Act, 1857. *Brotherton, In the goods of*, 70 L. J. P. 33; [1901] P. 139; 84 L. T. 330—Gorell Barnes, J.

Missing Executor—Citing, by Advertisement.]

—A testator died, leaving two executors surviving him, one of whom obtained probate, leave being reserved to the other executor to come in and prove. The executor who had obtained probate died, leaving a will and executors thereof. The other executor had disappeared, and had not been heard of for fourteen years. The Court refused to grant administration with the will annexed to the daughter and sole next-of-kin of the deceased testator—although the executors of the deceased executor consented to the application—without citing the missing executor, but gave leave for such missing executor to be cited by advertisement. *Reid, In the goods of*, 65 L. J. P. 60; [1896] P. 129.—Gorell Barnes, J.

Creditor—Assignment of Charge.]—The deceased in 1871 charged a reversionary interest in personalty in favour of a creditor. He died intestate in 1878, leaving his father his

next-of-kin. His father died in 1888 having appointed A. his executrix. A. died in 1896 having appointed L. her executrix. No letters of administration had been taken out to the estate of the deceased. The reversionary interest fell into possession in 1897. The charge had been assigned to the applicants, and the sum due on it exceeded the property charged. L. consented to the application:—*Held*, that a grant ought to be made to the applicants. *Lowe, In the goods of*, 78 L. T. 566—Gorell Barnes, J.

— **Mortgage of Leasehold by Sub-demise—Outstanding Day held in Trust.]**—A lessee of certain premises mortgaged them by sub-demise for the residue of the term less the last day which he covenanted to hold in trust for the mortgagee. The mortgagee entered into possession of the premises. The mortgagor died intestate and insolvent. The mortgagee assigned his interest in the premises. The assignee desired to surrender his interest, but difficulties arose from the existence of the outstanding day. The assignee applied for administration of the estate of the mortgagor, limited to the outstanding day:—*Held*, on proof of due citation of the next-of-kin, that the grant might be made as asked for. *Kingwell, In the goods of*, 81 L. T. 461—Gorell Barnes, J.

— **Right of Retainer—Assets in the Jurisdiction—Evidence.]**—A creditor will not be granted letters of administration to defeat the right of retainer of the next-of-kin, unless he can shew the existence of assets in the jurisdiction. A general allegation of information and belief as to the existence of assets is useless. *Foy, In the goods of*, 78 L. T. 49—Gorell Barnes, J. See EXECUTOR, col. 848.

Assignee of only Surviving Next-of-Kin.]

—Where the only surviving next-of-kin of a deceased intestate renounced all claim to a grant of administration and assigned the whole of her interest in his estate to the person he had intended to benefit by a will he had signed but never duly executed, THE COURT granted letters of administration to his estate to such assignee. *Quilliam, In the goods of*, 68 L. J. P. 17; 79 L. T. 472—Gorell Barnes, J.

Attorney of One of Two Next-of-Kin—Death of Attorney—Subsequent Application for Grant de bonis non to Attorney of the Other Next-of-Kin—Notice.]

—The death of an intestate, who was resident in Australia, was presumed in 1890. He left him surviving a son and daughter, his only next-of-kin, both also resident in Australia. A grant of administration was made to the attorney of the son. Subsequently such attorney died, leaving a portion of the estate unadministered. The son had assigned all his interest in his father's estate, and a power of attorney had been sent out to his assignees in Australia for signature by him, but had not been returned to this country. The daughter now applied to the Court for a grant *de bonis non* to her attorney in this country for her use and benefit. THE COURT, holding that the fact of the power of attorney having been sent out to Australia, as above stated, was a sufficient notice of the application to the person whose attorney had died, made the grant as prayed. *Barton, In the goods of*, 67 L. J. P. 10; [1898] P. 11; 77 L. T. 629; 78 L. T. 81—Jeune, P.

Appointee—Will not duly Executed according to Law of Domicil, but Good as Exercise of Power.]—A testatrix died domiciled in France, having been for many years separated from her husband. She left a will not duly executed according to French law, but which was, notwithstanding, a valid execution of a power under her marriage settlement. THE COURT made a general grant of administration with the will annexed to the executrix, as appointee under the settlement, subject to the consent of the husband being obtained; failing such consent, the grant to be limited to such property as deceased had power to appoint. *Tréfond, In the goods of*, 68 L. J. P. 82; [1899] P. 247; 81 L. T. 56—Jeune, P.

Solicitor of Duchy of Lancaster as Nominee of Queen Victoria—Death of Administrator without having Fully Administered—Grant de bonis non to Nominee of Her late Majesty's Executors.]—A grant was made to W., as solicitor for the Duchy of Lancaster, of administration to the estates of certain persons for the use and benefit of her Majesty Queen Victoria as Duchess of Lancaster. W. died without having fully administered the said estates, and no further grant in respect of them was made during the lifetime of her late Majesty. THE COURT made a grant *de bonis non* to the aforesaid estates and effects to D., the present solicitor to the Duchy, as nominee of the executors of her late Majesty, for their use and benefit. THE COURT ordered the administrator to give the usual administration bond, but dispensed with sureties. *Best, In the goods of*, 71 L. J. P. 9; [1901] P. 333; 85 L. T. 640—Jeune, P.

Crown—Land Transfer Act.]—Notwithstanding the provisions of the Land Transfer Act, 1897, s. 1, sub-s. 1, a grant to the nominee of the Crown as administrator to the estate of a person dying intestate and without known relatives, should go, as before the Act, to the personalty only, without making any mention of any real estate to which the deceased may have been entitled at the time of his or her death. *Hartley, In the goods of*, 68 L. J. P. 16; [1899] P. 40; 47 W. R. 237—Jeune, P.

Foreign Domicil—English and Foreign Testamentary Documents—Conflict of Laws as to Appointment of Executors—English Executors Passed Over.]—In deciding who should take a grant to the estate in England of a testator domiciled abroad and leaving English and foreign wills, the Court will follow the law of the domicil, and will make a grant to the person appointed by the law of the domicil, unless incompetent by English law. In doing so, the Court will pass over an English executor who is not recognised by the foreign Court. *Meatyrd, In the goods of*, 72 L. J. P. 25; [1903] P. 125; 89 L. T. 70—Jeune, P.

—Property in this Country—Grant to Attorney of Attorney of Heir-at-Law duly Appointed by Proper Tribunal of Domicil of Deceased.]—A. H. B. died domiciled in Egypt, and the Egyptian Courts appointed M. E. K. his heir-at-law. M. E. K. duly appointed M. A. E. R. his attorney, with "full powers to appoint another attorney or attorneys," and such appointment was duly certified by the Egyptian

Courts. M. A. E. R. appointed A. C. L. his attorney to take a grant of administration to the English property of the deceased. THE COURT, under these circumstances, made a grant of administration to A. C. L. as attorney of the attorney of the heir-at-law, duly appointed by the proper Court of the domicil of the deceased. *Abdul Hamid Bey, In the goods of*, 67 L. J. P. 59; 78 L. T. 202—Jeune, P.

—No Executor or Universal Legatee—Next-of-Kin not Cited.]—A testatrix died in the Republic of Hayti domiciled there, leaving a will duly executed according to Haytian law. The will appointed no executor or universal legatee, but contained the following clause: "B., of Port au Prince, and W., of Liverpool, shall carry out my last wishes." The only next-of-kin who was primarily entitled to the grant was in Hayti. Persons entitled to half the estate were in England. W. had managed the English affairs of the testatrix for twenty years, and had, at the time of her death, in his possession a sum of 1,260l. belonging to her estate. THE COURT made a grant to W. of administration with the will annexed under section 73 of the Court of Probate Act, 1857, without citing the next-of-kin. *Moffatt, In the goods of*, 69 L. J. P. 98; [1900] P. 152—Jeune, P.

Colonial Grant—Re-sealing.]—Where the executors of a will, under which a legacy of 250l. was payable to the "personal representatives" of the testator's brother, who died intestate domiciled in one of the Australian colonies leaving no estate in this country, insisted on the re-sealing here of a grant of letters of administration which the brother's widow had obtained in the colony, the Court allowed the grant to be re-sealed. *Sanders, In the goods of*, 69 L. J. P. 121; [1900] P. 292; 83 L. T. 716—Gorell Barnes, J.

Administrator out of Jurisdiction—Revocation of Grant—Administration de bonis non.]—An intestate died leaving eight children. His assets consisted of a farm hold under a judicial tenancy, and some other personal estate. Administration was granted to one of his sons who emigrated to Australia some years afterwards, without having administered the estate. The other children desired to have the farm sold and the assets distributed. The address of the administrator in Australia was not known. THE COURT, upon the application of the children, revoked the grant and made the usual order for administration *de bonis non* to one of them. *Loveday, In the goods of* (69 L. J. P. 48; [1900] P. 154), followed. *Colclough, In the goods of*, [1902] 2 Ir. R. 499—Andrews, J.

(d) Limited Grant.

Specific Fund Invested in Name of Trustee—Grant to Estate of Trustee to Beneficial Owner Limited to Fund in Question.]—Where a *cestui que trust* of a certain fund, after the death of her trustee and of another person who had been appointed executor under the will of the said trustee, became absolutely entitled to the corpus of the said fund, THE COURT, with the consent of all persons interested in the estate, made a grant to the *cestui que trust* to the estate of her trustee, limited to the fund in question. *Pegg*

v. *Chamberlain* (1 Sw. & Tr. 527) followed. *Ratcliffe, In the goods of*, 68 L. J. P. 47; [1899] P. 110; 80 L. T. 170—Gorell Barnes, J.

Will Annexed.]—A testator died insolvent, having some few years before executed a deed of assignment for the benefit of his creditors. His executors renounced, and no one interested under the will would apply for a grant of administration with the will annexed. A personal representative was required for the purpose of conveying certain leaseholds to the trustee of the deed of assignment. THE COURT made a grant of administration to the trustees or his nominee, limited to the property to be conveyed, but ordered that the grant should be made with the will annexed. *Butler, In the goods of*, 67 L. J. P. 15; [1898] P. 9; 46 W. R. 445—Jeune, P.

To Husband—Wife's Property not for her Separate Use.]—Under certain circumstances a grant of letters of administration limited to such property as the wife could not dispose of by will may still be made to a husband though the wife has made a will. In 1875 the deceased, a married woman domiciled in New Zealand, the law of which colony in respect of married women's property was at that time identical with English law before the passing of the Married Women's Property Act, made a will purporting to dispose of all her property, and after her death in 1875 the will was proved in New Zealand. She had been at the time of her marriage entitled to certain sums under English settlements. These were not limited to her separate use, and had never been reduced into possession during her lifetime:—*Held*, that letters of administration to these sums might be granted to the husband. *Donovan, In the goods of*, 78 L. T. 567—Gorell Barnes, J.

Trust Property.]—The Court granted letters of administration *de bonis non* to the goods of the surviving trustee of a deed, by which a rentcharge on real estate was put in settlement. The grant was limited to the appointment of a new trustee of the settlement and to vesting the rentcharge in the new trustee. *Berry, In the goods of*, [1907] 2 Ir. R. 209—Andrews, J.

(c) Administration de Bonis Non.

Property in Foreign Country—Certificates of Shares in England—Legal Estate only Vested in Deceased—Grant to Owner of Beneficial Interest.]—Where the legal estate in shares of a foreign railway company was vested in an intestate, who died domiciled in England, but had before his death sold the beneficial interest and delivered the documents necessary to complete such sale to a purchaser residing in this country, administration was granted to a person claiming through the purchaser to enable him to get in the legal estate by having himself registered in the books of the foreign railway company, and so to complete his title. *Agnese, In the goods of*, 69 L. J. P. 27; [1900] P. 60; 82 L. T. 204—Jeune, P.

Original Grant to Widow of Intestate who had since Disappeared—Subsequent Grant "de bonis non" to One of the Children, without Citing Widow.]—Where a grant of administration to

the personal estate and effects of a deceased intestate was made to his widow, who, having partly administered the estate, disappeared, had not been heard of for some years, and was supposed to be dead, THE COURT—there being a sum of money payable in an action in the Chancery Division to the personal representative of the intestate—made a grant *de bonis non* to one of his children, without requiring the widow to be cited. *Loveday, In the goods of*, 69 L. J. P. 48; [1900] P. 154; 82 L. T. 692—Jeune, P.

(f) Administration Bond.

Signature of One Surety—Substitution of Name of Second Surety—Cancellation.]—One surety to an administration bond executed the same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, and this person executed it. The first surety did not assent to the alteration:—*Held*, that the bond was void and must be cancelled. *Cowardin, In the goods of*, 86 L. T. 261—Gorell Barnes, J.

Premium Paid to Insurance Company—Allowance out of Estate.]—Where a person who is entitled as of right to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance company, and pays a premium thereon, it is within the discretion of the Court to allow the amount of such premium out of the general personal estate where the circumstances of the case shew that reliable security could not otherwise be obtained, and that the course adopted was reasonable and proper and for the interest of all parties entitled to the assets. *Lucas, In re; Parr v. Blair*, [1900] 1 Ir. R. 292—V.C.

Dispensing with Sureties.]—Where the executors of a deceased testatrix desired to apply for administration to the estates of her two sons who had predeceased her and died intestate, THE COURT, being satisfied—first, that the whole of the property of the two intestates would vest absolutely in the applicants, as executors of their mother; and secondly, that all liabilities of the said two deceased intestates had been fully discharged, —gave leave to the applicants to enter into the administration bond required by section 81 of the Court of Probate Act, 1857, without sureties. *Paton, In the goods of*, 70 L. J. P. 49; [1901] P. 188; 84 L. T. 570—Jeune, P.

—Where the applicant for administration is the nominee of a public department of State, sureties may be dispensed with. *Bryan, In the goods of*, 74 L. J. P. 41; [1905] P. 88; 92 L. T. 426; 21 T. L. R. 107—Jeune, P.

The Court will dispense with sureties altogether on a grant of letters of administration, taking only the bond of the principal, upon sufficient ground being shewn. *Unwin, In the goods of*, 87 L. T. 749—Gorell Barnes, J.

The Court, in granting administration to the personal estate and effects of a deceased intestate, will not "direct or control or suggest

anything with regard to the administration of the property, beyond granting administration in due course of law." Where, therefore, the Court was asked to order that, upon the widow of a deceased intestate taking a grant of administration to his estate, she should be at liberty to carry on the business formerly carried on by the deceased for the support of herself and the children of the marriage, and that she might be excused from giving sureties to the administration bond.—THE COURT refused the first part of the application, but, considering that it was a case in which the widow ought to have a free hand, ordered that under the special circumstances of the case she might give her own bond without sureties. *Cory, In the goods of*, 72 L. J. P. 24; [1903] P. 62; 88 L. T. 566—Jeune, P.

— **Personal Bond only Allowed.**—The administrator of an estate which consists of sums standing to the credit of an action in the Chancery Division may be allowed to give a personal bond for due administration without sureties for such sums as will be paid in that action to other beneficiaries directly, and only required to give a bond with sureties for the sum to which he is himself entitled. *Leach, In the goods of*, 80 L. T. 170—Gorell Barnes, J.

— **Trustee in Bankruptcy.**—Letters of administration may be granted to the trustee in bankruptcy of the next-of-kin without requiring sureties. *Asbury, In the goods of*, 80 L. T. 296—Jeune, P.

— **Official Receiver in Bankruptcy.**—Sureties will be dispensed with to an administration bond given by an official receiver in bankruptcy who has already given security in bankruptcy as an official of the Board of Trade. *Causton, In the goods of*, 75 L. J. P. 42; [1906] P. 124; 94 L. T. 613; 22 T. L. R. 247—Gorell Barnes, P.

(g) Practice.

Citation of Parties Interested—No Appearance.—When the parties who are interested under an alleged will have been cited to appear and propound it, and, after being personally served with the citation, have neither appeared nor propounded the alleged will, the Court will grant administration as to an intestate. *Bootle, In the goods of*, 84 L. T. 570—Jeune, P.

— **Party Entitled in Priority Missing.**—Where a person entitled in priority to administration of the personal estate and effects of a deceased intestate is missing, although not positively known to be dead, a grant may go under section 73 of the Court of Probate Act, 1857, without citing him, if the evidence warrant the conclusion on the part of the Court that he is dead, and on the applicant swearing that he verily believes himself, or some other person who has renounced, to be next-of-kin. *Chapman, In the goods of*, 72 L. J. P. 62; [1903] P. 192; 89 L. T. 308—Jeune, P.

— **Service on Lunatic.**—A citation was extracted calling upon a person who was in a

lunatic asylum to accept or refuse a grant of administration or shew cause why the person extracting the citation should not take a grant. The lunatic was served with the citation, but not in the presence of the doctor, under whose charge she was; subsequently the doctor was served, but not in the presence of the lunatic:—*Held*, that, although strictly the lunatic should, in accordance with probate practice, be served in the presence of the doctor, the service was sufficient. *Price, In re; Watkins v. Bushell*, 20 T. L. R. 540—Gorell Barnes, J.

— **Intestacy of Husband—Established Adultery of Wife—Marriage not Dissolved—Grant to Next-of-Kin without Citing Wife.**—The object of citation being to give a party, to be passed over in making a grant of administration, an opportunity of denying charges against him or her, is sufficiently satisfied by a previous finding in a suit for dissolution of marriage that the party to be passed over has been guilty of adultery, although no decree for dissolution be actually on foot at the time of application for the grant. Citation in such a case may be dispensed with. *Frost, In the goods of*, 74 L. J. P. 58; [1905] P. 140; 92 L. T. 667—Bargrave Deane, J.

— **Husband—Deed of Separation.**—A married woman executed a deed of separation, which provided that on her death her property should go as though her husband were already dead, and died while the deed was alleged to be still in operation, and while the husband was said to be largely indebted to the estate of the deceased for payments due under the deed:—*Held*, that letters of administration ought not to be granted to the deceased's next-of-kin without citing the husband, on the ground that he might dispute the deed. *Megson, In the goods of*, 80 L. T. 295—Jeune, J.

— **Sole Executrix of Alleged Will Cited to Prove Same—Notice of Intention of Next-of-Kin to Move Court for Administration as in Intestacy—Affidavit for Obtaining Administration.**—A deceased person by his will—apparently duly executed—left a certain person sole executrix and universal legatee thereof. The family having disputed the validity of the alleged will, a compromise was arrived at. Subsequently a citation was issued calling on the sole executrix and legatee to prove the will or shew cause why a grant of administration should not be made to the next-of-kin as on an intestacy. The executrix not having appeared to the citation, THE COURT made a grant of administration to the applicant on his undertaking on taking the grant to swear that he was the next-of-kin of the deceased. *Crosby v. Noton* (36 T. J. P. 55) followed. *Dennis, In the goods of*, 68 L. J. P. 67; [1899] P. 191—Jeune, P.

Foreign Grant Limited in Time—English Assets—Full Grant in England to Foreign Administrator.—The foreign Court of the domicile of the deceased intestate having appointed an administrator for a limited period, this Court in granting administration here for the collection of English assets, made a full grant to the foreign administrator under section 73 of the Court of Probate Act, 1857. *Lery, In the goods of*, 77 L. J. P. 57; [1908] P. 108—Bargrave Deane, J.

(h) *Revocation of Letters.*

Proceedings for — Staying Action — Previous Proceedings in Chancery — Acquiescence of Plaintiff — Laches.—In 1892 letters of administration to an estate were granted to the defendant in the present action as the lawful cousin and one of the next-of-kin of an intestate. On December 27, 1892, the present defendant commenced an action in the Chancery Division for the administration of the said estate. In May, 1894, the present plaintiff took out a summons in such action, claiming to be a first cousin of the intestate and entitled in distribution to a share in his estate. The matter came before the chief clerk, when it was proved that the present plaintiff was only a first cousin once removed, and the chief clerk decided that as such she was not entitled in distribution. The present plaintiff did not appeal against his decision. On April 21, 1896, an order was made in the Chancery action for the final distribution of the estate. On June 7, 1898, the plaintiff commenced the present action in the Probate Division. On a summons to dismiss the action, —*Held*, that the plaintiff had practically acquiesced in the Chancery proceedings, and had been guilty of such *laches* as to disentitle her to maintain an action against those who had received the estate, and that as the only object of the present action to revoke the letters of administration granted to the defendant, and to obtain a grant in her own favour, was to assist her to recover funds which had been distributed by order of the Chancery Division, the Court ought not to assist her to obtain a grant which would be useless to her, and that the action must be dismissed. *Mohan v. Broughton*, 68 L. J. P. 91; [1899] P. 211; 81 L. T. 57—Gorell Barnes, J.

— **Previous Proceedings in Chancery Division — Acquiescence — Laches.**—The Court will not revoke letters of administration at the instance of a person guilty of delay and acquiescence, and whose only object in seeking the revocation is to follow the estate into the hands of the persons to whom it has been distributed in an action in the Chancery Division. *Mohan v. Broughton*, 69 L. J. P. 20; [1900] P. 56; 82 L. T. 29; 48 W. R. 371—C.A.

There is no need to revoke the letters of administration in order to maintain an action in the Chancery Division for the purpose of following the estate into the hands of the persons to whom it has been distributed, including the administrator, if such an action is otherwise maintainable. *Ib.*

Letters of Administration Granted while Will Appointing Executor in Existence — Acts done before Administration — Validity.—Where letters of administration are granted while a will appointing an executor is in existence, and the will is subsequently proved and the letters of administration revoked, the grant of administration is void *ab initio*; and, generally speaking, dispositions of the assets by the supposed administrator are void also. *Abram v. Cunningham* (2 Lev. 182) followed. *Graysbrook v. For* (1 Plow. 275, 282) distinguished. *Ellis v. Ellis*, 74 L. J. Ch. 296; [1905] 1 Ch. 613; 92 L. T. 727; 53 W. R. 617—Warrington, J.

A mortgagor who had deposited the lease of a house to secure his mortgage-debt died, leaving a will by which he appointed an executor. The mortgagor's son paid off the debt with money which he borrowed for the purpose, deposited the lease with the lender of the money as security for the loan, and obtained letters of administration to his father's estate. The will was subsequently proved, and the letters of administration were revoked. The house having many years afterwards been sold by the sole beneficiary under the will, the lender's representatives brought an action against the purchaser for foreclosure:—*Held*, that, the letters of administration being wholly void, the son had no power to create a valid mortgage to the lender, and, in the circumstances of the case, that any claim of the plaintiffs by subrogation was barred by the Statute of Limitations and by the fact that the son was a debtor to the father's estate. *Ib.*

9. PRESUMPTION OF DEATH.

Disappearance.—Where an application is made to presume the death of an individual who has disappeared, the Court, on being satisfied that every reasonable means has been exhausted by advertisement and otherwise (without success) to ascertain his whereabouts, and on the evidence generally that there is every reason to believe that he is dead, will proceed to presume his death, without regard to the amount of time that may have elapsed since his disappearance, though the lapse of time is often an important element in the enquiry. *Matthews, In the goods of*, 67 L. J. P. 11; [1898] P. 17; 77 L. T. 630—Jeune, P.

In a case where the Court was satisfied as above, leave was given to presume the death of an individual who had disappeared just under three years. *Ib.*

— On November 13, 1899, the Court gave leave to presume the death of C. H. "in or since" the year 1863. The father of C. H. died July 1, 1866, intestate. If C. H. predeceased his father the latter would have the first right to administration. It being impossible to say whether C. H. predeceased his father or not,—THE COURT made a grant of administration of the estate of C. H., under section 73 of the Court of Probate Act, 1857, to his brother W. J. H., although the said W. J. H. had made no attempt to obtain a grant of administration to the estate of his deceased father. *Peck, In the goods of* (29 L. J. P. 95; 2 Sw. & Tr. 506), followed. *Harling, In the goods of*, 69 L. J. P. 32; [1900] P. 59; 81 L. T. 791—Jeune, P.

— **Length of Time since Disappearance.**—Where a supposed deceased had not been heard of for about six years and ten months and there was no other evidence of death, and a grant of administration was required for use in certain Chancery proceedings, THE COURT gave the applicant leave to swear that the death had occurred on the date the alleged deceased was last heard of, but directed that the grant should, except in so far as it might be required in the Chancery Division, remain in the Registry until the expiration of seven years from

that date. *Winstone, In the goods of*, 67 L. J. P. 76; [1898] P. 143; 78 L. T. 535—Gorell Barnes, J.

Commorientes.—Where a husband and wife were murdered in a massacre in China on July 9, 1900, THE COURT (following *Wainwright, In the goods of* (28 L. J. P. & M. 2; 1 Sw. & Tr. 257), and *Ewart, In the goods of* (1 Sw. & Tr. 258)), gave leave to presume the deaths on or since the above date, and also to swear that there was no reason to believe that either husband or wife survived each other. *Beynon, In the goods of*, 70 L. J. P. 81; [1901] P. 141; 84 L. T. 271; 65 J. P. 246—Gorell Barnes, J.

Brothers on Board Same Vessel—Total Loss—Leave to Swear Death—Declaration of Non-survivorship.—Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or any one else on board, from that time. THE COURT, in giving leave to swear that both the brothers died on or about May 14, 1896, added a declaration, and permitted the same to be included in the oath in each case, to the effect that there was no reason to suppose that either died before the other. *Johnson, In the goods of*, 78 L. T. 85—Jeune, P.

Applicant's Belief as to being Sole Next-of-Kin.—It is not the practice of the Court to presume death under any circumstances. It merely gives the applicant for letters of administration, or other applicant, leave to swear the death, and the applicant has to swear to the fact. *Jackson, In the goods of*, 87 L. T. 747—Gorell Barnes, J.

Affidavit of Applicant.—In motions for leave to presume the death of a person, the affidavit of the applicant filed in support of the motion must state his or her personal belief that such person died on or since the alleged date of death. *Hurlston, In the goods of*, 67 L. J. P. 69; [1898] P. 27—Gorell Barnes, J.

Compromise—Mistake—Interest under Will.—See COMPROMISE, col. 484.

Condition.—See CONDITION, col. 486.

10. DONATIO MORTIS CAUSA.

Handing Over of Box Containing Share Certificates and Personal Ornaments—Key Retained.—A testatrix shortly prior to her decease had intrusted a parcel containing a box to the care of a friend, and had requested this friend to carry out her instructions. At a subsequent interview the testatrix drew the friend's attention to a small key with a label attached thereto, saying, "If I die that will be sent to you." On the day of the testatrix's death the key with the label was received by the friend, and the box was found to contain share certificates and valuables, with a paper giving directions as to the persons to whom the testatrix desired the contents of the box to be given:—*Held*, that, inasmuch as the testatrix had retained the key, she had not parted with her dominion over the property contained in the box, and consequently that the handing over of the box did not constitute a valid *donatio mortis causa*. *Johnson,*

In re; Sandy v. Reilly, 92 L. T. 357—Farwell, J.

Certificates of Shares in Building Society—Post-Office Savings-Bank Book—Delivery.—Certificates of investment shares in a building society, which shares might at any time be withdrawn, are not the proper subject of a *donatio mortis causa*. *Weston, In re; Bartholomew v. Menzies*, 71 L. J. Ch. 343; [1902] 1 Ch. 680; 86 L. T. 551; 50 W. R. 294—Byrne, J.

A Post-Office Savings-Bank book may be a good subject of such a gift, and the delivery of the book will pass the right to the money on deposit. *McGonnell v. Murray* (Tr. R. 3 2d Eq. 460) discussed and distinguished. *Ib.*

On February 28, 1901, W., a butler in service in the country, but at that time ill in a London hospital, was visited by M., to whom for some years he had been engaged to be married, and he then told her that he had eight investment shares in the Hearts of Oak Building Society and 130l. in the Post-Office Savings Bank, and said that if anything should happen to him he wished his uncle to have 100l. and that she should have the rest. On March 7, M. visited him again, when he asked her to go to the country and get the building society certificates and the Post-Office Savings-Bank book, and gave her the key of the drawer in his bedroom where the certificates and bank book were, and told her she was to keep them. She went and obtained the certificates and bank book and took them to the hospital, but W. again told her she was to keep them. M., accompanied by a friend, called on W. on March 14, and he again repeated his wishes as to his property. He died on May 1:—*Held*, that there was a sufficient delivery, as it was not essential that there should be an actual delivery at the time of the gift, and that the bank book was a proper subject of a *donatio mortis causa*, but that the share certificates were not. *Cain v. Moon* (65 L. J. Q.B. 587; [1896] 2 Q.B. 283) followed. *Ib.*

Money on Deposit at Savings Bank—Local Loans Stock—Delivery of Bank Book and Investment Certificate.—Money on deposit at a Post-Office savings bank may be the subject of a valid *donatio mortis causa*, and the delivery of the bank book will pass the right to such money. But money invested for a depositor by the bank in Local Loans Stock is not a good subject of such a gift, and the delivery of the bank book and investment certificate will not pass such stock. *Andrews, In re; Andrews v. Andrews*, 71 L. J. Ch. 676; [1902] 2 Ch. 394; 87 L. T. 20; 50 W. R. 569—Kekewich, J.

Nuncupative Will—Document Disposing of Whole of Property—Trust to Settle Affairs and see to Burial—Delivery of Deposit Note and Share Certificate—Intention of Donor—Retention of Dominion over Property.—D., an old lady of considerable means, although frequently urged to make a will by the defendant L., who managed her affairs, always refused to do so. According to the written statement of L., he went to see D. on January 26, 1899, and found her very ill, and at her direction he wrote out the following document: "40 Horsfield Road, Bristol, Jan. 26, 1899. I, E. D., residing at the

above address, do give the whole of my property, whatever it may consist of at the time of my decease, to L. . . . upon the distinct promise that he will settle up my affairs and see to my burial, and will also give the following sums to the charities and persons named." Then followed a list of names and amounts, and the document concluded with "the mark of E. D." and a cross which she made. He then, at her request, went into another room, of which she gave him the key, and got a banker's deposit note for 30,000*l.* and a certificate for shares in a brewery company which she had mentioned, and gave them to her. She handed them back to him, saying, "You take charge of them. If I get better, of course you will bring them back. If I don't, you will know what to do with the money." He saw her again on January 30, when she said that if she did not get better he would find in the same room in which he found the deposit note and share certificate some gold and 800*l.* in notes. On the following day, January 31, he went to see D., and finding she was dying he took possession of the gold and notes and brought them into the room where D. was. She died the same evening, and he retained possession of the property and made a full communication to the plaintiff:—*Held*, that the language used by D. in reference to the deposit note, although it might by itself have created a *donatio mortis causa*, must be interpreted in connection with what had previously taken place, and that, so interpreted, D.'s intention was to reserve during her life dominion over all her property, that the document signed was distinctly of a testamentary character, that there was no valid *donatio mortis causa* of the deposit note, and that a *fortiori* the gift failed as to the other property of the deceased. *Treasury Solicitor v. Lewis*, 69 L. J. Ch. 833; [1900] 2 Ch. 812; 83 L. T. 139; 48 W. R. 694—Stirling, J.

Donor's Cheque—Cheque Presented but not Paid in Donor's Lifetime—Donor's Account Overdrawn.]—A cheque drawn by the donor and given but not resulting in payment, either actual or constructive, in the donor's lifetime, cannot be the subject of a valid *donatio mortis causa*. *Beaumont, In re*; *Beaumont v. Ewbank*, 71 L. J. Ch. 478; [1902] 1 Ch. 889; 86 L. T. 410; 50 W. R. 389—Buckley, J.

Hewitt v. Kaye (37 L. J. Ch. 633; L. R. 6 Eq. 198) and *Beak's Estate, In re*; *Beak v. Beak* (41 L. J. Ch. 470; L. R. 13 Eq. 489), followed. *Bromley v. Brunton* (37 L. J. Ch. 902; L. R. 6 Eq. 275) explained. *Ib.*

Delivery of a Cheque Accompanied by a Written Request that a Third Party shall Pay Same to Donee after Decease of Donor.]—An invalid lady with the help of a friend sent three cheques, each for the sum of 100*l.*, made out to three different persons, to another friend of hers with a letter couched in the following terms: "Miss Davis wishes me to send you the three inclosed cheques for you to keep for her, and in case of her death, and then see the said persons have the money, &c." Miss D. died upon the following day:—*Held*, that there had been no valid *donatio mortis causa*, and that the executor was not at liberty to honour the cheques. *Davis, In re*; *Griffith v. Davis*, 86 L. T. 889—Farwell, J.

I.O.U.]—An I.O.U. cannot be the subject of a *donatio mortis causa*. *Duckworth v. Lee*, [1899] 1 Ir. R. 405—C.A.

11. CONSTRUCTION.

(a) Generally.

Reading-in Words—Testator's Intention.]—In construing wills it is the duty of the Court to ascertain, if possible, what the testator really meant from the language he has used. The exact words are not to be followed in their literal meaning if it be plain that to do so would frustrate the real intention of the testator. If from a consideration of the whole will it is plain that to place a literal meaning upon one clause would have the result of defeating the clear intention, it is necessary even to do violence to the language used. The thing to be ascertained is, what is the testator's will? *Patterson, In re*; *Dunlop v. Greer*, [1899] 1 Ir. R. 324—M.R.

Rule of Uniformity.]—Whenever in a deed, will, or other document it is found that a word has some particular meaning when its meaning can be clearly made out, the presumption is that it means the same thing when its meaning is not so clear. *Birks, In re*; *Kenyon v. Birks*, 69 L. J. Ch. 124; [1900] 1 Ch. 417; 81 L. T. 741—C.A.

(b) Absolute Gift.

Property or Power—Life Estate to Wife—After her Death Executors to Sell Portion for Payment of Legacies—Balance to be Disposed of according to Wishes of Wife.]—A testator devised and bequeathed to his wife during her life all his cash, lands, &c., and directed that she was to receive all interests and profits out of his said property, to be paid to her during her life by his executors. After the death of his wife the executors were to sell portion of the property to pay certain pecuniary legacies. Any balance of the property remaining after the said bequests to be disposed of according to the wishes of his wife:—*Held*, that the wife took the property absolutely, subject to the legacies payable after her death. *Reid v. Carleton*, [1905] 1 Ir. R. 147—Barton, J.

Life Estate with General Power of Appointment—Repugnancy.]—A testator by will, after certain devises and bequests, gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his two sons executors after her death. By a codicil the testator revoked his will and gave all his property to his wife, so that "she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying without having devised or appointed the whole or any part of his property, then his will was to take effect as if the codicil had been made:—*Held*, that on the true construction of the codicil the wife took a life estate only in the property with a general power of appointment. *Sanford, In re*; *Sanford v. Sanford*, 70 L. J. Ch. 591; [1901] 1 Ch. 939; 84 L. T. 456—Joyce, J.

Superadded Words—Directions as to Investment for Certain Purposes—Motive of Gift—Trust.]—A testator, after certain legacies, directed that the balance of the purchase-money, realised by the sale of portion of his freehold property, to be equally divided among his four sons (of whom J. was one). He then provided as follows: "I direct my executors to invest the share of my said son J. in the purchase of a good, substantial tenement house in a good neighbourhood (having first had same examined by an architect), where my said son and family may enjoy apartments in same free of rent, and that he may have, after the payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof":—*Held*, that there was a gift of an absolute interest to J., and there was no trust created in favour of J.'s children. *Dowling v. Dowling*, [1902] 1 Ir. R. 79—M.R.

Subsequent Gift Over of any Balance Remaining after Legatee's Death.]—A testatrix bequeathed one-third of the residue of a sum of 6,000*l.* Consols to A. L., one-third to E. T. in trust for E. W., and one-third to E. T., in trust for M. W., and directed that any balance remaining in the hands of E. T. after the death of E. W. should go absolutely to E. T., and that any balance remaining in the hands of E. T. after the death of M. W. should be equally divided between the children of A. L. who should then be living:—*Held*, that the legacies to E. W. and M. W. were absolute gifts, and that the direction as to the balance was inoperative. *Constable v. Bull* (18 L. J. Ch. 302; 3 De G. & Sm. 411) discussed. *Lloyd v. Tweedy*, [1898] 1 Ir. R. 5—M.R.

Restrictions as to Mode of Enjoyment—Legacy to Daughter, and Gift over in Event of Daughter Dying Unmarried—Unmarried Daughter Survivor.]—A testator bequeathed to each of his daughters A, B, and C 1,000*l.* to be paid at their mother's death, provided they should have been previously married with the consent of his executors, and directed that if a daughter should not have been previously married, or, if married, had been married without such consent, she was only to receive the income of the 1,000*l.* during her life, or until marriage with the consent of his surviving executor, and that if she married without such consent, and died leaving issue, the 1,000*l.* was to be divided between her children equally, and in case any daughter should die without being married with such consent and without leaving issue, the principal left to the daughter so dying should go to her surviving brothers and sisters equally. B survived her brothers and sisters and died unmarried:—*Held*, that there was an absolute gift to each daughter in the first instance, coupled with restrictions on the enjoyment of it in certain events which did not happen; and that the event which happened—namely, the survivorship of B without having been married—not being subject to any restriction, B was absolutely entitled at her death to the legacy. *Lassence v. Tierney* (1 Mac. & G. 551), *Hancock v. Watson* (71 L. J. Ch. 149; [1902] A.C. 14), and *Olphert v. Olphert* ([1908] 1 Ir. R. 326) discussed. *Fitz-Gibbon v. McNeill*, [1908] 1 Ir. R. 1—M.R.

Subsequent Gift over on Death Childless and without a Will—Repugnancy.]—A testator, after giving an absolute gift, directed that in the case of the beneficiary dying childless and intestate, the property given should form part of his residuary estate:—*Held*, that, although the gift over on the contingency of childlessness, had it stood alone, might possibly have been valid, yet that, if the present case, the two contingencies could not be severed, and that the gift over was accordingly repugnant and void. *Dixon, In re; Dixon v. Charlesworth*, 72 L. J. Ch. 642; [1908] 2 Ch. 458; 88 L. T. 862; 51 W. R. 652—Swinfen Eady, J.

Gift Over.]—A gift by will of all the testator's real and personal estate to his wife for her absolute use and benefit, so that during her lifetime, for the purpose of her maintenance and support, she should have the fullest power to sell and dispose of his said estate absolutely, is an absolute gift, and will not by a gift over, after her death, "as to such parts of my real and personal estate as she shall not have disposed of as aforesaid, subject to the payment of my wife's funeral expenses," to trustees on trust to convert and pay the proceeds as therein mentioned, be cut down to a life estate with a power of disposition *inter vivos*. *Pounder, In re; Williams v. Pounder* (56 L. J. Ch. 113), distinguished. *Jones, In re; Richards v. Jones*, 67 L. J. Ch. 211; [1898] 1 Ch. 438; 78 L. T. 74; 46 W. R. 313—Byrne, J.

Contingent Gift Over.]—A testator gave and devised all his property to his wife for life, and after her death to his son John for life, and after John's death to John's eldest son, and failing such son then the same to be and become the property of my son the said James Cooper or of his eldest son lawfully begotten, and in case of the death of the said James Cooper without such male issue as aforesaid, then to the eldest son of my said daughter, Mary Cooper, wife of the said William M'Cormick. John Cooper never had a son, and died before the testator. James Cooper had a son, and both father and son survived the testator's widow, the son, however, dying before his father:—*Held*, that James Cooper was entitled absolutely, the gift to Mrs. M'Cormick's son only being intended to operate in the event of neither James Cooper, Junior, nor his son taking possession as proprietor. *M'Cormick v. Simpson*, 77 L. J. P.C. 12; [1907] A.C. 494; 97 L. T. 616—P.C.

Substituted Settled Legacy by Codicil—Incidents of Original Legacy Applicable—Forfeiture.]—A settled legacy substituted by a codicil for an absolute legacy given by the will is subject to all the conditions and incidents of the original legacy, even where the different quality of the original and substituted bequests renders the operation of a defeasance clause applicable to the original legacy more onerous in the case of the substituted legacy. *Joseph, In re; Pain v. Joseph*, 77 L. J. Ch. 309; [1908] 1 Ch. 599—Eve, J.

Bequest of Sum "sufficient to pay and discharge all estate duty"—Declaration of Trust—Charge on Settled Estates in Respect of Duty.]—A testator, by a codicil to his will, executed after the passing of the Finance Act, 1894, bequeathed to his eldest son, to whom certain

settled estates would pass on the testator's death, "a sum of money sufficient to pay and discharge all the estate duty which may be payable by" him; and he directed such sum to be paid out of moneys in the hands of his bankers at his death, but if the sum at the bankers should not be sufficient, he declared that no other part of his estate should be liable to make good the deficiency:—*Held*, that the legacy was a gift to the eldest son for his own benefit absolutely, and was not impressed with a trust to pay the estate duty out of it; and consequently that the legatee had not lost his right to recoup himself for the duty by a charge on the settled estates under section 9, subsection 6 of the Act. *Meaborough (Earl) v. Saville*, 88 L. T. 131—H.L. (E.)

Gift to Children upon Surviving their Parents

—**Vesting—Presumption in Favour of.**—A testator left a share of his property to trustees, upon trust for his son G. for life or until he should become bankrupt, and after his death or bankruptcy to E., the wife of G., for life, and directed that in case there should be any child or children of G. living at the death of G. and E., or at the other period thereafter contemplated, then, from and immediately after the death of the survivor of G. and E., or from and after the death of E. and the bankruptcy of G., the said share should be held in trust for all and every, or such one or more exclusively, of the others or other of the children or child of G. by his then or any future wife, with such provisions for their respective maintenance, education, and advancement, at such ages, days, and times, and if more than one in such shares as G. should by deed or will appoint, and in default of such appointment in trust for all and every such the children and child of G. who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or day of marriage, and if more than one in equal shares, and in case there should be only one such child then the whole for such one or only child; provided that after the death of the survivor of G. and E., or the death of E. and the bankruptcy of G., and until the whole of the trust funds should become vested in such child or children, his trustees should apply a competent part of the income of the trust funds for the benefit of the children or child for the time being entitled thereto in expectancy towards his or her maintenance and education; and in default of such child or children of G., upon the trusts in his will declared concerning the premises thereby given in trust for his daughter I. and the other persons therein mentioned. G. had one son, J., who attained age, married, and predeceased G., leaving children. E. predeceased G., who died without having become bankrupt:—*Held*, that the rule in *Emperor v. Rolfe* (1 Ves. son. 208) was applicable, and that J. took an absolute interest in the property on attaining age, although he did not survive G. *Duffield v. M'Master*, [1906] 1 Ir. R. 333—C.A.

Remoteness—Gift to Grandchildren "Absolutely" upon Attaining Twenty-five—Gift over—Power of Maintenance—Vesting.—Testator gave a sum of 12,000*l.* upon trust for a daughter for life, and after her death upon trust for all her children "when they shall attain the age of twenty-five years but not before," and in case

there should not be "any such child" the fund was to fall into residue. Until the said fund was invested as directed, interest was to be paid to his daughter or her children, "on their respective portions." The testator also gave one moiety of his residuary real and personal estate upon trust for his son N. for life, and after his death upon trust "for his child or children absolutely upon their attaining the age of twenty-five years, and in the event of the death of either or all the children of my said son before attaining the age of twenty-five years, then upon trust to pay the share of the child or children so dying" to testator's son H. absolutely. The will contained a power for the trustees to apply all or any part of the income of the expectant share of a grandchild of the testator, after the death of the preceding owner for life of such share, for the maintenance and education of the grandchild:—*Held*, that the grandchildren of the testator took vested interests, and the gifts were not void for remoteness. *Turney, In re; Turney v. Turney*, 69 L. J. Ch. 1; [1899] 2 Ch. 739; 81 L. T. 548; 48 W. R. 96—C.A.

Fox v. Fox (L. R. 19 Eq. 286) approved—*per* LINDLEY, M.R., and SIR F. H. JEUNE. *Seemle*, the suggestion in *Wintle, In re; Tucker v. Wintle* (65 L. J. Ch. 863; [1896] 2 Ch. 711) that the decision in *Fox v. Fox* was not good law, is not warranted. *Id.* See REMOTENESS, col. 2882, and PERPETUITIES, col. 1811.

Vesting—Condition as to Marriage.—A testatrix by her will left certain pictures "as heirlooms to my grandson, Edward Panter-Downes, to go to him when he is married and has a house of his own; till then I wish my daughter, Mrs. J. F. Bally, to take charge of those she now has; and those which my daughter-in-law, Mrs. Herbert Panter, has now I wish her to keep for him also": *Held*, that the gift was not conditional on the grandson marrying, but was an absolute gift accompanied by a direction as to the time for handing over the pictures. *Panter, In re; Panter-Downes v. Bally*, 22 T. L. R. 431—Swinfen Eady, J. And see CONDITION.

Gift "so long as she remains unmarried."—A direction in a will to set aside a sum of 200*l.* and thereout pay to the testator's widow a sum of 3*l.* monthly "so long as she remains unmarried or until the said sum of 200*l.* becomes exhausted, the said payment of 3*l.* monthly to cease on my said wife marrying again," is an absolute gift of the 200*l.* *Rishton v. Cobb* (9 L. J. Ch. 110; 5 Myl. & Cr. 145) followed. *Howard, In re; Taylor v. Howard*, 70 L. J. Ch. 317; [1901] 1 Ch. 412; 84 L. T. 296; 49 W. R. 480—Farwell, J.

Heirlooms—Title of Dignity—Chattels Bequeathed to Descend as Heirlooms so far as Rules of Law and Equity will Permit.—Testatrix by her will gave certain jewellery to her son R. O. Viscount Hill "until he shall die and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill . . . severally and successively as they shall in turn succeed to such title and dignity as aforesaid my intention being that the said . . . jewellery shall descend as heirlooms so far as the rules of law and equity will permit." Testatrix died in 1891.

Her son survived her, and entered into possession of the jewellery. He died in 1895, and was succeeded in the title by his son R. R. C. Viscount Hill, the present plaintiff. The plaintiff had brothers who were alive at the date of the will of the testatrix, and also at the death of her son R. C. Viscount Hill:—*Held*, that the plaintiff was absolutely entitled to the jewellery. *Tollemache v. Coventry* (2 Cl. & F. 611; 8 Bligh N.S. 547) followed. *Hill (Viscountess), In re*; *Hill (Viscount) v. Hill*, 71 L. J. Ch. 417; [1902] 1 Ch. 807; 86 L. T. 336; 50 W. R. 434—C.A.

(c) Accumulations.

Keeping on Foot Policy as Security against Depreciation in Value of Leaseholds.—A direction in a will to apply a portion of the rents of the testator's leaseholds in keeping on foot a policy of insurance to secure the replacement at the expiration of the term for which the lease was held of the capital which would be lost by not selling the leaseholds is not an accumulation within the meaning of the Accumulations Act, 1800, and is therefore valid notwithstanding that at the testator's death the unexpired residue of the term may exceed twenty-one years. *Gardiner, In re*; *Gardiner v. Smith*, 70 L. J. Ch. 407; [1901] 1 Ch. 697—Buckley, J.

Portions for Children.—A testator conveyed his whole estate to trustees, directing them, *inter alia*, to pay certain annuities to his widow and daughters, and "to accumulate the balance of the revenue," and on the death of his widow to realise his whole means and estate and "dispose of the proceeds thereof as well as the accumulations of the same, if any, as follows, viz." (after providing certain sums for his sons and daughters), "to hold and invest the residue and remainder of my said means and estate and accumulations of revenue, if any, for behoof of" his sons and daughters equally in life-rent for their life-rent use and their respective children in fee. In the last place, in the event of all his children dying before the period of division without issue, he directed his trustees to divide his estate between his own next-of-kin and his wife's next-of-kin. In a special Case presented by the testator's widow and children after the lapse of twenty-one years from the testator's death, as to the application of the Thellusson Act, — *Held* (Lord Young *diss.*), first, that the directions to accumulate could not be regarded as "a provision for raising portions for any child or children of the grantor" in the sense of the Act, and that the Act applied; and secondly, that the accumulations struck at did not fall to the residuary legatees, but became intestate succession, inasmuch as the residuary legatees could not be ascertained till the date of division. *Moon's Trustees v. Moon*, 2 F. 201—Ct. of Sess.

Conversion.—When by the operation of the Thellusson Act the accruing revenue of a mixed estate falls to be divided as intestate succession, the funds are to be distinguished as heritable or movable according to their source as existing at the date of the death of the testator without regard to any conversion authorised or directed by him for the purposes of his settlement, and

that annuities left by the testator fall to be deducted from the income of the heritage. *Ib.*

Trust for—Limit of Twenty-one Years Exceeded—Devolution of Surplus Rents and Income—“Trust estate.”—Testator gave his estate and effects to trustees in trust to pay the income to his brother for life, and after his death in trust to pay out of the income an annuity of 200*l.* to his niece for her life, and directed the surplus income of his trust estate to accumulate till the death of his niece, and subject and without prejudice to the trusts and provisions aforesaid directed his trust estate to be held upon trust for the children of his niece, and in default of children, after the death of the survivor of his brother and niece and the failure of her issue, upon trust as to one third part for his cousins and as to two third parts for a charity. The testator died in 1877, and the brother, who was his heir-at-law, and sole next-of-kin, died in 1878. The niece, who was married, was fifty-four years of age, and had had no child. The accumulations were made after the brother's death up to 1898, when further accumulation was forbidden by the Accumulations Act, 1800 (Thellusson Act). The charity claimed to have the residue of the estate immediately distributed after providing for the annuity:—*Held*, that the surplus income during the remainder of the niece's life went as undisposed of to the representatives of the brother, and that the estate was not distributable till the niece's death. *Held also*, on the construction of the will, that the words "trust estate" included the corpus of the past accumulations. *Weatherall v. Thornburgh* (47 L. J. Ch. 658; 8 Ch. D. 261), followed. *Wharton v. Masterman* (64 L. J. Ch. 869; [1895] A.C. 186) distinguished. *Travis, In re*; *Frost v. Grestoree*, 69 L. J. Ch. 663; [1900] 2 Ch. 541; 83 L. T. 241; 49 W. R. 38—C.A.

Partial Accumulation of Income of Property—Direction at End of Ten Years to Invest Accumulations in Purchase of Real Estate—“Land.”—The word "land" in the Accumulations Act, 1892, s. 1, when read in conjunction with the Interpretation Act, 1889, s. 3, includes incorporeal as well as corporeal hereditaments. Consequently a direction in a will to accumulate the rents and annual income of a mining property for ten years and at the expiration of that time to invest the accumulations in the purchase of "real estate" is a direction to accumulate "for the purchase of land only" within the Act of 1892, and, there being no minor in existence who, if of full age, would be entitled to receive the rents and income so directed to be accumulated, is void. Supposed *dictum* of CHERRY, J., in *Danson, In re*; *Bell v. Danson* (13 R. 633), discussed and disapproved. *Clutterbuck, In re*; *Fellowes v. Fellowes*, 70 L. J. Ch. 614; [1901] 2 Ch. 285; 84 L. T. 757; 49 W. R. 583—Byrne, J.

Conversion—Accumulation for Twenty-one Years—Discretion of Trustees—Trusts of Unconverted Property after Twenty-one Years—Income or Capital.—A testator devised and bequeathed the residue of his property upon trust for conversion; but the trustees were empowered to postpone conversion for a period not exceeding twenty-one years. Until conversion and re-investment the income of unsold

property was to be applied in paying debts and yearly charges, and the surplus accumulated in augmentation of capital. At the end of the twenty-one years a portion of the estate which had, in accordance with a power in the will, been let on mining lease for forty years was still unconverted:—*Held*, that the rents and royalties accrued since the expiration of the twenty-one years formed part of the capital of the residuary estate, and ought to be distributed accordingly, and that until sale or conversion the tenants for life of settled shares were entitled as from such date to receive out of the accrued and accruing rents and royalties such an annual sum as, in the opinion of the Court, would be a fair equivalent for the annual income which would have been received if the property had been sold at the end of the twenty-one years. *Wentworth v. Wentworth*, 69 L. J. P.C. 13; [1900] A.C. 163; 81 L. T. 682—P.C.

Discretionary Trust for Benefit of Person for Life — "Accumulation" of Surplus Rents — Devolution — Income or Capital of Residuary Estate.—Where a testator, who died in 1865, gave certain freehold houses to his trustees upon trust to receive the rents, and after making certain payments thereout to apply the residue at their discretion for the benefit of his daughter for her life, and after her decease to stand seised of the premises with any surplus or accumulation of rents that might not be applied for the benefit of his daughter in trust for her children with limitations over in default of children, and he also gave his residuary real and personal estate to his trustees upon trust for, amongst other persons, his daughter for life, and after her decease upon trust for other persons, it was held that by means of the Accumulations Act, 1800, the surplus rents after the expiration of twenty-one years from the testator's death formed part of the capital of the testator's residuary estate, and must be invested, and that the income only of such investment was payable to the tenants for life. *Pope, In re; Sharp v. Marshall*, 70 L. J. Ch. 26; [1901] 1 Ch. 64; 49 W. R. 122—Farwell, J.

To direct the accruing income of a fund to be invested and the income of the investment to be paid to a tenant for life is not to direct an accumulation. *Ib.*

Crawley v. Crawley (4 L. J. Ch. 265; 7 Sim. 427) and *O'Neill v. Lucas* (2 Keen, 313) followed. *Phillips, In re; Phillips v. Trevy* (49 L. J. Ch. 198), commented on and not followed. *Ib.*

(d) *Ademption.*

Question of Construction.—The question whether a testamentary gift or appointment is adeemed by the subsequent disposal of the subject of the gift during the lifetime of the testator is in every case a question of the construction of the will. *Dowsett, In re; Dowsett v. Meakin*, 70 L. J. Ch. 149; [1901] 1 Ch. 398; 49 W. R. 268—Farwell, J.

Special Power of Appointment—Testamentary Exercise of Power—Subsequent Compulsory Sale of Subject.—If the gift or appointment be given simply by a description of the subject as it

exists at the date of execution of the will, it will be adeemed if the subject be subsequently disposed of during the lifetime of the testator. If, on the contrary, it be given by a description which not only includes the subject of the gift as it then exists, but still includes it in whatever other form it may happen to exist at the date of the testator's death, it is not then adeemed by any subsequent disposal of it, provided that at the testator's death the original subject of the gift is represented by actual property which can be identified. *Ib.*

In applying this principle to the testamentary execution of a power of appointment, there is no distinction between general and special powers. *Ib.*

— — — **Settled Estate — Premiums on Leases by Tenant for Life—Appointment of Real Estate.**—For the purpose of determining whether a testamentary appointment under a power is adeemed by a change in the character of the subject-matter of the appointment between the date of the will exercising the power of appointment and the death of the appointor, there is no distinction between a will exercising a general power and a will exercising a special power. *Dowsett, In re; Dowsett v. Meakin* (70 L. J. Ch. 149; [1901] 1 Ch. 398), approved. *Moses, In re; Beddington v. Beddington*, 71 L. J. Ch. 101; [1902] 1 Ch. 100; 85 L. T. 596—C.A.

Per VAUGHAN WILLIAMS, L.J., and ROMER, L.J.—The principles on which *Gale v. Gale* (21 Beav. 349) and *Blake v. Blake* (49 L. J. Ch. 393; 15 Ch. D. 481) were decided apply in the case of the exercise of a special power. *Ib.*

Sub-section 5 of section 22 of the Settled Land Act, 1882, which provides, in effect, that capital money arising under the Act is to be held and go in the same way as the land from which it arose would have been held and gone if not disposed of, does not in any way enlarge or alter the effect of a testamentary appointment as regards the question of ademption. *Ib.*

B. was under the will of M. equitable tenant for life of certain real estate, with a power of appointment by will amongst his children, and in default of appointment the property was to go to all his children in certain shares. B. by his will in 1892, in exercise of the power, appointed the whole of the property to which his power extended to his two sons, part to one and part to the other. After the date of the will leases of parts of the real estate were granted by B. as a tenant for life under the Settled Land Act, 1882, at large premiums. The premiums were paid to the trustees of M.'s will, and invested by them. B. died in 1900 without having altered his will:—*Held*, on the true construction of the will of B., having regard to the will of M., that the premiums did not pass under the appointment to the two sons, but went as in default of appointment. *Ib.*

The dicta of LORD CAIRNS in *Cooper v. Martin* (L. R. 3 Ch. 47, 55, 56), and the observations of LORD ST. LEONARDS in *Sugden on Powers*, ch. vii. s. 7, par. 50, discussed, and *Cooper v. Martin* (L. R. 3 Ch. 47) distinguished.

Johnstone's Settlement, In re (49 L. J. Ch. 596; 14 Ch. D. 162), discussed. *Ib.*

Residuary Bequest among Children—Subsequent Gift to Two Sons—Rebuttal of Presumption against Double Portions—Codicil Subsequent to Gift.]—Where a testator between the date of his will and the date of his death advances to a child a large sum of money such as 5,000*l.*, the *prima facie* presumption, if nothing more were known, would be that it was an advance within the rule against double portions, and an ademption *pro tanto* of the amount left to the child by the will; but the presumption is liable to be rebutted, and all the circumstances and the manner of the gift must be taken into consideration in dealing with the case. *Scott, In re; Langton v. Scott*, 72 L. J. Ch. 20; [1903] 1 Ch. 1; 87 L. T. 574; 51 W. R. 182—C.A.

A father made a gift of 5,000*l.* to a son, A., after the date of his will. The father had two sons and six daughters, and at the date of his will he had made gifts of 5,000*l.* to each of his daughters, and had made no such gift to the sons. By his will he gave his residuary estate upon trust for his sons and daughters in certain proportions, and he directed that the sums of 5,000*l.* given to the daughters were not to be brought into account in ascertaining their shares; and he had, in conversation with two of his daughters, after the gift of the 5,000*l.* to A., referred to it as a gift, and as if he intended it to be on the same footing as the sums given to the daughters. He had also, after the gift to A., made a codicil, making some alterations in his will as regards the money left in his business, but making no alteration in the gift of his residue, and in all respects other than those mentioned confirming his will:—*Held*, that, taking all the circumstances into consideration, there was sufficient to shew that the 5,000*l.* was not intended to be an advance to A. on account of his share under the will, and it ought not to be brought into hotchpot in ascertaining his share of the residuary estate. *Ib.*

The father was carrying on business in partnership with another son, J. J.'s share of the capital consisted only of accumulations of part of his share of profits. Under the articles J. was to keep a certain amount of capital in the business. For some years the profits of the business had decreased, and J. had, to meet his current expenditure, drawn out of the business more than he was entitled to draw. J. applied to his father for assistance, pointing out that unless he obtained help he would have to part with his house and give up his position in society. The father then transferred 5,000*l.* from his account in the firm books to the account of J. and also gave J. 1,500*l.* to reduce the mortgage debt on his house. This took place after the advance to A., and after the date of the codicil:—*Held*, that the sums given to J. were, in effect, payments of his debts and to relieve him from temporary embarrassment, and were not advances within the rule against double portions, and ought not to be brought into hotchpot. *Ib.*

The view indicated by the COURT OF APPEAL in *Lacon, In re; Lacon v. Lacon* (60 L. J. Ch. 408, 411; [1891] 2 Ch. 482, 497), followed. So far as there is a difference between the view

expressed by SIR G. JESSEL in *Taylor v. Taylor* (44 L. J. Ch. 718, 719; L. R. 20 Eq. 155, 157) and that expressed by WOOD, V.C., in *Boyd v. Boyd* (36 L. J. Ch. 877, 878; L. R. 4 Eq. 805, 808), and by PEARSON, J., in *Blockley, In re; Blockley v. Blockley* (54 L. J. Ch. 722, 723; 29 Ch. D. 250, 252), the view taken by SIR G. JESSEL is to be preferred. *Ib.*

Child Taking Parent's Share.]—Where a testator directs that if a child of his should die in his lifetime leaving a child who should survive him, then such child should take the share in his estate which his or her parent would have taken if such parent had survived the testator, a grandchild of the testator taking in substitution for a parent is in no different position as regards bringing into hotchpot sums advanced to his or her parent than the parent himself would have been had he survived the testator. *Ib.*

"Use and benefit" of Legatee—Subsequent Settlement—Testator not in Loco Parentis—Particular Purpose.]—The purpose of a legacy expressed to be given "for the use and benefit" of a person to whom the testator is not *in loco parentis* is not such a particular purpose as will be satisfied by a subsequent settlement by the testator of a similar sum by way of provision for such person and so cause ademption of the legacy. *Smythies, In re; Weyman v. Smythies*, 72 L. J. Ch. 216; [1903] 1 Ch. 259; 87 L. T. 742; 51 W. R. 284—Swinfen Eady, J.

Specific Legacy—Policy of Insurance.]—By his will the testator directed his trustees in the fourth place to keep up a policy of insurance for 4,000*l.* which he had taken in his own name on the life of his wife, and on her death to divide the proceeds equally among all his children then alive and the issue of predeceasing. The testator was predeceased by his wife. Shortly before her death he had become *incapax*, and a *curator bonis* was appointed. He continued *incapax* down to his death. The proceeds of the policy were received by the curator, who after making certain payments on behalf of the ward invested the balance of 3,900*l.* on a deposit receipt in his own name, and the sum remained so invested at the date of the testator's death. In a question between the testator's daughters who claimed their share under the fourth direction of the will, and his sons, who were the residuary legatees,—*Held*, that the testator by the fourth direction in his will had provided only for the case of his wife surviving him, and had made no provision for the case which had occurred of his wife predeceasing him, and that in any view the legacy was a specific legacy of the contents of the policy, and could not receive effect, as these had been merged in the testator's general estate before his death. *Davidson's Trustees v. Davidson*, 4 F. 107—Ct. of Sess.

— A testatrix by her will, made in February, 1897, gave a moiety of a trust fund of 8,000*l.* on deposit at V. & Co., to which she was entitled, subject to a prior life interest to her nephews and nieces. She bequeathed her residue, including money at her banker's and on deposit with V. & Co., to S. M. M. In March, 1897, the prior life interest determined; and on December 14, 1897, 4,000*l.* was transferred by the trustee to the testatrix's deposit

account with V. & Co.:—*Held*, that the plain rule in cases of ademption was to enquire whether the specific thing given remained or not at the death of the testator. Here the 4,000*l.* (the moiety of the trust fund of 8,000*l.*) was intact, and was not adeemed either in whole or in part. *Vickers, In re; Vickers v. Mellor*, 81 L. T. 719—Kekewich, J.

Legacy by Parent to Child—Residue to Child and Stranger—Advances to Child—Portion.—The rule that a portion given to a child by its father or one *in loco parentis* to it, adeems in whole or in part a previous pecuniary legacy or residuary bequest, and must be brought into account before the child can take a benefit under the will, applies against the child only in favour of other children, and not in favour of a stranger. *Meinertzhagen v. Walters* (41 L. J. Ch. 801; L. R. 7 Ch. 670) followed. *Heather, In re; Pumfrey v. Fryer*, 75 L. J. Ch. 568; [1906] 2 Ch. 230; 95 L. T. 352; 54 W. R. 625—Swinfen Eady, J.

Legacy to Child—Gift by Testator—Double Portion—Satisfaction—“Advance.”—The rule that a gift by a parent to a child, to be in satisfaction of a legacy to the same child, must be *ejusdem generis* with the legacy, is still in force. It has not been overruled by *Lawes, In re; Lawes v. Lawes* (20 Ch. D. 81). Observations of NORTH, J., in *Vickers, In re; Vickers v. Vickers* (57 L. J. Ch. 738; 37 Ch. D. 525), considered and disapproved of. *Jaques, In re; Hodgson v. Bratsby*, 72 L. J. Ch. 197; [1903] 1 Ch. 267; 88 L. T. 210; 51 W. R. 229—C.A.

A testator by codicil provided that his daughter or the persons claiming the real estate specifically devised, and the share of residuary real and personal estate bequeathed in her favour, should not participate in the benefit of such devise and bequest without bringing into hotchpot “any advances or moneys lent by” the testator to the daughter or her husband since their marriage:—*Held*, that the word “advances” did not cover a farm and farming stock purchased by the testator and given to his daughter, and that she was not bound to bring the moneys applied in such purchases into account. *Id.*

(e) Advancement.

Heir-at-Law—Assignment—Distribution of Assets—Hotchpot.—D. was possessed of a farm held under lease *per autre vie*. By deed executed on the marriage of his son J., in consideration of the marriage and of 600*l.* paid to him by the father of the intended wife, D. assigned the farm and certain stock and chattels to J. D. died intestate, leaving J., his eldest son and heir-at-law, surviving:—*Held*, that the farm was exempt from being brought into hotchpot in the distribution of assets, on the ground that the assignment of it was an advancement of “land” to the heir-at-law, but that the stock and chattels transferred to him by the deed must be brought into hotchpot as being simply an advancement of personal estate. *Lyons, In re; Lyons v. Lyons*, [1905] 1 L. R. 156—M.R. And see *Hocking, In re; Michell v. Loe*, [1898] 2 Ch. 567, and *Whiteford, In re;*

Inglis v. Whiteford, 72 L. J. Ch. 540; [1903] 1 Ch. 889; 51 W. R. 491; also SATISFACTION, col. 2892.

(f) Ambiguity and Uncertainty.

Ambiguity Explained by Reference to Codicil.—Where there is an ambiguity in a will, it may be explained by reference to a recital in a codicil, provided that the latter is not obviously erroneous. *Darley v. Martin* (22 L. J. C.P. 249; 13 C.B. 683) and *Grover v. Raper* (5 W. R. 134) followed. *Venn, In re; Linden v. Ingram*, 73 L. J. Ch. 507; [1904] 2 Ch. 52; 90 L. T. 502; 52 W. R. 603—Joyce, J.

Previous Testamentary Instrument—Evidence.—Though no verbal or written statement of the intention of a testator is admissible, yet a previous testamentary instrument may be given in evidence to explain an ambiguous or insensible expression in a will. *Flood v. Flood*, [1902] 1 Ir. R. 538—M.R.

Extrinsic Evidence—Admissibility—Situation of Testator at Time of Making Will—Legacies—Fund for Payment—Specific Legacy—Administration.—Testator by his will appointed an executor and directed that all his just debts, funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. He then made certain specific bequests and a specific devise of real estate, and gave an annuity and several legacies, amounting to nearly 12,000*l.*, and continued: “All the residue and remainder of 9,187*l.* lent on mortgage to L. . . and of the sum of 4,000*l.* lent on mortgage to K. . . after payment of my just debts and funeral expenses and the expenses of proving this my will I give and bequeath unto” three persons named. The will contained no general residuary bequest. Extrinsic evidence was adduced showing that at the date of his will the testator had no other properties than those mentioned in the will, except about 145*l.* at his bank, but that between the date of his will and his death he became possessed of some 8,600*l.*, which went to increase his personal estate. On the question out of what fund the annuity and legacies ought to be paid,—*Held*, by LORD ALVERSTONE, M.R., and COLLINS, L.J. (*dissentiente* RIGBY, L.J.), that the will was so far ambiguous as to entitle the Court to receive extrinsic evidence so as to place itself in the position of the testator when he made his will, and that, having regard to that evidence, the annuity and legacies, as well as the debts and funeral expenses and the expenses of proving the will, were intended to be paid out of the two mortgage debts. *Held*, by RIGBY, L.J., that the gift was a clear and unambiguous gift of the mortgage debts subject only to the payment of the debts and funeral expenses and the expenses of proving the will. The principles on which extrinsic evidence is admissible on the construction of a will discussed. *Held* also, that, on the footing of the construction, the annuity and legacies were specific bequests, and were payable exclusively out of the two mortgage debts, and not out of the undisposed-of personal estate. *Grainger, In re; Dawson v. Higgins*, 69 L. J. Ch. 789; [1900] 2 Ch. 756; 83 L. T. 209; 48 W. R. 673; 49 W. R. 197—C.A.

Name and Description of Beneficiary—Ambiguity—Extrinsic Evidence to Explain.]—A testator gave property on trust for "his grandsons Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain twenty-one years." One of the testator's grandsons was named Robert William Henderson, son of Oliver Henderson. The testator left two other grandsons (the sons of a deceased son) named William Robert Henderson and John Barnett Henderson:—*Held*, that extrinsic evidence was admissible to shew that William Robert Henderson was the person really intended in the will. *Henderson v. Henderson*, [1905] 1 Ir. R. 353—Kennedy, J.

Latent Ambiguity—Evidence of Previous Wills.]—Where there is no one who answers to the description of a legatee given by a testator in his will, former wills made by him are admissible in evidence to shew his knowledge and state of mind at the time, so as to help the Court to find out the person whom he intended to benefit. *Waller, In re; White v. Scoles*, 68 L. J. Ch. 526; 80 L. T. 701; 47 W. R. 563—C.A.

Testator gave legacies to "such of the daughters of my late friend Ignatius Scoles deceased as shall be living and unmarried at my decease." Ignatius Scoles was living at the date of the will, and had never been married. He was the son of J. J. Scoles, who was dead at the date of the will, and who had several daughters, five of whom were living and unmarried at the date of the testator's death. It appeared that the testator was acquainted with the Scoles family, and knew the five daughters of J. J. Scoles intimately, and might have known J. J. Scoles; also that he knew that Ignatius was a Jesuit priest, and could not marry. By a former will he had left legacies to the daughters of J. J. Scoles by name, describing them as the daughters of "the late Mr. Scoles . . . who formerly resided" at the house where J. J. Scoles had lived:—*Held*, that the five daughters of J. J. Scoles were entitled to the legacies. *Ib.*

Copyholds—Custom of Manor—Title—Possession—Married Woman—Disability—Husband Suing in Right of Wife—Will—Construction—"Estate."]—Upon the death of an intestate in 1869, the copyholds of which he died possessed passed by the custom of the manor to his widow, and not to his eldest son. The intestate's widow died in 1870, having by her will given all the share and proportion of her late husband's estate to which she was entitled on his decease to be equally divided between her two daughters, one of whom was the plaintiff M. H.; and the testatrix stated that this provision was made in lieu of the various copyhold and freehold lands of her late husband, which descended to her son on the intestacy of her husband. At that time P. H. B., the eldest son of the intestate, was a minor, and was believed by every one to be entitled to the copyholds. In 1870 the husband of M. H. and a co-plaintiff entered into possession of the copyholds, and collected the rents until P. H. B. came of age in 1878, when he accounted to him and gave up possession, having in the meantime procured an enfranchisement in his favour. In 1888 it was

first discovered that the widow was the customary heir of this property, which had been in the meantime enfranchised. P. H. B. remained in possession until his death in 1890, having by his will given all his real estate to the defendants upon trust for the two children of the plaintiffs. In September, 1901, M. H. and her husband in her right brought an action claiming declarations to establish the right of M. H. to a moiety of this property as devisee under the widow's will:—*Held*, that both plaintiffs were barred by the Real Property Limitation Act, 1874, inasmuch as P. H. B. had been in receipt of the rents and profits of the property since 1870, more than thirty years before action brought; and *semble*, that as the widow had no intention of passing this real estate, which she thought had descended to her son, the gift in her will of all her share and proportion of her late husband's estate was ambiguous and not sufficient to pass this property, having regard to the context. *Hounsell v. Dunning*, 71 L. J. Ch. 259; [1902] 1 Ch. 512; 86 L. T. 382—Joyce, J.

Uncertainty—Object of Bequest not Named.]—A testatrix left a will in these terms: "I . . . for the love I have for my husband, J. M., bequeath and leave everything which belongs to me or may belong to me at some future time." Certain specific bequests to named individuals followed:—*Held* (*dissentiente Lord Young*), that this will did not contain a bequest in favour of the husband, J. M. *Murdoch v. Brass*, 6 F. 841—Ct. of Sess.

Erroneous Recital in Codicil—Parol Evidence.]—A testatrix by will made in 1897, among other legacies to charitable institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary and address of its office, 250l. By codicil made in 1902, she, after reciting twice incorrectly that she had given by will 500l. to the British Home for Incurables, Streatham, S.W., and, amongst others, to St. M.'s Orphanage, Bayswater, 100l., revoked all the legacies, "and instead thereof" bequeathed 500l. each to the Royal Home for Incurables, Streatham, S.W., and to St. M.'s Orphanage. Two societies made claim to the legacy of 500l. The executors paid it to one of them, the defendants, the Royal Hospital for Incurables, which was founded in 1854. In an action by the other, the plaintiffs, an institution founded in 1861, by the name of the British Home for Incurables, and in 1899 incorporated by charter by its present name, against the defendant institution and the executors, — *Held*, that on a proper construction of the codicil, the plaintiffs were entitled to recover the 500l. and interest, and that, in arriving at a decision of the question which institution was entitled to it, evidence was admissible of the nature and amount of the testatrix's subscriptions to the plaintiff and defendant institutions, and the titles she employed to designate them respectively, but not of her charitable intentions with regard to them. *British Home and Hospital for Incurables v. Royal Hospital for Incurables*, 89 L. T. 495—Kekewich, J.

Direction to Executrix to Dispose of Estate according to Wishes Verbally Expressed—Parol Evidence not Admissible.]—A testator, after

appointing his wife sole executrix and giving her a life interest in his property, continued as follows: "I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her"—*Held*, that parol evidence was not admissible to explain the testator's wishes, and that the clause purporting to create a power of disposition in the widow was void for uncertainty. *Fleetwood, In re; Sidgreaves v. Brewer* (49 L. J. Ch. 514; 15 Ch. D. 394), distinguished. *Helley, In re; Helley v. Helley*, 71 L. J. Ch. 769; [1902] 2 Ch. 866; 87 L. T. 265; 51 W. R. 202—Joyce, J.

Gift of Portions—Amount to be Fixed by Trustees.—A testator directed that the remainder of his farm, houses, and chattels should be divided equally between his two sons, subject among other payments to the payment of a portion to each of his five daughters, to be determined by his wife and executors, according to the value of their portions of the farm and the services the girls might have rendered to the family; and in case of a daughter's share being a marriage share, according to the match she might make, all of which amount of money and times and ways of payment were to be determined by his wife and executors:—*Held*, that the gift of portions to the daughters was not void for uncertainty. *Conn, In re; Conn v. Burns*, [1898] 1 Ir. R. 337—V.O.

Bequest to be Applied "in charity or works of public utility"—Bequest "for the benefit or hospitality" of a Company.—A testator bequeathed to the company of C. and the company of A. the sum of 5,000*l.* each, to be invested in such securities as the master and court of assistants of such companies might select, the revenue to be expended at the option of the master and court of such companies, as to two-thirds in "charity or works of public utility," and as to the remaining one-third for "the benefit or hospitality of the respective companies"—*Held*, that "or" was used disjunctively, and that the whole of the two-thirds might be applied for purposes which were not charitable, and therefore that the gift failed as to two-thirds. But, *held*, the gift of one-third was a gift of income for the absolute benefit of the companies, and that they were absolutely entitled to one-third. *Langham v. Peterson*, 87 L. T. 744; 67 J. P. 75—Swinfen Eady, J. *And see* CHARITY.

(g) Annuity.

Gift of Money to Executors to be Laid Out in Purchasing Annuity for A.—Interest.—A sum of money bequeathed to executors to be laid out by them in the purchase of an annuity carries interest only from a date twelve months after the death of the testator. A testator bequeathed to his executors the sum of 1,000*l.*, free of duty, to be laid out by them in the purchase of an annuity for his daughter M. The will contained no clause for maintenance, nor was there any further provision made for M.:—*Held*, that interest only commenced to run twelve months after the testator's death. *Friend, In re; Friend v. Young*, 78 L. T. 222—Stirling, J.

To Wife for Maintenance of Infant—Cesser.]—

A testator directed his trustees to pay an annuity to his wife during widowhood, and to pay to her a further annuity till his daughter should attain twenty-one to be applied by his wife for the maintenance and education of his daughter. The widow died while the daughter was an infant:—*Held*, that the further annuity had not ceased. *Yates, In re; Yates v. Wyatt*, 70 L. J. Ch. 725; [1901] 2 Ch. 438; 85 L. T. 393; 49 W. R. 646—Byrne, J.

Payable out of Income—Alternative Annuity not Expressed to be so Payable—Gift Over—"Subject to the trusts aforesaid"—Charge on Corpus or Continuing Charge on Income.—A testator, after devising certain real estate to his wife for life and after certain specific and pecuniary bequests, gave all his residuary real and personal estate to trustees upon trust for sale and conversion and to hold the net proceeds of sale upon trust in the first place to pay the interest on any mortgage on the estate given to his wife for life, "And in the next place in case I shall leave any child living at my decease then upon trust to pay to my said wife during her life and so long as any child of mine shall be living such a sum out of the income of my said residuary trust funds as with the income which my said wife shall from time to time receive under or by virtue of the settlement made on our marriage shall make up the total annual sum of 8,000*l.* But in case I shall leave no child surviving me or leaving such every such child shall die in the lifetime of my said wife then Upon trust to pay to her during her life such further sum as with the income to be derived from the said settlement shall make up the total annual sum of 10,000*l.* And I direct that the said annual sums of 8,000*l.* or 10,000*l.* as the case may be shall be deemed to commence and be payable as from the date of my decease And subject to the trusts aforesaid In trust to pay and divide my said residuary trust funds" among his children; and in default of children and subject to the trusts aforesaid he gave his residuary trust funds to his nephew. The testator died without having had any issue. His widow was still living. The income of the residuary estate was insufficient to pay the annual sum required:—*Held* (FLETCHER MOULTON, L.J., dissenting), that there were not two independent alternative gifts, but one provision for the widow in the shape of an annuity varying in amount according as one of two antithetical events should occur; that the words "out of the income of my said residuary trust funds" governed both clauses of the entire trust; that the words "subject to the trusts aforesaid" meant subject to the payment out of income of such sum as would make up 10,000*l.* a year; and that consequently such annual sum was not a charge on the corpus of the residuary estate or a continuing charge on the income thereof after the death of the widow. *Boden, In re; Boden v. Boden*, 76 L. J. Ch. 100; [1907] 1 Ch. 132; 95 L. T. 741—C.A.

Foster v. Smith (15 L. J. Ch. 183; 1 Ph. 629) applied; *Phillips v. Gutteridge* (32 L. J. Ch. 1; 3 De G. J. & S. 332) and *Booth v. Coulton* (39 L. J. Ch. 622; L. R. 5 Ch. 684) distinguished; *Birch v. Sherratt* (36 L. J. Ch. 925; L. R. 2 Ch. 644) considered. *Ib.*

•Tenant for Life and Remainderman—Public-

house—Compensation Fund—Statutory Charge.—Deduction from Rent—Incidence of Charge.]—Where a licensed house is comprised in a trust under a will, the sum deducted from the rent as percentage of a charge imposed on the tenant under section 3 of the Licensing Act, 1904, is an annual outgoing, and the person entitled to the income of the estate has no right to have a sum equal to the deduction raised out of capital and paid to him, in the absence of any direction to that effect in the will. *Smith, In re; Smith v. Dodsworth*, 75 L. J. Ch. 442; [1906] 1 Ch. 799; 94 L. T. 643; 54 W. R. 449; 70 J. P. 169; 22 T. L. R. 412—Swinfen Eady, J.

Accumulations.]—A testator gave to his wife, as personal provision for her and the children until majority or provision by marriage, an annuity of 12,000 dollars. The residue was given to the children living at testator's death, and on the death of any of them to their children, who were to be considered as one root and take the share of their parent. The trustees were to administer the property until the death of all the children, when a division was to be made. Each of the children from the time of majority or marriage was to receive out of the revenue 6,000 dollars a year:—*Held*, in a suit by the eldest son—first, that the income and arrears of income due to each child could only be taken from the current and accumulated revenue of his share, so long as such revenue was sufficient; secondly, that each of the children, whether of age or a minor, was entitled, without regard to the unequal benefits derived from their mother's annuity, to an equal share from the death of the father of the net revenue of the estate; thirdly, that the substitution in favour of children's children was confined to the capital share of residue bequeathed, the accumulations arising from revenue during minorities belonging absolutely to the legacies, the testator's children. *Beaudry v. Barbeau*, 69 L. J. P. C. 131; [1900] A. C. 669; 83 L. T. 236—P. C.

Arrears—Interest.]—Arrears of an annuity given by a will do not as a rule carry interest. *Hiscoe, In re; Hiscoe v. Waite*, 71 L. J. Ch. 347—Kekewich, J.

Administration Action—Certificate.]—Statement at p. 845 of *Daniell's Chancery Practice* (7th ed.), vol. i., that "the certificate shews the period from which arrears of annuities are due, if they are due from any other period than the testator's death," dissented from. *Ib.*

Rentcharge—Issuing out of Leaseholds—Chattel Real—Vendor's Lien—Intestacy—Next-of-Kin.]—A rentcharge issuing out of leaseholds is a chattel real. A rentcharge of this kind contracted to be purchased by a testator who died intestate in respect thereof is within the provisions of the Real Estate Charges Acts, 1854, 1867, and 1877 (which are to be read together), and passes to his next-of-kin as persons claiming through him, subject, as between themselves and the other persons claiming through the deceased, to a primary liability to payment of the vendor's lien for unpaid purchase-money, notwithstanding the absence of any reference to next-of-kin in the negating part of section 1 of the Act of 1877.

Fraser, In re; Lowther v. Fraser, 73 L. J. Ch. 481; [1904] 1 Ch. 726; 91 L. T. 48; 52 W. R. 516.

Direction to Purchase Annuity—Death of Annuitant before Probate.]—See ANNUITY, col. 12.

(h) Apportionment.

"Express stipulation."—A declaration in a will that every share "hereby bequeathed shall carry the dividends accruing thereon at my death" is an "express stipulation," within section 7 of the Apportionment Act, 1870, that no apportionment shall take place; and trustees to whom shares are given will take the dividends accruing thereon as income, not as capital. Every company formed and registered under the Companies Act, 1862, is a "public company" within section 5 of the Apportionment Act, 1870. *Lysaght, In re; Lysaght v. Lysaght*, 67 L. J. Ch. 65; [1893] 1 Ch. 115; 77 L. T. 637—C. A.

"Whole of income derived" from certain Shares.]—A declaration by a testator that "the whole of the income derived" from certain shares in a limited company shall, after his death, be paid to A during her life is an "express stipulation" within section 7 of the Apportionment Act, 1870, that no apportionment shall take place. *Meredith, In re; Stone v. Meredith*, 67 L. J. Ch. 409; 78 L. T. 492—North, J.

(i) Charge of Debts and Legacies.

Devise of Real Estate to Trustees—Right to Sell.]—A testator, after appointing an executrix and directing his debts and funeral and testamentary expenses to be paid, and, subject thereto, making certain pecuniary bequests, gave all the rest, residue, and remainder of his real and personal estate to trustees upon trust to pay to or permit and suffer his wife to receive the rents and profits of his real estate and the income of his personal estate (which last he directed to be converted) during her life, and after her decease to pay to or permit and suffer his niece to receive the same during her life for her separate use, and after the death of the survivor the testator directed the trustees to pay legacies to two persons if then living, and after payment thereof to stand possessed of his real estate and residue of his personal estate in trust for the children of his niece when they should attain twenty-one years, with a gift over in default of such children: *Held*, that the testator had charged his real estate with the payment of his debts and legacies, both with those payable immediately on his own death (*Creville v. Browne*, 7 H. L. C. 689, followed), and also with the reversionary legacies payable on the death of the tenants for life; but that, inasmuch as the first tenant for life, being entitled to the rents and profits of the real estate not for her separate use, took, according to *Doe d. Leicester v. Biggs* (2 Taunt. 109), the legal estate during her life, the testator had not devised the same so charged to the trustees for the whole of his estate and interest therein, and that, consequently, the trustees had not power to sell the real estate under

section 14 of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act). *Adams and Perry's Contract, In re*, 68 L. J. Ch. 259; [1899] 1 Ch. 554; 80 L. T. 149; 47 W. R. 326—Stirling, J.

Horton v. Horton (7 Term Rep. 652) recognised in *Van Grutten v. Foxwell* (66 L. J. Q.B. 745; [1897] A.C. 558), distinguished, on the ground that, in the present case, the trustees having no active duties to perform during the life of the first tenant for life, there was no reason why they should be held to take the legal estate during that period. *Doe d. Noble v. Bolton* (11 Ad. & E. 188; 3 P. & D. 135) followed. *Ib.*

If Personal Estate Insufficient—Specific Devise—Mortgage.]—A testator directed that legacies should in the first instance be charged upon "chattel property, money and effects," and if they should be insufficient, upon his "real and personal estates," and then made two specific devises of real estate, one of which only was expressed to be "subject as aforesaid." These devises exhausted the whole real estate, and the personalty was insufficient. The lands devised not expressed to be "subject as aforesaid" were mortgaged to the appellants:—*Held*, that the legacies were charged upon these lands. *Bank of Ireland v. McCarthy*, 67 L. J. P.O. 13; [1898] A.C. 181; 77 L. T. 777—H.L. (Ir.)

(j) Charity.

Devise of Realty—Trust—Discretionary Power—Charitable or other Purpose.]—A testatrix, entitled to real estate, by her will provided as follows: "I give and bequeath my dwelling-house, office-house, yard and garden to the Rev. T. L., parish priest, for a Roman Catholic school, or for whatever other purpose he pleases." The testatrix died within three months of the date of the execution of the will:—*Held*, that there was no trust created for a charitable purpose, and that the Rev. T. L. was entitled beneficially to the gift. *Harbison, In re; Morris v. Larkin*, [1902] 1 Ir. R. 103—M.R.

Uncertainty of Object—Erroneous Recital in Codicil.]—A testatrix, by will made in 1897, among other legacies to charitable institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary and address of its office, 250l. By codicil made in 1902, after reciting twice incorrectly that she had given by will 500l. to the British Home for Incurables, Streatham, S.W., and amongst others, to St. M.'s Orphanage, Bayswater, 100l., she revoked all the legacies, "and instead thereof" bequeathed 500l. each to the Royal Home for Incurables, Streatham, S.W., and to St. M.'s Orphanage. The legacy of 500l. was claimed by the Royal Hospital for Incurables and by the plaintiff institution, founded in 1861 by the name of the British Home for Incurables, and in 1899 incorporated by Royal Charter by its present name:—*Held*, that, having regard to entries in a book kept by the testatrix containing particulars of her charitable contributions, she distinguished the two institutions as the

"Royal" and the "British," and therefore, on the true construction of the codicil, the Royal Hospital for Incurables was entitled to the legacy. *British Home for Incurables v. Royal Hospital for Incurables*, 90 L. T. 601—C.A. And see *AMBIGUITY, supra*, col. 2819, and *CHARITY*.

(k) Children.

"Children belonging to me"—Grant of Probate to Illegitimate Child.]—There is a distinction between gifts whether by deed or will by the father of illegitimate children and those by their mother, and the reasons of public policy which are against the former do not extend to the latter. *Frogley, In the goods of*, 74 L. J. P. 72; [1905] P. 137; 92 L. T. 429; 54 W. R. 48; 21 T. L. R. 341—Bargrave Deane, J.

The expression children "belonging to me" in the will of a spinster construed to extend to an illegitimate child in fact living at her death. *Lowe, In re; Danily v. Platt* (51 L. J. Ch. 415), commented on. *Ib.*

Children or their "natural representatives" if Dead—Widow of Child Excluded.]—A testator gave all his property after certain life interests upon trust for all and every his children, whether sons or daughters, who should then be living or their "natural representatives" if dead according to the statute rule of distribution. He left seven children, one of whom (a son) died before the property became divisible, leaving a widow (his second wife) and children by his first wife:—*Held*, that as the widow's position was a contractual one, and that of the children, owing to nature, one by affinity of blood, the testator intended such persons as by nature represented the children, and excluded contractual relations. The widow was therefore held not entitled to share with the children. *Bromley, In re; Wilson v. Bromley*, 83 L. T. 315—Farwell, J.

Gift to Testator's Children—Provision for Grandchildren in Case any Child "shall" Die—Child Dead at Date of Will Leaving Children.]—A testator by his will gave relatively small legacies to four children of his deceased son A., whom in his will he described as "my deceased son." He also made specific bequests in favour of certain of his own children, and gave the residue of his estate, which was of large value, "in trust for all or any of my children who shall be living at my death and being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares; provided that in case any one or more of my children shall predecease me leaving any child or children living at my death then such child or children of any deceased child shall take the share which his her or their parent would have taken if such parent were living and over the age of 21 at my decease." The testator left eight children him surviving. A., who was dead at the date of the will, left five children, all of whom survived the testator:—*Held* (*dissentiente ROMER, L.J.*), that on the true construction of the will the children of the predeceased son A. were entitled to share in the residue. The principle of the decision in

Loring v. Thomas (30 L. J. Ch. 789; 1 Dr. & S. 495) applied. *Gorringe, In re; Gorringe v. Gorringe*, 75 L. J. Ch. 687; [1906] 2 Ch. 341; 95 L. T. 574—C.A. Reversing, 54 W. R. 267—Joyce, J.

Gift of Income of Residue to Children for Life in Equal Shares Subject to Annuity to Widow—Advances to Some Children—Adjustment between Advanced and Unadvanced Children—Hotchpot.]—A testator, by his will and codicil, dated May 5, 1880, and July 12, 1882, respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of 2,000*l.* to his widow during her life, and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of 1,000*l.*, these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly. The testator died on July 3, 1887, and left surviving him six children, of whom three had received advances and three had not. The widow died in March, 1900:—*Held*, that for the purpose of ascertaining the proportions of the settled shares of the six children, the value of the net residuary estate of the testator at the day of his death ought to be ascertained, and there should be added thereto the several advances, and that the actual income received from the testator's death ought to be divided in the respective proportions so ascertained, and that the share of each child in such income ought to be debited with one sixth part of testator's widow's annuity; and therefore any calculation of interest on the amount advanced to any child was unnecessary. *Hargreaves, In re; Hargreaves v. Hargreaves*, 88 L. T. 100—C.A.

Gift "to the children of A and B"—Knowledge of Testator—Mode of Division.]—A gift of personality "to the children of A and B," unless to the knowledge of the testator B be dead leaving children alive, is a gift of one moiety to the children of A and the other moiety to B. *Walbran, In re; Milner v. Walbran*, 75 L. J. Ch. 105; [1906] 1 Ch. 64; 93 L. T. 745; 54 W. R. 167—Joyce, J.

Eldest or Only Son for Time Being Entitled to Possession or Receipt of Rents and Profits of Estate—Exclusion of—Estate Disentailed—Testator not in Loco Parentis.]—In construing limitations in an instrument excluding from certain benefits an eldest son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates, a different rule is to be applied where the author of the instrument is a parent or person *in loco parentis* making provision for a family from that to be applied where the author does not stand in that relation to the objects of his bounty. *Shuttleworth v. Murray*, 70 L. J. Ch. 453; [1901] 1 Ch. 819; 84 L. T. 605; 49 W. R. 388—C.A.

Testator, who died in 1875, by his will made

in 1855, devised his real estates to the use of his nephew for life, with remainder to all and every the son and sons of the nephew born in the lifetime of the testator, or in due time afterwards ("other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates" situate at C., "after the decease" of the nephew, "as tenant for life or any greater estate or interest whatsoever"), severally and successively in remainder one after another for their respective lives. In 1869, the eldest son of the nephew, who was tenant in tail of the C. estates in remainder expectant on the death of his father, and was then twenty-one, joined with his father in disentailing the estates. The estates were sold, and the proceeds held on certain trusts, under which the eldest son took some benefit. He subsequently became bankrupt, and his interest in the proceeds was sold. The nephew was dead:—*Held*, that the eldest son was not within the exception, and he was entitled to the first life interest after the death of the nephew in the estates devised by the testator's will. *Collingwood v. Stanhope* (38 L. J. Ch. 421; L. R. 4 H.L. 43) distinguished. *Ib.*

"Next eldest brother."]—By his will B. left all his property to his wife for life, and after her death he devised to each of his six sons a specific portion of his landed property, and to the other (his third) son he left one shilling. He charged some of these lands so devised with portions for his daughters, and directed that if any of his sons should "die before he attained the age of thirty, the portion of him so dying should go to his next eldest brother, and so on, respectively"; and if any of them should die without issue lawfully begotten after attaining the age of thirty, then his share should go to his "next eldest brother, and so on, respectively":—*Held*, that by "next eldest brother" was meant the next younger, and not the next elder. *Crofts v. Beamish*, [1905] 2 Ir. R. 349—C.A.

Discretionary Trusts—Support of Husband and Wife and Children or any of Them or Accumulation—Validity—Remoteness.]—A testator devised and bequeathed unto trustees certain property, with power to sell the same, and he directed his trustees to apply the net income of the property or of the investments for the time being representing the proceeds of sale thereof or any part thereof in such proportions and generally in such manner as to his trustees in their absolute discretion should seem best for the support of his son W. C. B. and his wife and children or any of them, or to accumulate the same or any part thereof at their like discretion for the benefit of the children of his son who should become entitled to the capital of the trust premises under the trust therein contained, and, subject to such discretionary trust, he directed his trustees to pay the net annual income to his son W. C. B. during his life, and after his decease to his widow (if any) during her life and so long as she should remain his widow, and after the death of the survivor of them or the re-marriage of his widow the testator declared that his trustees should stand possessed of the property and of the investments by which the proceeds of sale thereof might for the time being be

represented, as well the capital as the income, upon trust for the child or children of his son W. C. B. who being sons attained the age of twenty-one years, or being daughters attained that age or married under it, if more than one, in equal shares as tenants in common:—*Held*, that on the construction of the will the discretionary trust was limited to the life of W. C. B., but that if it was not so limited it was void as infringing the rule against perpetuities. *Blew, In re; Blew v. Gunner*, 75 L. J. Ch. 373; [1906] 1 Ch. 624; 95 L. T. 382; 54 W. R. 481—Warrington, J.

Watson, In re; Cox v. Watson (27 L. J. N.C. 174; W. N. (1892), 192), and *Wise, In re; Jackson v. Parrott* (65 L. J. Ch. 281; [1896] 1 Ch. 281), not followed. Error in headnote of *Gooding v. Read* (4 De G. M. & G. 510) pointed out. *Ib.*

Trust for Children, including named Illegitimate Son—Legitimation for all other Purposes of Will.]—A testator devised Blackacre to his trustees upon trust for the benefit of his nephew G. F. S. and his wife and issue, "including S. S. R. hereinafter named," and subject thereto to sell the same and hold the proceeds on trust for all the children of G. F. S., "including amongst such children S. S. R. the illegitimate son of my said nephew," with a gift over. By the next following devise of his will the testator gave Whiteacre to his trustees upon trust to pay the income thereof to his niece M. S. for her life, and subject thereto to sell the same and hold the proceeds on trust for his named nephews and nieces, including G. F. S., and "for the issue living at the decease of M. S. of such of my said other nephews and nieces as shall die in the lifetime of M. S. leaving issue as tenants in common," S. S. R. not being expressly mentioned in this later devise. G. F. S. predeceased M. S. leaving issue only the illegitimate son S. S. R.:—*Held*, that there was sufficient recognition of S. S. R. in the will to justify the inclusion of him in the class of issue of G. F. S. so as to share in the devise of Whiteacre. *Smilter, In re; Bedford v. Hughes*, 72 L. J. Ch. 102; [1903] 1 Ch. 198; 87 L. T. 644; 51 W. R. 231—Kekewich, J.

Expression of Number — Evidence — Admissibility.]—The testator gave a share in his residue to "the three children respectively of Caroline Lewis born prior to her marriage with her present husband." There were four such children (all illegitimate) of Caroline Lewis, born in 1873, 1876, 1878, and 1880. The testator was the father of the three later-born children, and acknowledged the paternity:—*Held*, that the burden of proof was on the child born in 1873 to shew that the testator intended to benefit him. *Held* also that evidence that the testator knew of the existence of the child born in 1873 was admissible, but that his instructions for his will and declarations of intention to benefit the parties, and former wills, were inadmissible. *Mayo, In re; Chester v. Keirl*, 70 L. J. Ch. 261; [1901] 1 Ch. 404; 84 L. T. 117—Farwell, J.

Devisee "Born" within Testator's Lifetime—Devisee en Ventre sa Mère at Time of Testator's Death.]—There is no rule of law that the word "born" includes a child *en ventre sa mère*

under all circumstances. Where, accordingly, a will devised an estate tail to a child unborn at the date of the will, with a proviso that this estate tail was to be cut down to a life estate in case the devisee should be "born" within the testator's lifetime,—*Held*, that the devisee was not "born" within the testator's lifetime, although he was *en ventre sa mère* at the date of the testator's death. *Villar v. Gilbey*, 74 L. J. Ch. 529; [1905] 2 Ch. 301; 93 L. T. 51; 53 W. R. 658; 21 T. L. R. 561—Swinfen Eady, J.

"Nephews and nieces" — Dispositions by Illegitimate Testator—Indications of Meaning.]—A testator, who was one of eight natural children born of the same father and mother, and by them brought up as one family, recognising one another as brothers and sisters and recognised by the father as his children, made testamentary dispositions in favour of six of the eight by name, with the addition "my brother" or "my sister," and in favour of three of their children with the addition "my nephew" or "my niece." One of the reputed sisters, who had married and died long before the date of the will, was not mentioned therein, nor were her children:—*Held*, that the latter were entitled, equally with the children of the named brothers and sisters, to share in a residuary gift in the will to "all my nephews and nieces," the testator having by the language above-mentioned sufficiently indicated what he meant by the expression. *Corsellis, In re; Freeborn v. Napper*, 75 L. J. Ch. 607; [1906] 2 Ch. 316; 95 L. T. 583; 54 W. R. 536—Swinfen Eady, J.

Illegitimate Son Described as "Son"—Residuary Gift to Grandchildren — Children of Illegitimate Son.]—A testatrix having described her illegitimate son George as "my son George," gave her residue to "all my grandchildren." George left three children, and three legitimate children of the testatrix also left issue:—*Held*, that the children of George were entitled to share in the residuary gift in favour of grandchildren. *Kiddle, In re; Gont v. Kiddle*, 92 L. T. 724; 53 W. R. 616—Kekewich, J.

Illegitimate Children—Intention of Mistaken Testatrix.]—Effect given to the express intention of a testatrix to benefit a specified class of children, even where she was in error in believing that as a fact they had been legitimated by the Roman-Dutch law which legitimates children born out of wedlock when the parents are subsequently married by lawful ceremony. *Plant In re; Griffith v. Hill*, 47 W. R. 183—Kekewich, J.

— Gift to Children by Name — Gift to Next-of-Kin of Children—Intestacy.]—A testator gave legacies to his seven children, naming them, and directed his trustees to hold his residuary estate in trust in equal shares for such of his seven children as should be then living and have attained or attain the age of twenty-one years; daughters' shares to be retained upon trust to pay the income to her for life, and after her death upon trust for her children, as therein mentioned, and if there should be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such

share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married. An illegitimate married daughter of the testator survived him, and died without ever having had a child:—*Held*, that her interest in the residue did not devolve upon the persons who would have been her next-of-kin at the time of her death had she been legitimate, but to her legal personal representative as if the same had been absolutely bequeathed to her. *Standley's Estate, In re* (L. R. 5 Eq. 303), followed. *Deakin, In re; Starkey v. Eyres* (63 L. J. Ch. 779; [1894] 3 Ch. 565), not followed. *Wood, In re; Wood v. Wood*, 70 L. J. Ch. 856; [1901] 2 Ch. 578; 85 L. T. 447; 50 W. R. 102—Kekewich, J.

—**Trust for Unmarried Woman**—“**Her children living at my death**”—**After-born Illegitimate Child.**—Where a testator provides for “the children living at my death” of a woman who is unmarried, her illegitimate children can take, if the relevant and admissible facts are such as to render such an intention attributable to the testator. There is no uncertainty in designating future illegitimate children by reference to the mother, and so long as the provision is limited to children *in esse* at the time when the will takes effect it is more in accordance with public policy that it should be effective than that they should become a burden on public funds. *Occleston v. Fullalove* (43 L. J. Ch. 267; L. R. 9 Ch. 147) and *Hastie's Trust, In re* (56 L. J. Ch. 792; 35 Ch. D. 728), followed. *Loveland, In re; Loveland v. Loveland*, 75 L. J. Ch. 314; [1906] 1 Ch. 542; 94 L. T. 336; 22 T. L. R. 321—Swinfen Eady, J.

—**Uncertainty—Public Policy.**—In class gifts a will speaks from death, and therefore a bequest to a woman's future illegitimate children born in the testator's lifetime, and not defined by reference to actual paternity, is not uncertain or contrary to public policy—*secus*, a gift by deed. *Occleston v. Fullalove* (L. R. 9 Ch. 147) and *Hastie's Trusts, In re* (35 Ch. D. 728), followed. *Ib.* And see CLASS, *infra*.

Trust for Persons Entitled under Statutes of Distribution—Illegitimate Next-of-Kin.—Testator gave legacies to his seven children, naming them, and gave his residuary estate in trust for his wife for life, and after her death upon trust for such of his seven children thereinbefore named as should be then living and should attain the age of twenty-one years, and directed each daughter's share to be retained upon trust for the daughter for life, and after her death upon trust for her children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and if there should be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the Statutes of Distribution in case she had died possessed thereof without having been married. The three eldest children—two daughters and a son—were illegitimate. One of such illegitimate daughters survived the wife and attained twenty-one, and died without ever having had a child:—*Held*, that her share devolved on the persons who would have been her statutory next-of-kin at her death if the testator's children had been all legitimate.

Wood, In re; Wood v. Wood, 71 L. J. Ch. 723; [1902] 2 Ch. 542; 87 L. T. 316; 50 W. R. 695—C.A.

(1) Class.

Gift, whether to Class or Personæ Designatæ.]

—A testator, among other legacies, gave the sum of 200*l.* to each of his three sisters, whom he named, and devised his farm, with all household furniture, &c., in the dwelling-house, and live stock, &c., subject to their mother's life interest therein, to his “said three sisters,” or such of them as should survive him, in equal shares as tenants in common. The testator bequeathed the residue of his property to a charitable institution. By a codicil he revoked the legacy of 200*l.* given to one of his sisters, and also the bequest in remainder to her of a share in the farm, &c., and in other respects confirmed his will. The testator's mother and three sisters survived him:—*Held*, that the bequest of the farm, &c., under the terms of the will passed to the sisters, not as members of a class, but as *personæ designatæ*, and that consequently the revoked share fell into the residue. *Orford v. Orford*, [1903] 1 Ir. R. 121—V.C.

Gift “to A and the children of B,” equally.]—

A gift to “A and the children of B,” A and B's children being in the same degree of relationship to the testator, is a gift to a class, and on the death of A in the testator's lifetime A's share does not lapse, but goes to B's children. *Kingsbury v. Walter*, 70 L. J. Ch. 546; [1901] A.C. 187; 84 L. T. 697—H.L. (E.)

Gift to A and B and the Children of C—Gift

Divisible into Thirds—No Class Gift.—By his will dated June 7, 1870, a testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion, and upon certain trusts for the benefit of his daughter for life, and for her issue (all of which trusts failed), and the will then continued as follows: “And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister, Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use.” The testator died on June 26, 1870. There were four children of Richard Hollings living at the date of the death of the testator, all of whom attained the age of twenty-one years. *Held* (*dissentiente STIRLING, L.J.*), that the intention of the testator was that the investments representing the residuary trust fund should be divided into equal thirds (one of such thirds being again divisible into fourths) between George Barker, Mary Barker, and the children of Richard Hollings; that those persons did not constitute a class, they not being united or connected by any common tie; and that the gift was therefore not a class gift. Reasoning of LORD WESTBURY in *Davis v. Bennett* (4 De G.

F. & J. 327) applied. *Blackler v. Webb* (2 P. Wms. 383) considered. *Capes v. Dalton*, 86 L. T. 129—C.A.

Gift to A and the Children of B to Share Equally.]—Testator gave property upon trust for A and the child or children of B who should attain the age of twenty-one years equally to be divided between them as tenants in common. —*Held*, by LINDLEY, M.R., and SIR F. H. JEUNE, that, whether or no this was to be called a gift to a class, the intention of the testator was that the property should go to the persons whom he named or such of them as should be living, and on the death of A in the lifetime of the testator A's share would not lapse, but would go to the children of B. *Held*, by ROMER, L.J., that the gift was a gift to a class, and as A did not survive so as to share, the rest of the class would take the whole property. *Moss, In re; Kingsbury v. Walter*, 68 L. J. Ch. 593; [1899] 2 Ch. 314; 81 L. T. 139; 47 W. R. 642—C.A.

Per ROMER, L.J.—A gift by will to a class and A equally, so that the testator contemplates A taking the same share that each member of the class will take, is *prima facie* a gift to a class. *Id.*

Gift to A and B and the Children of C—Gift to a Class.]—A testator by his will bequeathed his residuary personal estate to trustees upon trusts for the benefit of his daughter for life, and for her issue, and, in the event of the failure of issue, “in trust for G. B., his sister M. B., and the children now living of R. H., who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares.” The daughter died unmarried. At the date of the death of the testator there were four children of R. H. living, who all attained the age of twenty-one years:—*Held*, that the gift was a gift to a class, and that the fund was divisible in equal sixths between G. B., M.B., and the four children of R. H. *Kekewich v. Barker*, 88 L. T. 130—H.L. (E.)

Gift to Class who shall Attain Twenty-one—Gift Over on Testatrix's Death without Leaving any Children—Vested or Contingent—Child Surviving Testatrix and Dying under Twenty-one—Intestacy.]—Testatrix gave real and personal property in trust for all her children who being sons should attain twenty-one, or being daughters attain twenty-one or marry, in equal shares; and in the event of her death “without leaving any children surviving” her, then over. She left one child only, who died in early infancy:—*Held*, that the gift to the child was contingent and not vested at birth. *Held* also, that “without leaving any children surviving” ought not to be read as meaning “without leaving any such children surviving,” and therefore that the gift over failed and there was an intestacy. *Kidman v. Kidman* (40 L. J. Ch. 359) approved on the first point, but dissented from on the second. *Edwards, In re; Jones v. Jones*, 75 L. J. Ch. 321; [1906] 1 Ch. 570; 94 L. T. 593; 54 W. R. 446—C.A.

Period of Ascertaining Class—Gift of Income to Children during their Lives—Gift of Capital in Remainder—Perpetuity.]—A gift by will of

income to the children of A *simpliciter* during their lives is confined to children living at the testator's death, if there are any then in existence, to the exclusion of afterborn children. A gift in remainder of the capital to the children of such children is not therefore void for remoteness. *Wenmoth's Estate, In re* (57 L. J. Ch. 649; 37 Ch. D. 266), distinguished. *Powell, In re; Crosland v. Holliday*, 67 L. J. Ch. 148; [1898] 1 Ch. 227; 77 L. T. 649; 46 W. R. 231—Kekewich, J.

— Gift to Tenant for Life—Other Gifts on His Death—Gift on Failure of those Gifts to Persons Entitled at Tenant for Life's Death as Testator's Statutory Next-of-Kin—Class of Next-of-Kin.]—By his will testator, who died in 1884, gave his residuary trust funds to trustees in trust to pay the income to his nephew during his life, and after his death on certain trusts in favour of the children and issue of his nephew who should attain the age of twenty-one or marry; and the testator declared that if no children or issue of his nephew should attain a vested interest the trust funds should be in trust for such person or persons as on the death of his nephew would be entitled as testator's next-of-kin under the Statutes for the Distribution of Intestates' Estates. The nephew died in 1906 without issue:—*Held*, that the class of next-of-kin must be ascertained at the testator's and not at the nephew's death. *Wilson, In re; Wilson v. Batchelor*, 77 L. J. Ch. 13; [1907] 2 Ch. 572; 97 L. T. 656—C.A. Affirming, 96 L. T. 392—Parker, J.

— Gift to Children at Twenty-one—Advancement Clause—Power to Advance out of Vested Share.]—Where there is a gift to children at twenty-one the general rule is that the class is fixed when the eldest child attains twenty-one, and no child born after can take. But if maintenance or advancement is continued beyond the time when the eldest child attains twenty-one—if, for instance, advancement is directed out of vested shares—all children will be let in. *Iredell v. Iredell* (25 Beav. 485) followed. *Courtenay, In re; Pearce v. Foxwell*, 74 L. J. Ch. 654—Kekewich, J.

Devise to Class on Attaining Twenty-one—Right to Income—Divesting.]—Where real estate is vested in trustees in fee upon trust for a tenant for life, and after her death for her children who attain twenty-one, and the tenant for life has died leaving children all infants, the persons entitled to the income will be the same as if the contingent remainders had been legal instead of equitable—that is to say, the first child who attains twenty-one will thenceforth take the whole income subject to the divesting of proportionate parts thereof as the other children attain twenty-one. *Averill, In re; Salsbury v. Buckle*, 67 L. J. Ch. 233; [1898] 1 Ch. 523; 78 L. T. 320; 46 W. R. 460—Romer, J.

• Condition of Surviving Tenant for Life—“Class gift”—Lapse.]—A testatrix by her will gave her residuary estate to be divided equally between the brothers and sisters of the tenant for life living at the latter's decease and three named persons “in equal shares,” and by a codicil recited that in her will she had directed such estate to be “divided between the persons

therein named." Of the three named legatees one predeceased the testatrix, another the tenant for life, and the third, together with one brother of the tenant for life, survived the latter:—*Held*, that the ambiguity in the will could be explained by reference to the codicil, and that the estate was divisible not into moieties, but in equal shares among all the persons mentioned; that the representatives of the legatee who predeceased the tenant for life took a share, as there was no condition of surviving the tenant for life, but that there was a lapse of the share intended for the legatee who predeceased the testator, as, following *Kingsbury v. Walter* (70 L. J. Ch. 546; [1901] A.C. 187), the gift was not one to a class. *Venn, In re; Lindon v. Ingram*, 73 L. J. Ch. 507; [1904] 2 Ch. 52; 90 L. T. 502; 52 W. R. 603—Joyce, J.

Gift to Tenant for Life with Remainder to a Class, their Children to take by Substitution—Occurrence of Events not Contemplated by Testator.—A gift by will to a class to take effect after a life estate, with a substitutional gift to the children of deceased members of the class, expressed in words of futurity, does not let in the children of a member of the class in a case where, he having survived the tenant for life, both die after the date of the will during testator's life. *Kinnear, In re; Kinnear v. Barnett*, 90 L. T. 537—Kekewich, J.

Direction "to hold"—Period of Distribution.—A testator directed his trustees "to hold" a fund in trust for all the children of A who being sons should attain twenty-one, or being daughters should attain that age or marry. During A's lifetime, certain of his children who had attained majority claimed payment of their shares:—*Held*, that as the class of beneficiaries could not be ascertained till after the death of A, no child was entitled to payment of a share before that event. *Andrews v. Partington* (3 Brown Ch. Cas. 401) commented on. *Hope Johnstone v. Sinclair's Trustees*, 7 F. 25—Ct. of Sess.

Gift "upon the death of my son C. and my daughters E. and S." of Property in Thirds unto Children of C., E., and S. respectively—Undisposed-of Income.—A testator, after making certain provisions for his widow and children during their respective lives out of the income of his estate, continued his will as follows: "In case of the death of my son C. leaving children, then one-third . . . of such annual income to such children as hereinafter mentioned . . . and upon the death of my son C. and my said daughters E. and S. A." he gave one-third part of his property to the children of C. in equal shares, and as to the two remaining one-third parts respectively to the children of E. and S. A. respectively in equal shares, "Provided nevertheless that in case of the death of any of my said children without leaving lawful issue the share . . . so given . . . to his or her issue shall go and be divided by and between the issue of the survivor or survivors of my said children in the same manner and proportions and under the same trusts as hereinbefore given and bequeathed *per stirpes*." E. died in 1879 leaving issue. The widow died in 1887. C. died in 1893 without issue:—*Held*, first, that "upon the death of my said son C. and my said

daughters E. and S. A." must be construed to mean upon the death of the survivor of them; and secondly, that the *corpus* was distributable as to one-third among the children of E. and as to two-thirds among the children of S. A., and distinguishing *Bowman, In re; Whytehead v. Boulton* (41 Ch. D. 525), that the word "survivor" must be read in its natural sense. *Rubbins, In re; Gill v. Worrall*, 79 L. T. 313—C.A.

Gift of Residue to Class—Settlement of One Share—Death before Period of Distribution—Intestacy.—A testatrix gave the residue of her estate in trust for all or such of her brothers and sisters who should be living at the decease of the survivor of two of her sisters in equal shares, with a substitutionary gift to the then living children of parents who should be then dead. She then settled the share of a sister, Charlotte, in trust to pay her the income for life, and after her decease the capital to be held in trust for her children as she should appoint, and in default of appointment to vest in her children who should attain twenty-one, or being daughters marry, with a gift over in default of children to the persons entitled to the other shares. At the period of distribution all the brothers and sisters of the testatrix were dead. Charlotte alone had had issue, and they had attained twenty-one, but had all died before the period of distribution:—*Held*, that the gift of the settled share had not failed in consequence of Charlotte's death before the period of distribution, and therefore that the representatives of Charlotte's children were entitled to the testatrix's residuary estate. *Roberts, In re; Tarleton v. Bruton* (53 L. J. Ch. 1023; 30 Ch. D. 234); *Pinhorn, In re; Moreton v. Hughes* (63 L. J. Ch. 607; [1894] 2 Ch. 276), and *Powell, In re; Campbell v. Campbell* (69 L. J. Ch. 788; [1900] 2 Ch. 525), considered. *Whitmore, In re; Walters v. Harrison*, 71 L. J. Ch. 673; [1902] 2 Ch. 66; 87 L. T. 210—C.A.

Class Gift to Children—Illegitimate Children Alive at Date of Will—Reputation—Surrounding Circumstances—Extrinsic Evidence.—Under a class gift to the children of the testatrix's nephew A, and of her nieces B and C, where A's children, although believed by the testatrix to be legitimate, are in fact illegitimate, but evidence of surrounding circumstances is given showing a strong probability of the testatrix's intention to include such children in the gift, then such of the illegitimate children as have, at the date of the will, acquired the reputation of being A's children are entitled to take along with the legitimate children of B. and C. *Holt v. Sindrey* (38 L. J. Ch. 126; L. R. 7 Eq. 170) and *Hill v. Crook* (42 L. J. Ch. 702; L. R. 6 H.L. 265) followed. *Du Bochet, In re; Mansell v. Allen*, 70 L. J. Ch. 647; [1901] 2 Ch. 441; 84 L. T. 710; 49 W. R. 588—Joyce, J.

Illegitimate Child Born after Date of Will—Reputed Child—Exclusion.—An illegitimate child of A born after the date of the will, and about the fact of whose paternity there is no question or dispute, is not entitled to share under the gift, notwithstanding the fact that such child also has acquired the reputation of being A's child long before the death of the testatrix, and has always, equally with each of

A's other illegitimate children who do take, been believed by the testatrix and her family generally to be the child of A born in lawful wedlock. *Bolton, In re; Brown v. Bolton* (55 L. J. Ch. 398; 31 Ch. D. 542), adopted and applied. *Occleston v. Fullalove* (43 L. J. Ch. 297; L. R. 9 Ch. 147) and *Goodwin's Trust, In re* (43 L. J. Ch. 258; L. R. 17 Eq. 345), not followed. *Id.* And see *CHILDREN, supra*, col. 2828.

(m) *Codicil.*

Construction — "Instead of" — Revocation — Whether Total or Partial only — Substitutionary Bequest.]—A trust declared by codicil of residuary personal estate, and expressed to be "instead of" an absolute bequest thereof by will to a legatee, who was the first tenant for life under the trust, construed, not as revoking the bequest altogether, but only as modifying the nature of the legatee's enjoyment to the extent shewn by the codicil, so that, upon failure of the trust, the original absolute bequest took effect. *Wilcock, In re; Kay v. Dewhurst*, 67 L. J. Ch. 154; [1898] 1 Ch. 95; 77 L. T. 679; 46 W. R. 153—Romer, J.

(n) *Condition.*

Gift on—Option to Purchase—Interest Transmissible to Executor of Person to whom Option Given.]—A testator devised his house and farm to his wife for life. His will then provided: "I desire that my brother A. shall get the entire of said house and lands, together with the plough and winnowing machine at 8*l.* sterling per statute acre. . . . If my brother A. will not take the land at 8*l.* an acre, together with the buildings, &c., they are then to be sold by public auction." A. predeceased the testator's widow, having bequeathed to his son J. "all my interest and goodwill in my deceased brother's farm, together with the plough and winnowing machine." On the death of the widow, *Held*, that there was a gift of property to A. on the condition of paying a price for it, and that this option was exercisable by his executor after his death. *Belshaw v. Rollins*, [1904] 1 Ir. R. 284—M.R.

Marriage with Consent—Restraint of Marriage.]—Where a testator bequeaths an annuity in any event, followed by an additional annuity conditional on the annuitant marrying with consent, the condition is operative and not *in terrorem* merely. *Gillet v. Wray* (1 P. Wms. 284) followed. *Reynish v. Martin* (3 Atk. 330) distinguished. *Nourse, In re; Hampton v. Nourse*, 68 L. J. Ch. 15; [1899] 1 Ch. 63; 79 L. T. 376; 47 W. R. 116—Stirling, J.

Estate in Special Tail.]—A testator, after leaving certain annuities to his wife and daughter, which he charged on his landed property, left his lands (held in fee-simple) to his son R. J. M., with the exception of what his wife was to get; "but the said R. J. M. shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female, of proper conducted parents".—*Held*, that R. J. M. took an estate in special tail. *Ma Gee v. Martin*, [1902] Ir. R. 367—C.A.

Gift of Life Interest to K. subject to Forfeiture if she "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces."—*Uncertainty.*—A testator by his will gave his residuary estate to trustees upon trust to pay the income to K. for life, and after her death to divide the corpus among her children. By a codicil he declared that if she "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces," &c., then the life interest was to be forfeited and a gift over was to take effect. On an originating summons taken out to ascertain the effect of the codicil upon the original gift, *Held*, that the condition was void for uncertainty. *Jeffreys v. Jeffreys*, 84 L. T. 417—Farwell, J.

Condition Precedent—Perpetuity—Statutes of Mortmain.]—A testator, who died in March, 1894, by his will dated in July, 1893, after devising his residuary real estate to trustees upon trust for sale, and to hold the proceeds upon the trusts declared of his residuary personal estate, gave the sum of 10,000*l.* to his trustees upon trust to transfer the same to trustees to be appointed by them, or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number), to be held by them upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting almshouses" in a certain parish for the deserving poor of that parish, without regard to religious denomination, and in making weekly or other periodical allowances to the inmates of such almshouses; and he empowered the trustees so appointed, in conjunction with the trustees of his will, to make rules for the regulation and maintenance of such almshouses. And, after giving other charitable and general legacies, the testator gave all his residuary personal estate to his trustees upon trust for sale and conversion, and to pay debts and legacies, and to hold the residue of the moneys upon trust, to pay or transfer the same to trustees to be nominated and appointed by the trustees of his will upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting and maintaining" a certain orphanage or institution; and the will contained directions for the management and regulation of such institution:—*Held*, that the language of the will did not constitute a condition precedent to the gifts, but was introduced for the purpose of mere machinery so as to avoid the provisions of the Statutes of Mortmain; and that the principle to be applied to the present case was that explained in *Chamberlayne v. Brockett* (28 L. T. 248; L. R. 8 Ch. 206). *Held*, therefore, that, without prejudice to any question, if land could not be obtained, there must be a declaration that the sum of 10,000*l.* and the residue were well given to charities; and that special trustees thereof must be appointed as directed by the will, and liberty given to apply. *Gyde, In re; Ward v. Little*, 79 L. T. 261—C.A.

Liability of Tenant for Life for Dilapidations Existing Prior to Testator's Death.]—Testator by his will declared that his trustees might permit his widow to reside in his leasehold house as long as she might desire, "she paying the rent and all rates and taxes, outgoings, and

repairs in connection therewith, and my trustees shall not be concerned to see to the upkeep of, or be responsible for, the said premises in any way during such time as my wife shall reside in the said premises":—*Held*, that the widow was not liable to pay for dilapidations existing prior to the testator's death. *Smith, In re; Bull v. Smith*, 84 L. T. 835—Byrne, J.

Forfeiture.—See **CONDITION**, col. 490.

Name and Arms Clause.—See **CONDITION**, col. 495.

(c) *Contingency.*

Contingent Gift—Maintenance—Discretionary Power—Vesting.—A testator bequeathed certain property to his nephew upon his attaining twenty-five, and directed his trustees to accumulate the profits and invest them in trust for his said nephew on his attaining twenty-five. He also empowered his trustees, in their absolute discretion, to apply any part of the said profits, or the income thereof, for the advancement, maintenance, and education of his said nephew while under such age. The nephew died before attaining twenty-five:—*Held*, that the gifts of both capital and income were contingent, and therefore failed. *Russell v. Russell*, [1903] 1 Ir. R. 168—V.C.

Child of Testator—Appropriation—Interest—Maintenance—Life Tenant—Accumulations of Surplus Income.—Testator bequeathed a legacy of 50,000*l.* to each of his daughters who should attain twenty-one or marry, with a direction that his trustees should retain the same in trust to pay the income to the daughter for life, and after her death upon trusts in favour of her children. The will contained an express maintenance clause in respect of certain legacies given to the testator's sons on attaining the age of twenty-five years, but no express maintenance clause in respect of the daughter's legacies; but it expressly provided that the testator's infant children should be made wards of Court, and thereafter all powers, whether statutory or otherwise, as to education, maintenance, and advancement should only be exercised by the trustees under the direction of the Court. The will also empowered the trustees to appropriate any part of his personal estate to answer each legacy, which the trustees did shortly after the testator's death. The Court made an order allowing an annual sum out of the income of her legacy for the maintenance of one of the daughters during her minority, and the trustees had accumulated the surplus income. The daughter having attained the age of twenty-one years,—*Held*, that the surplus income and the accumulations did not vest in the daughter absolutely, but must be treated as an accretion to the capital of the legacy. *Bowlby, In re; Bowlby v. Bowlby*, 73 L. J. Ch. 810; [1904] 2 Ch. 685; 91 L. T. 573; 53 W. R. 270—C.A.

Per ROMER, L.J., and COZENS-HARDY, L.J.—The rule that interest is payable from the testator's death on a legacy to an infant child of the testator contingently on attaining twenty-one, where no other fund is provided for maintenance, only means that it carries

interest for the purpose of the maintenance of the infant, and the infant does not acquire an immediate vested right to the interest on the legacy or to the income of a fund appropriated to answer it. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—So far as their language is concerned, the Judges who established the rule in such cases construed the will of the father as giving the interest to the child independently of the happening of the contingency; but, the practice of the Court having been to take a different view, that practice ought now to be followed. *Ib.*

Per VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J.—Having regard to the decision of the Court of Appeal in *Dickson, In re; Hill v. Grant* (54 L. J. Ch. 510; 29 Ch. D. 331), section 43 of the Conveyancing Act, 1881, unless expressly incorporated by the will, does not apply in the case of a contingent gift, if on attaining twenty-one the infant will not become entitled to the past income absolutely, but only to a life interest therein. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—The will contained no express direction that the provisions of section 43 should apply. *Per COZENS-HARDY, L.J.*—The direction as to the exercise by the trustees of all powers, statutory or otherwise, as to maintenance amounted to an express direction that the provisions of section 43 should apply to the income of the appropriated legacy. *Ib.*

The words "property from which the same arises," in sub-section 2 of section 43 of the Conveyancing Act, 1881, mean the property the income arising from which has been accumulated. *Scott, In re; Scott v. Scott* (71 L. J. Ch. 475; [1902] 1 Ch. 918), overruled, and the suggestion of NORTH, J., in *Wells, In re; Wells v. Wells* (59 L. J. Ch. 113; 43 Ch. D. 281), disapproved of. *Ib.*

Legacy in Trust for A for Life, and afterwards, if he shall have Two Children who Attain Twenty-one, as to a Moiety for his Executors or Administrators—Whether A Absolutely Entitled.—Where a testator bequeathed a legacy to trustees upon trust to pay the income to A for life, and after his decease, if A should have three or more children who should attain twenty-one, for his executors or administrators; and if he should have two such children, as to a moiety for his executors or administrators, and as to the other moiety for the sister of A and her children, it was held that, A, having had two children, he was absolutely entitled, on their attaining twenty-one years, to a moiety of the fund. *Bogle, In re; Bogle v. Yorstoun*, 78 L. T. 457—Stirling, J.

Power of Advancement—Expectant Interests—Possibility of Issue of Woman—Presumption in Favour of.—If property is given to a person in the event of another having children, the Court will treat the first person as having an interest in the property during the life of the other, even although such other is a woman past the natural age for child-bearing. *Hocking, In re; Michell v. Doe*, 67 L. J. Ch. 662; [1898] 2 Ch. 567; 79 L. T. 164; 47 W. R. 114—C.A.

Under a will the children of L. were entitled

to shares in certain trust funds in the event of H. having children, and in the event of H. having no children the funds were undisposed of. The will gave the trustee power to make advances to the children of L. on account of their "then expectant presumptive or then vested" shares. H. was a widow of fifty-four years of age and had never had a child:—*Held*, that the power of advancement was exercisable during the life of H. *Ib.*

Supplying Words from Context.]—A testator left his personal property for life to A, with a power of appointment in case of her death unmarried or without issue. There was no gift over in default of appointment; but the power of appointment was given "subject as hereinafter set forth," and in a later clause the testator provided "that in the event of my said daughter, under the circumstances before detailed, in case of non-marriage or no issue living at the time of her decease," all his property was to go to certain persons named:—*Held*, that it was clear that some word or words was or were omitted in the latter clause which provided for the event of the daughter doing or not doing something, but did not say what, and that the Court should supply the words "failing to exercise the said power of appointment" in order to effectuate the testator's intention, which had been imperfectly expressed, but was to be gathered from the context and the whole will. *Munro v. Henderson*, [1907] Ir. R. 440—*Barton, J.* Affirmed, [1908] 1 Ir. R. 260—C.A.

(p) *Conversion.*

Trust for—Administration—Tenant for Life and Remainderman—Power to Retain Securities—Unauthorised but Non-wasting Securities—Income Pending Conversion.]—Where there is an express trust for conversion and power to retain securities of every kind, authorised and unauthorised, and there is no gift either express or implied of the income pending conversion, the tenant for life is entitled to the income of authorised securities, but not to the income of unauthorised securities. As regards the latter he is only entitled to interest at 3 per cent. on their value at the testator's death. The rule applies to non-wasting as well as to wasting securities. *Chaytor, In re; Chaytor v. Horn*, 74 L. J. Ch. 106; [1905] 1 Ch. 233; 92 L. T. 290; 53 W. R. 251—*Warrington, J.*

Thomas, In re; Wood v. Thomas (60 L. J. Ch. 781; [1891] 3 Ch. 482), and *Woods, In re; Gabellini v. Woods* (73 L. J. Ch. 204; [1904] 2 Ch. 4), applied. *Bulkeley v. Stephens* (3 N. R. 105; 10 L. T. 225) not followed. Statement in *Theobald on Wills* (5th ed.), pp. 480, 481, approved. *Ib.*

(q) *Cy-près.*

Doctrine—Perpetual Succession of Life Estates—Estate Tail—Distribution per Stirpes.]—Testator, who died in 1835, devised his real estate to his children, A, B, and C, without words of limitation and declared that they and the survivors of them should stand seised thereof in trust to retain the income thereof for their own use in equal shares during their lives,

providing, however, that if any of his three children should die unmarried, or being married without leaving any child or children, his or her share should accrue to the survivors of his three children, to be equally divided between them, if more than one, and that the last survivor of his three children should stand possessed of his freehold estate for his or her absolute use and benefit. The will then proceeded, "but in case such son or daughter so dying shall leave issue at his or her decease, whether before or after the age of 21 years, the share of such child so dying to go and be divided equally amongst his or her child or children whether sons or daughters for life share and share alike if more than one, and if but one then the whole share to such only child for life and to be paid and applied towards their maintenance and support during their minority and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parents' share equally between them in all cases of decease." The will contained no gift over in default of issue. B died in 1856 a bachelor and intestate. A died in 1874, leaving one child D her surviving. C died in 1890 without issue:—*Held*, that the *cy-près* doctrine did not apply to the clause providing for the case of a son or daughter dying and leaving issue so as to give either A or D an estate tail in the moiety of the real property not passing to C, but that this moiety on the death of D belonged to the testator's heir. *Seaward v. Willock* (5 East, 198) applied; *Mortimer v. West* (2 Sim. 274), *Forsbrook v. Forsbrook* (L. R. 3 Ch. 93), and *Parfitt v. Hember* (L. R. 4 Eq. 443) distinguished. *Richardson, In re; Parry v. Holmes*, 73 L. J. Ch. 153; [1904] 1 Ch. 332; 91 L. T. 169; 52 W. R. 119—*Buckley, J.*

Real Property—Limitation of Estates for Life to Unborn Persons—Remoteness.]—Testator, who died in 1871, devised real estate to the use of G. for life, with remainder to the use of his first and other sons successively for life, and after the death of each such son to the use of the sons of that son successively according to seniority in tail male, with remainder to the use of all and every the daughters of each of the sons of G. as tenants in common in tail with cross-remainders in tail between such daughters if more than one, with remainder, after the determination of all the aforesaid uses, to the use of all and every the daughters of G. as tenants in common in tail, with cross-remainders in tail between them if more than one; and there was an ultimate remainder to the use of G., his heirs and assigns. G. died in 1903 without ever having had any issue. It was contended that though the limitations after the life estate of G. were bad as being too remote, the ultimate limitation to G., his heirs and assigns, might be supported under the doctrine of *cy-près* by substituting for the limitations in the will limitations to the use of G.'s sons successively in tail male, with remainder, if on the determination of these estates tail male there should be a failure of the issue of the sons of G. other than daughters or issue of daughters, to the use of G.'s sons successively in tail general, with remainder to the daughters of G. as tenants in common in tail general with cross-remainders between them, with remainder to

G. in fee-simple:—*Held*, that the Court could not insert such a contingent limitation as suggested, as that would be a large extension of the doctrine of *cy-près*, and would be, in effect, making a new will for the testator. The ultimate remainder therefore failed, and the estate on the death of G. without issue devolved on the heir-at-law of the testator. *Seaward v. Willock* (5 East, 198) and *Monypenny v. Dering* (17 L. J. Ex. 81; 16 M. & W. 418; 22 L. J. Ch. 313; 2 De G. M. & G. 145) followed. *Nicholl v. Nicholl* (2 W. Bl. 1159) observed upon. *Mortimer, In re*; *Gray v. Gray*, 74 L. J. Ch. 745; [1905] 2 Ch. 502; 93 L. T. 459—C.A. Affirming, 53 W. R. 394—Farwell, J. *And see* CHARITY, col. 239.

(r) *Death without Issue.*

"Die without child or children"—Without Leaving Children—Real Estate—Executory Gift Over.—The words "die without child or children" in a will held to mean "die without leaving a child or children." *Booth, In re*; *Pickard v. Booth*, 69 L. J. Ch. 474; [1900] 1 Ch. 768; 48 W. R. 566—Byrne, J. *And see* ISSUE.

(s) *Description.*

"Eldest son"—Failure of Limitations—Gift Over—Intestacy.—The term "eldest son" in a will is properly applied to the elder of two sons, and if there be a person answering the description at the date of the will, such person, though he dies afterwards in the testator's lifetime, is an object of the testator's bounty, section 24 of the Wills Act, 1837, not having, with reference to the objects of bounty, the same effect as it has "with reference to the real and personal estate comprised in it." *Amyot v. Dwarries*, 73 L. J. P.C. 40; [1904] A.C. 268; 90 L. T. 102; 53 W. R. 16; 20 T. L. R. 268—P.C.

A testator devised real estate, after limitations which failed, to his sister's "eldest son," there being only two sons at that date, both of whom predeceased the testator without issue. A third son was born after the date of the will, but in the testator's lifetime, and survived the testator. There was no residuary devise in the will:—*Held*, that the estate did not go to the persons entitled under the third son, but vested in the appellant, the surviving trustee, as under an intestacy. *Ib.*

"Eldest or only son" Excluded from Gift.—The exception contained in the gift of an estate to the sons of A. successively for life of "an eldest or only son for the time being entitled to the possession or the receipt of the rents and profits of the C. estate as tenant for life, or for any greater estate," excludes from the gift a son who was originally entitled in tail but has joined in disentailing the estate and resettling it upon trust for sale with a trust of the purchase-moneys under which he takes a benefit, though the C. estate has been sold before he comes into possession. *Shuttleworth v. Murray*, 69 L. J. Ch. 423; [1900] 1 Ch. 795; 82 L. T. 668—Cozens-Hardy, J.

"My own nephews and nieces"—Previous Inaccurate Description.—There is no general

rule that where a legatee has once been referred to by an inaccurate description in a will, the same description in all other parts of the will must be treated as including that person and all others in the same degree of relationship. The true rule is to determine by the language and context of each will, and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred. *Cogens, In re*; *Miles v. Wilson*, 72 L. J. Ch. 39; [1903] 1 Ch. 138; 87 L. T. 581; 51 W. R. 220—Swinfen Eady, J.

A gift to "my own nephews and nieces" restricted to the children of a brother of the half-blood and sisters of the whole-blood notwithstanding a reference, in earlier parts of the will, to a nephew of the husband of the testatrix as "my nephew" and to a daughter of a nephew and a daughter of an illegitimate son of a sister of the testatrix as "my nieces." *Ib.*

"Nieces and nephews"—Misdescription—Uncertainty.—A testatrix by her will bequeathed certain stocks and shares to her "nieces and nephews," coupled with the following directions: "None of them to be sold, but the father's and mother's name to be put in instead of mine, and they to receive the interest for them until they are twenty-one years old." After giving other legacies the will concluded as follows: "If my husband should require money, he can get some of the interest of what is left to the children, the remainder to go for their keep." At the date of the will all the children of the testatrix's brothers and sisters were of age, and none of them had both father and mother living. Several grandchildren, with their father and mother, lived with the testatrix, and evidence was offered that she used to refer to them as "the little children," and expressed an intention to benefit them:—*Held*, that there were sufficient materials in the will, with the help of admissible explanatory evidence, to shew that the testatrix, in making a bequest to her "nieces and nephews," did not refer to the children of her brothers and sisters, but that there were not sufficient materials of a legal and admissible kind to enable the Court to determine definitely the objects of the bequest, and that consequently it was void for uncertainty. *McHugh v. McHugh*, [1908] 1 Ir. R. 155—Barton, J.

"Great-nephews and great-nieces born previously to the date of" Will Infant en Ventre sa Mère at that Date.—A testator by his will dated October 17, 1904, gave a number of pecuniary legacies and 500*l.* to each of his great-nephews and great-nieces "born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will or any codicil thereto." He made two codicils, dated respectively October 18, 1904, and February 17, 1905, and died on April 19, 1905. One of his great-nieces was not born until March 14, 1905, and she was therefore *en ventre sa mère* at the date of the will and codicils:—*Held*, that the rule of construction, that a child *en ventre sa mère* at a particular time, who is subsequently born alive, is to be considered as "born" at that time, where such construction is for the benefit of the child,

applied; that no contrary intention was indicated in the will; that there was no ground for the suggestion that the rule only applied to a class of children to be ascertained at some future date as distinguished from a class of children born at the date of the will, and that consequently the infant was entitled to a legacy of 500*l.* *Salaman; In re; De Pass v. Sonnenthal*, 77 L. J. Ch. 60; [1908] 1 Ch. 4—C.A.

The rule, as stated by the COURT OF APPEAL in *Villar v. Gilbey* (75 L. J. Ch. 308; [1906] 1 Ch. 583), is not in any way qualified by the HOUSE OF LORDS (76 L. J. Ch. 339; [1907] A.C. 139), in any case in which the rule would operate for the benefit of the child. *Trower v. Butts* (1 L. J. (o.s.) Ch. 115; 1 Sim. & S. 181), as explained and adopted in *Blasson v. Blasson* (34 L. J. Ch. 18; 2 De G. J. & S. 665), and in *Villar v. Gilbey*, [1907] A.C. 139, in the HOUSE OF LORDS, applied. *Id.*

"Domestic servant."—A testator bequeathed a legacy to each domestic servant in his service at his death who should have been in his service for ten years or upwards. The plaintiff was for over ten years in the testator's service as laundress, and received 60*l.* a year paid quarterly. She worked in a laundry in a yard adjoining the testator's house, but supplied her own food and slept in a house of her own some distance away.—*Held*, that she was not a "domestic servant" within the meaning of the bequest. *Ogle v. Morgan* (1 De G. M. & G. 359) followed. *Ogilby, In re; Cochrane v. Ogilby*, [1903] 1 Ir. R. 525—M.R.

"Unmarried."—By her will a testatrix gave her residuary estate to trustees upon trust to apply such part as they thought fit for the personal maintenance and benefit of her brother, and so much as remained in their hands after his death was to be held in trust for his children or child; but if he should die "unmarried and without leaving any children," then it was to be divided between two persons. The brother died, leaving a widow, but never having had any children.—*Held*, that in order to give full effect to every word in the clause, "unmarried" must be read according to its secondary meaning, as "without leaving a wife," and that, the gift over being inoperative, there was an intestacy as to the residuary estate. *Chant, In re; Chant v. Lemon*, 69 L. J. Ch. 601; [1900] 2 Ch. 345; 83 L. T. 341; 48 W. R. 646—Cozens-Hardy, J.

Gift to "Wife"—Second Wife.—A testator gave the residue of his real and personal estate upon trust for sale and to invest one thirteenth part thereof and pay the resulting income to his son for his life, and after his decease "unto the wife of my said son" for her life, and after her decease to the lawful children of his son who should be living at his (the son's) decease. The will contained a proviso that the thirteenth share so given should be enjoyed by the son only till he should alien or incur the same, or become bankrupt or insolvent, and upon such event "the income of the thirteenth part or share hereinbefore directed to be invested for my said son and his family" should be applied by the trustees at their discretion for the support of "my said son, his wife, and children" in such manner as they should think fit. At the dates of the will and of the testator's death

the son had a wife living, who subsequently died, and the son, having married again, died, leaving his second wife him surviving:—*Held*, that the widow was entitled to the income of the thirteenth share during her life. *Lynne's Trust, In re* (38 L. J. Ch. 471; L. R. 8 Eq. 65), followed. *Burrows' Trusts, In re* (10 L. T. 184), not followed. *Drew, In re; Drew v. Drew*, 68 L. J. Ch. 157; [1899] 1 Ch. 336; 79 L. T. 656; 47 W. R. 265—Stirling, J.

Gift to "Wife" of Son—Wife of Son Living at Date of Will and Death of Testatrix—Subsequent Second Marriage of Son.—Where in a will there is a gift to the wife of a person, and there is a wife of that person known to the testator and living at the date of the will and of the death of the testator, the gift *prima facie* refers to that existing wife, and not to any subsequent wife that the person may have, unless there is sufficient context to show that the testator was referring to a subsequent wife. *Burrows' Trusts, In re* (10 L. T. 184), approved, and *Lynne's Trust, In re* (38 L. J. Ch. 471; L. R. 8 Eq. 65), disapproved by ROMER, L.J., and COZENS-HARDY, L.J. *Coley, In re; Hollinshead v. Coley*, 72 L. J. Ch. 502; [1903] 2 Ch. 102; 88 L. T. 517; 51 W. R. 563—C.A.

Testatrix by her will made in 1869 gave her residuary estate upon trust to pay the income thereof to her son W. during his life, and after his death to "his wife for her life if she shall continue his widow," and after her decease or second marriage, whichever should first happen, she gave her residuary estate equally among such of the children of her son as should attain twenty-one or die under that age leaving issue him or her surviving, and, in default of such issue of her son, equally among such of her nephews and nieces as therein mentioned. And she provided that "after the decease or second marriage of any legatee entitled for life or during widowhood whichever shall first happen," her trustees might apply the interest of the presumptive shares of grandchildren or nephews or nieces of hers towards their maintenance. Testatrix died in 1870. W. was her only child. He had in 1861 married his first wife. She was well known to the testatrix, and survived her, dying in February, 1899. W. in October, 1899, married again, and he died in 1902. He had no issue by either marriage:—*Held*, that the second wife was not entitled to a life interest in the testatrix's residuary estate. *Id.*

Misdescription — Compound Designation — "Wife"—No Legal Marriage.—A testator, who died in 1893, bequeathed 5,000*l.* upon trust to pay the income to his "son Francis during his life and from and after his death to pay such income to his wife Letitia during her life if she shall survive him and after the death of the survivor of my said son Francis and Letitia his wife" upon the trusts therein contained. The son was in New Zealand for many years prior to his death in 1899, and in 1888 had written to his family that he had married Letitia Lilian C.; but it had appeared since the death of the testator, to whom the lady was not known personally, that there had been no legal marriage:—*Held*, that the gift did not fail by reason of the lady, whose identity was established with the *persona designata* "Letitia," not having been legally married to the son of

the testator. *Anderson v. Berkley*, 71 L. J. Ch. 444; [1902] 1 Ch. 936; 86 L. T. 443; 50 W. R. 684—Joyce, J.

Life Interest to Husband—After his Death to his Wife “during widowhood”—Divorce.—A testatrix by her will dated September 20, 1898, devised and bequeathed all her real and personal estate to trustees upon trust to sell and as to one equal third part upon trust to invest and pay the income thereof to her son M. K. during his life, and after his death to pay the income of the share to “his wife A. K. during her widowhood,” with remainders over. The testatrix died on January 15, 1901, and on May 6, 1907, A. K. obtained an absolute decree of divorce against her husband M. K. on the ground of his adultery and desertion. M. K. died on October 8, 1907. Neither M. K. nor A. K. married again after the decree for dissolution. On a summons being taken out by the trustees to determine whether A. K. was entitled to be paid the income of the trust estate, and, if so, for what period, *Held*, that A. K. was not entitled to be paid the income, as the gift was to commence and finish with widowhood, and, as the lady divorced her husband, she never became a widow, and the period of enjoyment specified had therefore never commenced. *Boddington, In re; Boddington v. Clairat* (53 L. J. Ch. 475; 25 Ch. D. 685), followed. *Kettlewell, In re; Jones v. Kettlewell*, 98 L. T. 23—Parker, J.

Gift to “Widow”—Gift during Widowhood—Wife not Legally Married to Testator—Bigamy—Secondary Meaning of “Widow”—Condition or Limitation.—A testator having gone through the ceremony of marriage with a married woman, made his will whereby he gave the income of his residuary estate to “my said wife,” whom he had previously mentioned by name, “during her life if she shall so long continue my widow for her own use and benefit and from or after her decease or second marriage” upon trust for children and grandchildren, with an ultimate trust for his cousin. The testator was never married, and at the time when he went through the ceremony of marriage he knew that his alleged wife had a husband living:—*Held*, upon the true construction of the will, and having regard to the circumstances, that the married woman who went through the ceremony of marriage with the testator was entitled as his “widow” to the income of his residuary estate, unless and until she contracted a marriage subsequent to the testator's death. *Wagstaff, In re; Wagstaff v. Jalland*, 76 L. J. Ch. 369; [1907] 2 Ch. 35; 96 L. T. 605; 23 T. L. R. 426—Kekewich, J. Affirmed in C.A., 24 T. L. R. 136.

Misdescription of Godson.—A testator devised his property in trust to pay, *inter alia*, a legacy of 500*l.* to his “godson, the Hon. H. A. J. P., son of Lord G.” His godson was in reality the Hon. R. M. P., another son of Lord G.:—*Held*, that the legacy passed to the godson, the Hon. R. M. P. *Blake's Trusts, In re*, [1904] 1 Ir. R. 98—V.C.

Gift to Person by Wrong Name.—Two residuary legatees were described as “Edith Beale, daughter of E. J. Beale,” and “Violet Beale, daughter of E. J. Beale.” E. J. Beale

had two and only two daughters, one of whom was named Violet Edith Beale, the other had different first names:—*Held*, that both daughters were residuary legatees. *Radcliffe, In re; Young v. Beale*, 51 W. R. 409—Buckley, J.

—A testatrix by her will gave a legacy to Percy H., son of C. A. H. C. A. H. had no son Percy; but he had a son Herbert, who was generally called “Bertie.” Two persons, not sons of C. A. H., but who stood to the testatrix in the same degree of relationship as the sons of the said C. A. H., bore the name of Percy, but they did not claim the legacy:—*Held*, that Herbert, son of C. A. H., was entitled to the legacy, the solicitor taking testatrix's instructions having probably mistaken the word “Bertie” for the word “Percy.” *Hooper, In re; Hooper v. Warner*, 88 L. T. 160; 51 W. R. 153—Byrne, J.

Misdescription—Specific Legacy—General Legacy.—A testatrix lent 21,000*l.* to A. F. & Co., a firm of which A. S. F. and W. F. were partners. The firm of A. F. & Co. ceased to exist in 1899, when a limited company was formed which took over its business. The testatrix was allotted debenture stock and shares in the new company in respect of her debt. By her will, in 1903, the testatrix made the following bequest: “To A. S. F. and W. F. I forgive the sum of 20,000*l.* now owing to me jointly by them, or any member of the firm”:—*Held*, that A. S. F. and W. F. were entitled to be paid 20,000*l.* out of the general assets of the testator. *Lindgren v. Lindgren* (9 Beav. 358) and *Selwood v. Midmay* (3 Ves. 306) followed. *Findlater v. Lowe*, [1904] 1 Ir. R. 519—M.R.

Gift of “Carriages”—Motor Car.—A testator died in 1907 leaving a will dated 1890. By the will he directed his trustees to make over his landed estate to his wife, and, with certain exceptions, his whole “furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements.” At the date of his will the testator had carriages and horses, but subsequently he sold those and bought two motor cars, which he possessed at the time of his death:—*Held*, that the bequest of carriages included the motor cars. *Denholm's Trustees v. Denholm*, [1908] S.C. 43—Ot. of Sess.

Specific Devise—General Description—Particular Enumeration—Leading Description—False Demonstratio.—A testatrix specifically devised “the real estate to which I under the codicil to the will of my father . . . became entitled . . . namely . . . O. House . . . in the county of Essex and lands and hereditaments in the same county” to M. H., and she gave her residue to W. F. C. In addition to the properties mentioned in her will, the testatrix was entitled under her father's codicil to a freehold in the Temple:—*Held*, that the specification by name and locality formed the leading description, and that the freehold house not mentioned did not therefore pass under the specific devise, but fell into residue. *West v. Layday* (11 H.L.C. 375) considered. *Brocket, In re; Davies v. Miller*, 77 L. J. Ch. 245; [1908] 1 Ch. 185; 97 L. T. 780—Joyce, J.

Mistake—Description of Subject-matter—Evidence—Former Wills.—By his will made in 1902 the testator bequeathed to his daughter "all my consolidated ordinary stock in the Midland Railway Company," and in the same will he bequeathed "all my preferred and deferred ordinary stock in the Midland Railway (but not my consolidated ordinary stock in such company) to my trustees upon trust" as therein mentioned. The testator, at the date of his will and at the time of his death, held $2\frac{1}{2}$ per cent. perpetual preference stock and preferred and deferred converted ordinary stock of the company. He had before 1897 held 4 per cent. preference stock and ordinary stock in the company. By the Midland Railway Act, 1897, the preference stock was converted into $2\frac{1}{2}$ per cent. preference stock, and the ordinary stock into preferred and deferred converted ordinary stocks. Evidence of former wills made by the testator was admitted to explain the mistake in the description of the subject-matter of the gift:—*Held*, that the testator intended by the first gift to pass the ordinary stock, and by the second gift the preference stock. *Smith, In re; Smith v. Johnson*, 20 T. L. R. 287—Byrne, J.

(t) *Devises.*

General Words of Devise—"All other my real estate in the county of L."—**Advwsons in Gross.**—Advwsons in gross held to pass under general words of devise—namely, "All other my real estate in the county of L."—notwithstanding that such words were not words of apt description. *Hodgson, In re; Taylor v. Hodgson*, 67 L. J. Ch. 591; [1898] 2 Ch. 545; 79 L. T. 345; 47 W. R. 44—Romer, J.

"My personal estates, etc., etc."—**Devise of Real Estate.**—A testator, after giving and bequeathing his real estates and all his personal estate and effects to his wife for her life, after her death gave to certain relatives "an equal share of my personal estates, etc., etc."—*Held*, that the gift after the death of the wife included the real estate of the testator. *Andrew's Estate, In re; Creasey v. Graves*, 50 W. R. 471—Buckley, J.

"Devise" of "personal estate and effects"—**Real Estate.**—A testator gave, devised, and bequeathed, subject to the payment of his debts, his "personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, which I may be possessed of, interested in, or entitled unto at the time of my decease, whether in possession, reversion, remainder, or expectancy," to his wife, "her heirs, executors, administrators, or assigns":—*Held*, that the real estate passed under these words. *Wass, In re; Clark, In re*, 95 L. T. 758—Neville, J.

Devise to a Son, "if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants"—**Estate in Special Tail Male.**—*Held*, that a devise to a testator's son, "if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants," the son having married such a gentlewoman, created in the son an estate in special tail male. *Pelham-Clinton v. Newcastle (Duke)*, 72 L. J. Ch. 424; [1903] A.C. 111; 88 L. T. 273; 51 W. R. 608—H.L. (E.)

Devise of "All my estate and interest in the lands of H."—**Election.**—A testatrix devised all

her estate and interest in the lands of H. to A., and appointed B. residuary legatee. She had no power to dispose of the lands to H., which were settled by her husband's will on herself for life with remainder to B. in fee:—*Held*, that the testatrix only intended to dispose of her estate and interest, if any, and not to dispose of property which was not her own, and that therefore no case of election arose. *Whitley v. Whitley* (31 Beav. 173) distinguished. *Galvin v. Devereux*, [1903] 1 Ir. R. 185—M.R.

Devise of Estate Tail—Provision for Reduction to Life Estate if Devisee "Born" within Testator's Lifetime—Devisee en Ventre sa Mère at Time of Testator's Death—Strict Settlement.—*Prima facie*, for the purpose of the devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child at that time *en ventre sa mère* and subsequently born alive; and in the case of a will no such distinction ought to be made unless the context requires it. The grounds of the decision of Lord Westbury in *Blason v. Blason* (34 L. J. Ch. 18, 19; 2 De G. J. & S. 665, 670) are not sound, and the decision cannot be supported except on the ground that the particular words of the will there shewed an intention to take the case out of the general principle above stated. *Villar v. Gulbey*, 45 L. J. Ch. 308; [1906] 1 Ch. 583; 94 L. T. 424; 54 W. R. 473; 22 T. L. R. 347—C.A.

Testator by his will devised to the third son of his brother, then unborn, an estate tail in certain real estate, and declared his intention to be that any third son of his brother "born" in his lifetime should not take a larger interest in the estates than for life only, with remainder to his issue in tail. The third son of the testator's brother was born about three weeks after the testator's death:—*Held*, that for the purpose of the construction of the will he must be treated as if born in the testator's lifetime, and the estate taken by him was an estate for life only. *Ib.*

Equitable Estate in Tail Male—Realty—Gift of Rents to S. M.—Proviso against Incumbrance and Revocation of the Gift in such Event from S. M. and his Heirs Male—Remainder over in Tail Male to W. M. in default of Male Issue of S. M.—A testator devised his estates to trustees to pay the rents half-yearly to S. M., but in case he incumbered the lands at any time the testator revoked the gift of the rents from S. M. and his heirs male. In the event of S. M. so forfeiting the same, and dying without male issue him surviving, there was a remainder over to W. M. in tail male:—*Held*, that the frame of the will afforded a sufficient indication of the testator's intention to confer on S. M. an equitable estate in tail male. *Crumpe v. Crumpe*, [1899] 1 Ir. R. 359—C.A.

Rule in Shelley's Case.—Real estate was limited by will "to my son Charles if he marries a fit and worthy gentlewoman and has issue male to such issue male and their male descendants in failure of which" over:—*Held*, that, whether the rule in *Shelley's Case* (1 Co. Rep. 93b) applied or not, Charles took an estate in special tail male. *Pelham-Clinton v. Newcastle (Duke)*, 69 L. J. Ch. 875; 49 W. R. 12—Buckley, J. *And see* vol. 2830.

Devise to "Right heirs" of Testator—Co-parceners—Joint Tenants—Purchasers.]—Since the Inheritance Act, 1833, a devise to the testator's "right heirs" will pass the property to the heir as purchaser, and if the testator leaves two daughters who are his co-heiresses they will take by purchase as joint tenants, and not as co-parceners, it being impossible to create estates in co-parcenary by purchase. *Owen v. Gibbons*, 71 L. J. Ch. 338; [1902] 1 Ch. 636; 86 L. T. 571—C.A.

Devise of "freehold lands and hereditaments at," &c.—Residuary Devise—Customary Freeholds.]—A devise of "freeholds" will include land which, though not strictly freehold, is usually known as "freehold" or "customary freehold," unless there is reason to suppose that the testator is using the term "freeholds" in its strict and technical sense. And this is true even though the will contain a residuary gift of real estate. *Steel, In re*; *Wappett v. Robinson*, 72 L. J. Ch. 42; [1903] 1 Ch. 185; 87 L. T. 548; 51 W. R. 252—Swinfen Eady, J.

Devise of "real estate" — Fee-simple — Leasehold Interest—"Contrary intention."]—A testator who was possessed of the fee-simple in certain freehold property subject to a term of years, and was also possessed of a sub-leasehold interest in the said term of years less by two days than the original term, "gave and devised all his real estate whether in possession, reversion, or remainder," to a certain devisee. He also "gave and bequeathed all his leasehold estate" (except a certain house thereinbefore specifically bequeathed) to his executors. At the date of his will, the fee-simple in remainder and the sub-leasehold interest in the property in question had been enjoyed and dealt with by the testator and his predecessor in title for more than twenty years as a single freehold estate in possession:—*Held*, that although the sub-leasehold interest did not pass under the devise of "real estate" by virtue of section 26 of the Wills Act, 1837, yet that, having regard to the whole of the surrounding circumstances, it passed under the devise on the true construction of the will. *Guntton and Rosenberg's Contract, In re*, 70 L. J. Ch. 751; [1901] 2 Ch. 591; 85 L. T. 66; 50 W. R. 38—Cozens-Hardy, J.

Possibility of Reverter—Right of Entry.]—The possibility of reverter on a fee-simple conditional is a right of entry devisable under section 3 of the Wills Act, 1837. Whether such a possibility of reverter is an estate, *quære*. *Pemberton v. Barnes*, 68 L. J. Ch. 192; [1899] 1 Ch. 544; 80 L. T. 181; 47 W. R. 444—North, J.

Devise of Land in Strict Settlement—Gift of Personality on Similar Trusts—Ultimate Gift to "right heirs and assigns"—Persona Designata.]—A testator devised his real estate in trust for his eldest son for life, with remainders over in tail, remainder to his right heirs, and bequeathed his personality on similar trusts, with an ultimate remainder to his "right heirs and assigns":—*Held*, that the personality under the ultimate gift passed to the heir-at-law of the testator as *persona designata*, and not to his next-of-kin. *Skinner v. Cumbleton*, [1903] 1 Ir. R. 36—V.C.

Devise of Real Estate—Building Contract—

Non-completion at Death of Testator—Conversion.]—A testator, who had contracted with a builder to erect certain buildings on his freehold lands, died before the buildings were finished, having by his will devised the land to A for life. The contract was never completed:—*Held*, that A was entitled (in an action to administer the testator's estate) to have an enquiry directed whether any, and what, compensation was payable by the testator's personal estate in respect of the uncompleted contract. *Cooper v. Jarman* (36 L. J. Ch. 85; 14 R. 3 Eq. 98) followed. *Day, In re*; *Day v. Sprake*, 67 L. J. Ch. 619; 79 L. T. 437; 47 W. R. 238—North, J.

Estate Tail—Devise of, to Child—Provision for Reduction to Life Estate if Devisee "born" in Testator's Lifetime—Child en Ventre sa Mère at Testator's Death.]—There is no rule of construction that a gift to a child "born" within a specified period will extend to a child still *en ventre sa mère* at that period. That construction will only be adopted when it is for the benefit of the child then unborn, as laid down by Lord Westbury in *Blason v. Blason* (34 L. J. Ch. 18; 2 De G. J. & S. 665). *Villar v. Gildbey*, 76 L. J. Ch. 339; [1907] A.C. 139; 96 L. T. 511; 23 T. L. R. 392—H.L. (E.)

Devise to One and His Heirs, with Contingent Remainder to a Collateral Heir.]—A testator devised two cottages to a daughter for life, with remainder as to one cottage to her youngest daughter Elizabeth Graham and her heirs, and with remainder as to the other cottage to her son William Graham and his heirs, with a gift over, "if either the said Elizabeth or William should die without an heir, their share is to go to the survivor's heir or heirs":—*Held*, that Elizabeth and William took estates tail, with a contingent remainder in fee to the person who should be the heir of the survivor at the death of the tenant for life. *Wagh, In re*; *Wagh v. Cripps*, 72 L. J. Ch. 586; [1903] 1 Ch. 744; 88 L. T. 54; 51 W. R. 461—Farwell, J.

Absolute Gift—Executory Devise Over on a Contingency which does not Happen.] A testatrix bequeathed all her estate, except two specified sums, to her sister B., and added the words, "I would wish my money to be divided in equal shares after my sister B.'s death between my sister G. and my niece H., should they survive her." G. and H. predeceased B.:—*Held* (Holmes, L.J., *dissentiente*), that B. took an absolute interest, which, though liable to be divested if G. and H. survived her, became indefeasible on her surviving them. *Monek v. Croker*, [1900] 1 Ir. R. 56—C.A.

Rule in Shelley's Case—Equitable Fee-simple.]—Freehold land was devised to trustees in fee-simple upon trust out of the rents and profits to pay certain annuities, and then to pay the residue of the rents and profits to W. D. for his life, and from and immediately after the respective deceases of the annuitants and W. D. upon trust to convey the land together with any accumulations of rent unto the right heirs of W. D. The land was acquired compulsorily by a railway company, and the purchase-money paid into Court. The sur-

viving annuitant had previously released the property from her annuity. On a petition by W. D. for payment out to him,—*Held*, first, that the rule in *Shelley's Case* (1 Co. Rep. 93b) applied to the devise, and that under the will W. D. took an equitable estate in fee-simple in the land subject to the annuities; and secondly, that, in the circumstances, W. D. was absolutely and presently entitled to the fund in Court. *Yomans' Will, In re; Great Central Railway, ex parte*, 70 L. J. Ch. 430; [1901] 1 Ch. 720; 84 L. T. 201; 49 W. R. 509—Joyce, J.

— **Gift to Person for Life and "his sons and their sons in succession"—Estate Tail.**—Any expression which imports the whole of the inheritable blood has the same effect in bringing the rule in *Shelley's Case* into operation as the word "heirs." Accordingly, a gift to a person for life "and then to his sons and their sons in succession and in default thereof" over confers an estate tail. *Buckton, In re; Buckton v. Buckton*, 76 L. J. Ch. 584; [1907] 2 Ch. 406; 97 L. T. 332—Kekewich, J.

— **Legal Estate Taken by Trustees.**—A testator devised an estate to trustees, in case he should leave only one child (an event which happened), "to permit and suffer" such child to receive the rents and profits for her natural life, and declared that immediately after his death the trustee should stand seised and possessed of the hereditaments unto and to the use of the heirs of the body of such child, and the hereditaments were to be legally conveyed and assured unto such heirs of his child in equal shares as they should severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever, the rents and profits in the meantime to be paid and applied by the trustees for the maintenance and education of such heirs of the child in such manner as the trustees should direct.—*Held*, that, notwithstanding the use of the words "to permit and suffer," the legal estate remained throughout in the trustees; that the rule in *Shelley's Case* applied; and that the will created an estate tail in the testator's daughter. Decision in *Montgomery v. Montgomery* (3 Jo. & Lat. 60) criticised by LORD MACNAGHTEN. *Van Grutten v. Foxwell*, 66 L. J. Q.B. 745; [1897] A.C. 658; 77 L. T. 170; 46 W. R. 426—H.L. (E.)

— **Fee Expectant on Estate Tail.**—A testator being seised in fee of certain real estate devised it to trustees upon certain trusts under which it was held that his only child took an equitable estate tail, and he further directed that on the death of his child the estate should be "legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever." The testator's child married and died leaving one child, who attained the age of twenty-one years and died unmarried and intestate.—*Held*, that the remainder in fee-simple expectant on the termination of the estate tail was disposed of by the will of the testator, and that the grandchild took an estate in fee-simple by purchase and not by descent, which passed to his heir-at-law. *Foxwell v.*

Van Grutten, 82 L. T. 272; 49 W. R. 653—H.L. (E.)

— **Devise of Mortgaged Land—Fund for Payment of Debts—"Contrary or other intention"—Real Estate Charges Act.**—A testator devised certain real estate specifically, and also devised and bequeathed his E. L. estate, and the residue of his real and personal estate, to trustees upon trust for sale. And he directed that his trustees should, out of the moneys to arise from such sale, pay his funeral and testamentary expenses and debts, "except charges and mortgage debts if any on property specifically devised." At the time of the testator's death there existed a mortgage on the E. L. estate.—*Held*, that the above direction to pay funeral and testamentary expenses and debts was sufficient evidence of "contrary or other intention" within the meaning of the Real Estate Charges Acts, 1854 and 1867, to avoid the operation of section 1 of the Real Estate Charges Act, 1854, and to throw the discharge of the mortgage on the E. L. estate on the mixed fund. *Valpy, In re; Valpy v. Valpy*, 75 L. J. Ch. 301; [1906] 1 Ch. 531; 94 L. T. 472; 54 W. R. 401—Swinfen Eady, J.

— **Free from Mortgages—Pecuniary Legacy—Priority—Marshalling Assets.**—Specific devisees of real estate, by the terms of the will freed and discharged from the payment of mortgages thereon, are not entitled to have the benefit of the payment off of the mortgages out of the residuary personal estate unless and until the ordinary pecuniary legatees have been satisfied in full. *Lutkins v. Leigh* (Ca. t. Talb. 53) followed. *Smith, In re; Smith v. Smith*, 63 L. J. Ch. 333; [1899] 1 Ch. 365; 80 L. T. 113; 47 W. R. 223—Romer, J.

— **Devise of Real Estate—No Real Estate—Intention of Testatrix Entitled to Proceeds of Sale of Realty Subject to Trust—Extrinsic Evidence.**—A testatrix, who never had any real estate in the strict sense of the term, was entitled, under trusts created by the will of her father, during the life of his wife, who was still alive, to one moiety of the annual produce of the proceeds of sale of real estate, and to a moiety of the capital of such proceeds absolutely after the death of the wife. The father's will provided that until sale of his devised real estate the same should for all purposes be considered as money or personal estate and be transmissible accordingly, and the rents and profits until sale be applicable as if the same were income of the proceeds of sale. None of the real estate had been sold, when the testatrix by her will devised and appointed all her real estate to her trustees upon trusts in favour of the defendants, her sister and nephews and nieces, and she made her husband, the plaintiff, her residuary legatee.—*Held*, upon the construction of the will itself, and with the aid of extrinsic evidence properly admissible to explain terms used when they were not sensible with regard to surrounding circumstances, that the testatrix had intended, under the denomination of her real estate, to dispose of her interest in her father's realty. *Higgins v. Dawson* (69 L. J. Ch. 789; [1900] 2 Ch. 756; in H.L., 71 L. J. Ch. 132; [1902] A.C. 1) considered. *Glassington, In re; Glassington v. Follett*, 75 L. J. Ch. 670; [1906] 2 Ch. 305; 95 L. T. 100—Joyce, J.

Secret Trust for Charitable Purposes—Tenant in Common—Death of Testator within Three Months.]—A testator devised certain houses, and also a legacy of 600*l.* charged on the remainder of his property, which comprised landed property, to three persons absolutely, as tenants in common, coupled with a secret trust for charitable purposes. One of the legatees at the time the will was made was informed of the trust, the other two had no knowledge of it until after the testator's death. The testator died within three months of making his will:—*Held*, that the bequest of the one-third of the property to the trustee who was aware of the trust was invalid, but that the other two-thirds went absolutely to the other two devisees. *Geddis v. Semple*, [1903] 1 Ir. R. 73—C.A.

Limitations in Strict Settlement—Contingent Remainders or Executory Devises—Remoteness.]

—Testator by his will devised freehold estates to uses in strict settlement in favour of successive tenants for life and their first and other sons successively in tail male, and by a codicil declared that no devisee of the estates devised by his will should have a vested interest therein or be entitled to the possession thereof until the attainment of the age of twenty-four years. The testator died in 1879. The tenant for life in possession died in 1903, leaving a son, the plaintiff next in order of limitation, who was born in 1888, and claimed the estates as tenant in tail male. The next person in order of limitation was born in 1860, and claimed the estates as tenant for life:—*Held*, that the effect of the codicil was to convert the limitations in the will into executory devises under which the estates did not vest in interest until the attainment of the age of twenty-four years, and that the limitation to the plaintiff and all subsequent limitations failed for remoteness. *Wrightson, In re*; *Battie-Wrightson v. Thomas*, 73 L. J. Ch. 742; [1904] 2 Ch. 95; 90 L. T. 748—C.A.

Gift of Property of which Testator was Tenant in Common, and which had not been Partitioned—Tenancy in Common of Interest in New River Company—Separate Receipt of Dividends—No Formal Partition—Extrinsic Evidence—Admissibility.]

R. was tenant in common with his brother C., under their father's will, of an interest in the New River Co. The dividends were paid separately to R. and C., and they were regarded by the company as being each the owner of an undivided share in the interest. No formal partition of the property, however, was at any time effected, and in an agreement between R. and C. relating to the partition of other property of which they were tenants in common it was recited that they had agreed not to partition the interest in the New River Co., but to retain it for the present in their joint ownership. R. afterwards died, having devised to C. all his share and interest of and in all the real estate derived under the will of his father, which he held as tenant in common with C., and which should not, at the date of R.'s death have been partitioned. At the date of R.'s death there was other real estate of which R. and C. were tenants in common under their father's will, and which had not in any way been partitioned. On a summons taken out for the determination of the question whether R.'s share in the interest in the New

River Co. passed to C. under the above devise or not,—*Held*, that in view of the separate receipt of dividends by R. and C. there had ceased to be unity of possession in the interest, that it had been fully partitioned and R. and C. had ceased to be tenants in common of it, and that it therefore did not pass by the devise. *Held*, also, that the recital in the agreement for the partition of the other property was not admissible as evidence of the testator's intention. *Trimmer, In re*; *Crundwell v. Trimmer*, 91 L. T. 26—Joyce, J.

Piece of Land Purchased as Part of One Property, Occupied by Testator as Part of Adjoining Property—Will Speaking from Death of Testator.]

A testator who had purchased two adjoining freehold houses, known as Broad Green Lodge and the Cedars respectively, each having a garden and piece of meadow land in the rear, and had occupied until his death Broad Green Lodge with the garden and meadow land at the rear, and also the piece of meadow land at the rear of the Cedars, and had let the Cedars with its garden, but without the piece of meadow land at the rear, to a tenant for twenty-one years, by his will made prior to the lease by him of the Cedars devised (*inter alia*) his two freehold houses to trustees upon trust as to his "residence known as Broad Green Lodge" for the residence of his wife for life, and at her death for sale, with a direction that the proceeds should form part of his residuary estate, which he divided amongst his children. And after the death of his wife the testator gave to one of his daughters the income to arise from his "freehold property known as the Cedars":—*Held*, that the will, as to the property comprised in it, must speak from the date of the testator's death, at which time the piece of meadow land was occupied by him as part of the Broad Green Lodge property, and that the gift of the income of his freehold property known as the Cedars comprised the premises let by him as the Cedars, but not the piece of meadow land at the rear, which formed part of the testator's residuary estate. *Potter, In re*; *Stevens v. Potter*, 83 L. T. 405—Cozens-Hardy, J.

Specific Devise—Failure—“Residuary devise”—Restriction as to Tenure.]

A devise of "all other my freehold messuages or tenements at W. and elsewhere" is a good "residuary devise" within section 25 of the Wills Act, 1837, so as to include the subject-matter of a previous specific devise of freehold property which has failed. It is not necessary in order to constitute a good residuary devise that it should apply to real estate of any tenure, copyhold as well as freehold. *Mason v. Ogden*, 72 L. J. Ch. 152; [1903] A.C. 1; 87 L. T. 622; 51 W. R. 560—H.L. (E.)

Freehold—Devise by Mortgagee in Possession—Mortgage Debt Passing by Devise.]

A devise in fee-simple of "my two houses and stable," of which the testator is mortgagee in possession only, will suffice to pass the mortgage debt secured upon the property in question, where an intention to give all the interest that the testator had in the property can be gathered from the words of the devise; and there is no rigid rule of law to prevent such an intention from being carried into effect. *Carter, In re*;

Dodds v. Pearson, 69 L. J. Ch. 426; [1900] 1 Ch. 801; 82 L. T. 526; 48 W. R. 555—Cozens-Hardy, J.

Vesting—Contingent Remainder—“If alive.”

—K. devised real estate, of which he was seised in fee farm, in the following terms: “To my daughter for her life, and should her husband survive her he is to have them for his life, and at his decease I bequeath them to my nephew J., if alive; if not, to his next brother E.; and in the case the latter should also be dead, they are to go to the eldest survivor of my brother’s four younger sons.” The testator’s daughter survived her husband and all the testator’s nephews, some of whom, however, including J. and E., were alive at the death of the husband:—*Held*, that the words “if alive” meant if alive at the deaths of both the daughter and her husband, and that, in the events which happened, upon the death of the daughter in 1895 the estate was undisposed of and passed to the testator’s heir-at-law. *Dundalk and Enniskillen Railway, In re; Roebuck, ex parte*, [1898] 1 Ir. R. 219—C.A.

Executory Limitation—Devise to A “when she shall attain the age of 25 years”—Controlling Context—Contingency—Vesting.—A devise to A “when she shall attain the age of 25 years,” in the absence of some controlling circumstance, or context, confers upon A an estate in fee-simple contingent upon her attaining that age, and not a vested estate in fee-simple liable to be divested if she die under the age of twenty-five years. *Francis, In re; Francis v. Francis*, 74 L. J. Ch. 487; [1905] 2 Ch. 295; 93 L. T. 132; 53 W. R. 571—Swinfen Eady, J.

Devise of Personalty—Interest for Life—Absolute Interest.—A devise of personalty to M. H. C. “for her life, with remainder to her issue in tail male, and in default thereof to her daughters,” and in default over:—*Held*, that M. H. C. took an interest for life only. *Cullen’s Estate, In re*, [1907] 1 Ir. R. 73—Ross, J.

Yearly Tenancy—Gift of Chattels Real to A for Life, and at his Decease “to his eldest son or heir-at-law.”—A testator devised and bequeathed his lands to A. (held from year to year) to his son J. for life, and at his decease to his eldest son or heir-at-law. J., who had gone into possession of the lands on his father’s death and had an eldest son living, agreed to sell the lands to B. B. objected to the title on the ground that J. took a life interest only under the will:—*Held*, that J. took only a life interest with remainder to his eldest son or heir-at-law as *persona designata*, and that therefore the vendor could not make title. *Smith v. Butcher* (48 L. J. Ch. 186; 10 Ch. D. 113) followed. *Bishop and Richardson’s Contract, In re*, [1899] 1 Ir. R. 71—M.R.

Gift of Rents—Gift Over on Failure to Fulfil Conditions from Devisee of Rents and His Heirs Male—Equitable Estate in Tail Male.—A devise in a will that trustees should pay the rents of real estate half-yearly to a person named, but, in case such person should incur the lands at any time, that the gift of the rents should be revoked from such person and his heirs male, and that in case of such revocation various

remainders over should take effect,—*Held*, to confer an equitable estate tail on the devisee of the rents. *Crumpe v. Crumpe*, 69 L. J. P.C. 7; [1900] A.C. 127; 82 L. T. 130—H.L. (Ir.)

“Lessees or holders of the present leases.”—A devise of real estate “unto the lessees or holders of the present leases in the quantities, dimensions, and measurements set forth in their respective leases” includes holders either by the original leases or by assignment of the existing leases of the property. *King v. Rymill*, 67 L. J. P.C. 107; 78 L. T. 696—P.C.

Devise subject to Condition.—See **CONDITION**, col. 486.

Executors—Gift to.—See **LEGACIES**, col. 2864.

(u) *Executory Trust.*

Direction to Settle—Possibility of Issue.—A testator bequeathed *inter alia* two legacies of 300*l.* to Mary M. and Elizabeth M. respectively, for their own sole and separate use, free from the control of any husband either might marry; said legacies not to be payable by the trustees and executors of his will until a settlement, to be approved of by them, should be made in reference to same. The testator died in 1866. The legatees never married and had attained the ages of seventy-five and seventy years respectively. No settlement had ever been executed, and the money was retained in the hands of the trustees:—*Held*, that under the circumstances the legatees were entitled to have the legacies paid over to them by the trustees without any settlement. *Jordan’s Trusts, In re*, [1903] 1 Ir. R. 119—V.C.

(v) *Exoneration of Personalty.*

Onerous and Beneficial Property—Aggregate Gift—Incidence of Burden—Right to Disclaim Gift.—When a testator includes all his real estate in one aggregate devise, a lien for unpaid purchase-money on property which the testator has contracted to purchase after the date of his will, and a mortgage, which exceed the value of the property on which they are respectively charged, must be paid, as to the excess, out of the real estate comprised in the aggregate gift and not out of personalty. *Kensington (Baron), In re; Longford (Earl) v. Kensington (Baron)*, 71 L. J. Ch. 170; [1902] 1 Ch. 203; 85 L. T. 577; 50 W. R. 201—Farwell, J.

Leaseholds given upon such trusts as should correspond with the uses of real estate, “or as near thereto as the nature of the premises will permit,” are, for this purpose, included in one aggregate gift with the real estate. *Syer v. Gladstone* (30 Ch. D. 614) discussed. *Ib.*

Bequest of “all my personal estate”—Devise of Real Estate subject to Debts, &c.—Expression of Intention.—A specific gift of all a testator’s personal estate to A, followed by a devise of real estate to B and C subject to the payment of his debts, &c., is not an expression of intention sufficient to exonerate the personalty from its primary liability for those payments, especially when in the will a wish is expressed that none

of the realty shall be sold while any descendants of testator's name are living. *Banks's Trusts, In re; Banks v. Bysbridge*, 74 L. J. Ch. 336; [1905] 1 Ch. 547; 92 L. T. 225—Buckley, J.

(w) *Gift Over.*

Exclusion from Original Gift.]—Under an original gift in her will the testatrix appointed a fund in trust for her surviving children other than a daughter whose children were substituted for their mother, and for such of the issue then living of any child dying before the testatrix who being a male should attain twenty-one, or a female should attain that age or be married. By a gift over the shares of children who had no child attaining a vested interest were to be “in trust for the other of my children and their issue to whom or in whose favour I have hereinbefore appointed the money to arise as aforesaid . . . upon the same or the like trusts as are hereinbefore declared concerning the original shares of such children respectively”:—*Held*, that the children of the daughter who was excluded from the original gift were entitled to share in the gift over. *Edyvean v. Archer*, 72 L. J. P.C. 85; [1903] A.C. 379; 80 L. T. 4—P.C.

“Die unmarried and without issue.”—By her will a testatrix devised her estate and interest in certain hereditaments in trust for the use of her youngest son H. and his heirs, and (after devising other property in trust for her four youngest daughters, which, on the youngest of them attaining twenty-one, was “to become the property of such of them as shall have remained unmarried in equal proportions”) she provided that if H. should “die unmarried and without issue” the hereditaments devised to him should go over to her sons E. and M. as tenants in common, “the share of either of them dying unmarried to go and become the estate and property of the survivor.” H. married, but his wife predeceased him. He had no children:—*Held*, that the words “die unmarried and without issue” following the gift to H. must be read in their primary signification as meaning “die without ever having been married and without issue”; that consequently H. became indefeasibly entitled to the hereditaments, and the gift over in favour of the other sons did not take effect. *Roberts v. Kulmore (Bishop)*, [1902] 1 Ir. R. 333—M.R.

In the Event of Death.]—A testator devised all his real estate to his wife for life, and after her death upon trust for four stepsons and a son, or such of them as should be living at the wife's death and should attain twenty-one; and in case all should be living at the wife's death and attain twenty-one, he devised certain specific properties to each of the stepsons and son for life; and in case of the death of any of the five he devised the share to which such person would have been entitled to the use of the person or persons who should then answer the description of heir-general of the person so dying. Two of the stepsons died before their mother, and the appellant was heir to both:—*Held*, that the appellant was entitled to the two fifth shares to which the two stepsons would have been entitled if they had lived until the period of distribution. *Penny v. Commissioners*

for Railways, 69 L. J. P.C. 113; [1900] A.C. 628; 83 L. T. 182—P.C.

On Death before Legatee Entitled—“Entitled” construed “entitled in possession.”—Where a testatrix directed her trustees to pay the income of the residue of her trust estate to her son's wife for life and after her death to divide such residue amongst all the children of her son; and in the event of either of her grandchildren “dying before becoming entitled” to any share of her estate, the testatrix directed that the child or children of such deceased grandchild should take the parents' share, or if there should be no such child then such share should vest equally in all her surviving grandchildren:—*Held*, that “entitled” meant “entitled in possession,” and the substitutionary clause operated at any time during the subsistence of the prior life estate, and therefore that the shares of the grandchildren were not indefeasibly vested, but were subject to be defeated so long as the tenancy for life existed. *Maunder, In re; Maunder v. Maunder*, 71 L. J. Ch. 815; [1902] 2 Ch. 875; 87 L. T. 262; 51 W. R. 31—Joyce, J.

Dying “without leaving any child.”—In a gift over in a will upon death “without leaving any child or children,” it is a well-settled rule of construction that these words will be construed “without having had any child who has attained a vested interest” under the previous gift; and it makes no difference in the application of this rule of construction that the testator knew at the date of the will that the person on whose death the gift over is made in fact had a child then living. *Treharne v. Layton* (44 L. J. Q.B. 202; L. R. 10 Q.B. 459) followed. *Cobbold, In re; Cobbold v. Lawton*, 72 L. J. Ch. 588; [1903] 2 Ch. 299; 88 L. T. 745—C.A.

Gift to Widow—Gift Over of Balance, “if any,” of Money.]—A testator bequeathed the residue of his estate to his wife for her sole use and benefit so long as she should remain his widow. In the event of her re-marriage he directed that the balance, if any, of money and farm stock left, not to exceed 400L., should be divided between his brothers and sisters:—*Held*, that the widow took absolutely except as to a sum of 400L., which went over upon her marrying again, in the event of there being a balance of unexpended residue to that amount on the day of her second marriage. *Rowland, In re; Jones v. Rowland*, 86 L. T. 73—Swinfen Eady, J.

Estate for Life to Eldest Son—Remainder to Grandchildren—Gift Over to Heir-at-Law.]—The testator devised his freehold estate called P. G. to trustees upon trust for his eldest son for life; and, after making directions as to the disposal of his personal estate among his six children, concluded his will thus: “When my six children shall have all departed this life it is my will and desire that the said estate called P. G. be sold in public sale to the highest bidder, and that the moneys arising from the sale thereof be equally divided among my then surviving grandchildren share and share alike, and in case no grandchild of mine be then living it shall become the property of the heir-at-law”:—*Held*, that the heir-at-law must be construed as meaning the heir of the testator at his death, and not the person who would have been the

heir of the testator if he had died at the death of the last of his children. *Frith, In re; Hindson v. Wood*, 85 L. T. 455—Joyce, J.

• **Vesting — Survivorship — “Either” — “Survivor.”**—A testatrix bequeathed her residuary personal estate upon trust to pay the income to her sister Thirza during her life, and after her death to pay and divide the same equally between two other sisters, and if either of my said sisters shall be then dead I declare that my trustee shall stand possessed of the whole of the said trust moneys upon trust for the survivor of my said sisters absolutely.” Both sisters survived the testatrix, and died in the lifetime of the tenant for life:—*Held* (RIGBY, L.J., dissenting), that the word “either” could not in the present case be construed as meaning “both,” and that, both sisters having died before the tenant for life, the gift over to the survivor did not take effect, and the representatives of the two took equally under the original gift, which conferred vested interests from the death of the testatrix. *White v. Baker* (29 L. J. Ch. 577; 2 De G. F. & J. 55) distinguished. *Pickworth, In re; Snaith v. Parkinson*, 68 L. J. Ch. 324; [1899] 1 Ch. 642; 80 L. T. 212—C.A. And see *Turney, In re, supra*.

Gift Over if before “actual payment” Legatee has Deprived Himself of Benefit of Share—Contingency Definite and Certain—Gift Over not Void for Uncertainty.—Bequest of share of residue to J. G. for his own use absolutely, with a gift over in the event of J. G. being unable at any time prior to the actual payment of the share to give a receipt for the same by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share. Before the money was handed over, J. G. had committed an act of bankruptcy, which was followed by a receiving order and adjudication:—*Held*, that the contingency was described with definite certainty, and that consequently the gift over was not void for uncertainty, but took effect. *Goulden, In re; Goulder v. Goulder*, 74 L. J. Ch. 552; [1905] 2 Ch. 100; 93 L. T. 163; 53 W. R. 531—Swinfen Eady, J.

Johnson v. Crook (48 L. J. Ch. 777; 12 Ch. D. 639), *Chaston, In re; Chaston v. Seago* (50 L. J. Ch. 716; 18 Ch. D. 218), and *Wilkins, In re; Spencer v. Duckworth* (50 L. J. Ch. 774; 18 Ch. D. 634), followed. *Martin v. Martin* (35 L. J. Ch. 679; L. R. 2 Eq. 404) and *Bubb v. Padwick* (49 L. J. Ch. 178; 13 Ch. D. 517) not followed. *Id.*

(x) *Incumbrances.*

Direction to Pay — Mortgage on Freeholds—Further Security—Apportionment.—A testator devised freeholds in trust for his daughter and her children, and gave the residue of his estate, both real and personal, in trust for sale and conversion, the clear residue to be divided, after payment of his debts, funeral and testamentary expenses and duties, and any incumbrances charged on his said estate. The same freeholds were subject to a mortgage, for which a life policy (which formed part of the residue) had been deposited as further security. *Held*,

that the said mortgage debt must be apportioned according to the respective values of the properties charged, and that the proportion on the policy moneys should alone be paid out of residue. *Athill, In re* (50 L. J. Ch. 123; 16 Ch. D. 211) followed. *Pinon, In re; Sharpe v. Hodgson*, 91 L. T. 190; 52 W. R. 648—Farwell, J.

Mortgage Debt — Contrary Intention — Locke King’s Act.—A testator bequeathed his business and the premises in which it was carried on, which were leasehold, to his son W., subject to payment of all debts and liabilities owing in respect of the business; he bequeathed his personal estate on trust for conversion, and directed his funeral and testamentary expenses, debts, and legacies to be paid out of the proceeds; and subject thereto for his children equally. The testator had deposited with his bankers the lease of the business premises to secure a private debt:—*Held*, that the intention of the testator was that W. should take the business premises subject to the trade debts only; that this was a declaration of intention contrary to Locke King’s Act, and that the business premises were exonerated from liability in respect of the private debt secured by equitable mortgage. *Nevill, In re* (59 L. J. Ch. 511), considered and followed. *Thompson v. Bell*, [1903] 1 Ir. R. 489—M.L.

Equitable Tenant for Life with Contingent Remainder in Fee—Lands Subject to Charge—Subsequent Vesting in Tenant—Direction to Sell—Devise of Principal Sum to be Realised by the Sale—Merger.—Under a settlement made in 1871 J. P. was entitled, as equitable tenant for life, to certain lands, with remainder in fee in the event of his dying without issue, subject to the interposed life estate in his wife. At the time of the settlement the lands, which were held under a church lease which in 1873 was converted into a grant in fee, were subject to a charge vested in A. I. In 1878 J. P. made his will, wherein, after reciting that by his marriage settlement he had given his wife a life estate in the lands, he proceeded as follows: “But if it please Providence that I leave no child, then, from and after the decease of my said wife, I will, bequeath and direct that the said lands . . . shall be sold . . . and I hereby leave and bequeath the principal sum to be realized by the sale of said property to . . . the . . . bishops of the diocese of O. . . and to their respective successors . . . in trust to and for the following uses” &c. A. I. died in 1879, having by her will bequeathed the charge on the said lands to J. P., who as her sole executor obtained probate. Subsequently J. P. executed three codicils to his will, by each of which he disposed solely of sums of Government stock, leaving them to his wife for life, and after her death to the bishops, on the trusts declared in his will. J. P. died in 1884. On a question subsequently arising as to whether the charge was still a valid and subsisting charge,—*Held* first, that, on the evidence, the inference to be drawn was that the testator intended the charge to merge; and secondly, that, apart from this question, the words in the will, “principal sum to be realized by the sale,” were sufficient to pass the entire net proceeds of sale, including the charge. *Butlin’s Estate, In re*, [1907] 1 Ir. R. 169—Wylie, J.

(y) Investments.

Direction as to "Securities" — Extrinsic Evidence.]—Testator, who described himself as a general broker, by his will dated December 11, 1895, gave a sum of money upon certain trusts, and he declared that "the monies liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorise my trustees to continue or leave any monies invested at my death in or upon the same securities".—*Held*, that there was sufficient in the context of the will to shew that the testator was using "securities" as equivalent to "investments" in both sentences; and that the trustees were authorised to appropriate to the trust legacy out of investments belonging to the testator at his death ordinary stock of the Midland Railway; and to purchase with money belonging to the trust legacy ordinary stock of the London and North-Western Railway. *Rayner, In re; Rayner v. Rayner*, 73 L. J. Ch. 111; [1904] 1 Ch. 176; 89 L. T. 681; 52 W. R. 273—C.A.

Per VAUGHAN WILLIAMS, L.J.—Evidence is admissible to shew that expressions used in a will had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes; and where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under surrounding circumstances, the sense and meaning of the language may be ascertained by evidence outside the instrument. *Ib.* And see *Aiken, In re; Bolton v. Gilliland*, [1898] 1 Ir. R. 325.

"Pecuniary investment"—Money on Deposit at Bank.]—Money on deposit at a bank is not a "pecuniary investment" in ordinary parlance, and under ordinary circumstances will not pass under a bequest of "pecuniary investments" contained in a will. *Evan Price, In re; Price v. Newton*, 74 L. J. Ch. 437; [1905] 2 Ch. 55; 93 L. T. 44; 53 W. R. 600—Farwell, J.

Conversion—Wasting Property.]—A testatrix, after giving certain specific legacies, left the rest of her property, both real and personal (which included leaseholds), to her trustees upon trust to pay A an annuity of 250*l.*, and directed the remainder of the income to be derived from her property or the investments representing same, to be paid to her husband during his life and after his decease to B, C, and D, in certain shares. She directed that in the event of A dying without issue the incomes so provided for should be increased by the amount of his annuity; but that if A died leaving issue, the said annuity should be paid for the benefit of his child or children until he or they attained twenty-one, when, out of all her said property, a sum of 4,000*l.* was to be raised and distributed as directed in the will. Subject thereto the testatrix gave all her property to B, C, and D in certain shares.—*Held*, that there was no sufficient indication of intention on the part of the testatrix that the property should be enjoyed *in specie*, to exclude the application of the rule laid down in *Howe v. Dartmouth*, (7 Ves. 137), and that the property should be converted for the benefit of those entitled in

remainder. *Lyons v. Harris*, [1907] 1 Ir. R. 32—C.A. And see *Stanier v. Hodgkinson*, 73 L. J. Ch. 179; 52 W. R. 260—Buckley, J.

Investment Clause.]—See TRUST AND TRUSTEE, col. 2584.

(z) Issue.

Meaning of.]—There is no rule of construction which compels the Court to construe the word "issue" as meaning "children" in a particular gift where the testator has not used any restrictive language, merely because in a number of other gifts in the same will he has used language so restricting its meaning. *Ridgeway v. Munkittrick* (1 Dr. & W. 84), *Rhodes v. Rhodes* (27 Beav. 413), and *Harrison's Estate, In re* (3 L. R. Ir. 114), not followed. *Birks, In re; Kenyon v. Birks*, 65 L. J. Ch. 319; [1899] 1 Ch. 703; 80 L. T. 257; 47 W. R. 374—Kekewich, J.

A testator bequeathed 600*l.* on trust to pay the income to his daughter M. for her separate use; and in case of her marrying and leaving lawful issue, then the said interest and principal moneys were to pass to such issue in such manner as was described relative to the issue of her sister J., which was as follows: "In case of the death of my said daughter leaving issue, said interest money to be paid and payable to such issue, if more than one, share and share alike, for their support and education, and on their respectively attaining the age of twenty-one years, such principal sum, and such other sum as they or their said mother may be entitled to in this will shall be divided among them share and share alike." The testator then directed that in case of the death of any of his children leaving lawful issue, the share or shares of such child or children should go respectively to the lawful issue of such child or children, if more than one, share and share alike. M. survived the testator, and having died leaving several children and grandchildren, the question arose whether the 600*l.* was divisible among her children only *per capita*, or among her children and grandchildren *per stirpes*.—*Held*, that the fund was divisible among all her children and remoter issue living at the period of distribution. *Berry v. Fisher*, [1903] 1 Ir. R. 484—V.C.

Children or Remoter Issue.]—A testator gave twelve pecuniary legacies to various persons with substitutional gifts in favour of the "issue" of the legatees in the event of their respectively dying in his lifetime. In every case except one he used words which, as was admitted, had the effect of limiting the meaning of the word "issue" to "children." In the one remaining case the substitutional gift was to issue simply, without any words to shew in what sense that word was used: *Held*, that in this case also the word "issue" must be taken to mean "children." *Hicks, In re; Kenyon v. Hicks*, 50 L. J. Ch. 124; [1900] 1 Ch. 417; 81 L. T. 741—C.A.

Gift of Realty by Husband to Wife and Issue of their Marriage—Gift of Realty and Chattels to Wife and Issue.]—A testator by his will bequeathed a certain farm, held in fee-simple, "to my wife and the issue of our marriage";

and he also bequeathed to his wife "and issue" that part of his land, houses (also held in fee-simple) where he lived, also his cattle and chattel property, &c. His wife and an infant son born in his lifetime survived him:—*Held*, that the words "of our marriage" had not the effect of taking the first gift out of the general rule of construction applicable to wills, that issue, in the absence of a context shewing a contrary intention, must be held to include all lineal descendants; and that therefore the widow took an estate tail in both gifts. *Walsh v. Johnston*, [1899] 1 Ir. R. 501—V.C.

Gift to "my surviving children" and their respective issue—Personal Estate—"Issue"
Word of Limitation or of Purchase—Alternative Original Gift—Alternative Substitutional Gift—Division per Stirpes.]—In gifts of personalty "issue" is not *prima facie* a word of limitation, and the question whether it is so is purely one of construction on each particular instrument. *Coulden, In re; Coulden v. Coulden*, 77 L. J. Ch. 209; [1908] 1 Ch. 320—Parker, J.

The words "and their issue" or "and their respective issue" can be construed as an alternative gift, although such gift is an original and not a substitutional one. *Ib.*

A testator directed his real and personal estate to be sold at a certain period and equally divided amongst his then surviving children and their respective issue:—*Held*, that "issue" was not a word of limitation; that the gift to the issue, though original, was alternative; and that the property was divisible *per stirpes* among the children of the testator who survived the period of distribution and the surviving issue of children who predeceased it. *Ib.* And see CHILDREN, col. 2824.

(aa) *Joint Tenancy; Tenancy in Common; Co-parceners.*

Gift to Children for Lives and then to Grandchildren then Living "or the issue of such as may have died"—Conjunctions "or" and "and"—Original Gift—Joint-Tenancy or Tenancy in Common.]—A testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between and among his "grandchildren then living equally *per stirpes* and not *per capita*, or the issue of such as may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally *in loco parentis*":—*Held*, first, that the gift to the issue of grandchildren was original, and not substitutional, and consequently that a great-grandchild who predeceased his own parent and the last surviving tenant for life took a vested interest; and secondly, that the issue of the grandchildren took as tenants in common, and not as joint-tenants. *Martin v. Holgate* (35 L. J. Ch. 789; L. R. 1 H.L. 175) followed. *Merricks' Trusts, In re* (35 L. J. Ch. 418; L. R. 1 Eq. 551), explained. *Woolley, In re; Wormald v. Woolley*, 72 L. J. Ch. 602; [1903] 2 Ch. 206; 89 L. T. 16—Joyce, J.

Co-parceners or Joint-Tenants.]—A testator who died in 1858 devised real estate upon trust to pay the rents and profits to his niece S. N.

for life, and afterwards for her children on their attaining twenty-one years. And if there should be no such child, then to his right heirs for ever. S. N., who, together with three other ladies who were still living, were the testator's co-heiresses, died in 1898 without issue. A summons having been taken out to ascertain whether these co-heiresses succeeded as joint-tenants or co-parceners:—*Held*, that, having regard to section 3 of the Inheritance Act, 1833, they took as devisees and not by descent. That co-parceny was an incident of descent, and that there was nothing in the Act to shew an intention to annex it to the estate of devisees. That accordingly the three surviving ladies took as joint-tenants. *Baker, In re; Pursey v. Holloway*, 79 L. T. 343—Stirling, J.

(bb) *Lapse.*

Settlement of Share—Death in Testator's Lifetime of Legatee of Share.]—Where a testator gives residuary estate in trust for daughters in equal shares, and then directs the shares to be settled on each daughter *jointe* with remainders over to her husband and children, if, on the construction of the whole will, the daughters take only tenancies for life, the share of a daughter who dies in the testator's lifetime leaving a husband or children will not lapse. *Pinkhorne, In re; Moreton v. Hughes* (63 L. J. Ch. 607; [1894] 2 Ch. 276), followed. *Roberts, In re; Tarleton v. Bruton* (53 L. J. Ch. 1023; 30 Ch. D. 234), distinguished. *Powell, In re; Campbell v. Campbell*, 69 L. J. Ch. 788; [1900] 2 Ch. 525; 83 L. T. 24—Cozens-Hardy, J.

(cc) *Leaseholds.*

Bequest of Leasehold House—Tenant for Life and Remainderman—Rent—Repairs—Liability.]—Where a testator has bequeathed a leasehold house, held under a lease granted to him, to a beneficiary for life, with a gift over on death, the tenant for life will not be bound to fulfil any of the covenants in the lease as to payment of rent, repairs, or otherwise. The liability under the covenants is a burden cast upon the testator's estate. *Courtier, In re; Coles v. Courtier* (56 L. J. Ch. 350; 34 Ch. D. 136), considered and followed. *Tomlinson, In re; Tomlinson v. Andrew*, 67 L. J. Ch. 97; [1898] 1 Ch. 232; 78 L. T. 12; 46 W. R. 299—Kekewich, J. And see ESTATE.

(dd) *Legacies and other Bequests.*

(i.) *Generally.*

"Household furniture and effects"—Whether Including Jewellery, Horses and Carriages.]—A testator gave his household furniture, books, pictures, paintings, engravings, plate, linen, china, and other effects to A. & P. in equal shares:—*Held*, that, following the rule in *Parker v. Marchant* (1 Y. & C. C.C. 290), the word "effects" must be limited to things of the same kind as previously enumerated. That jewellery therefore did not, but that the carriages and horses did, fall under that description. *Hammersley, In re; Heasman v. Hammersley*, 81 L. T. 150—Stirling, J.

"Furniture and other personal effects"—**Articles of Personal Use and for Business Purposes**—**Tenant's Fixtures.**—Bequest of "all the furniture and other personal effects belonging to me and which at the time of my death are at the Roebuck Hotel," the testator being yearly tenant of the hotel.—*Held*, to pass furniture and personal effects, whether used for the hotel business or testator's personal use, but not tenant's fixtures. *Seton-Smith, In re; Burnand v. Waite*, 71 L. J. Ch. 386; [1902] 1 Ch. 717; 86 L. T. 322; 50 W. R. 456—Buckley, J.

Finney v. Grice (48 L. J. Ch. 247; 10 Ch. D. 13) followed. *Pratt v. Jackson* (2 P. Wms. 302; 1 Bro. P.C. 222), *Le Farrant v. Spencer* (1 Ves. sen. 97), and *Manning v. Purcell* (24 L. J. Ch. 522; 7 De G. M. & G. 55) distinguished. *Id.*

Farming Stock—**Articles "quæ ipso usu consumuntur."**—Farming stock bequeathed by a tenant farmer to his wife so long as she remained his widow, the proceeds of which were upon her decease or re-marriage to be equally divided ~~amongst~~ against his children, and the will containing no declaration that she should not be liable to account for any diminution or depreciation, does not fall within the doctrine relating to things *quæ ipso usu consumuntur*, and the widow cannot dispose of it as though her interest in the bequest were absolute. *Myers v. Washbrook*, 70 L. J. K.B. 357; [1901] 1 K.B. 840; 83 L. T. 633—D.

Chose in Action—Chattels—Local Description—**Bond Payable to Bearer—Shares.**—A testator bequeathed the residue of his personal estate and effects "within the United Kingdom" to one set of trustees, and his personal property, estates, and effects "in Natal and the Orange Free State and elsewhere in South Africa" to another set of trustees:—*Held*, that bonds of the Port Elizabeth Waterworks Co., payable to bearer, fell under the rule that debts are to be considered as locally situate where the debtor lives. *Held* also, that shares in companies which were registered in South Africa, but which shares could be transferred in England and of which the certificates were in England at the testator's death, must be regarded as locally situate in England. *Clark, In re; McKechnie v. Clark*, 73 L. J. Ch. 188; [1904] 1 Ch. 294; 89 L. T. 736; 52 W. R. 212; 20 T. L. R. 101—Farwell, J.

"Money in bank."—A husband bequeathed to his wife "all moneys at my death in the house or in the Bank of Scotland, or the City Bank of London, or in any other bank or banks in my name." At his death he held, in addition to money in his account current with the Bank of Scotland, a deposit receipt for 2,000*l.* with the Queensland National Bank, Ltd., repayable four years after its date:—*Held*, that the deposit receipt was included in the bequest to the testator's wife. *Harper's Trustees v. Bain*, 5 F. 716—Ct. of Sess.

Legacy "In addition to the sums owing"—**No Sums Legally Due—Falsa Demonstratio.**—A bequest to a legatee of "the sum of 300*l.* in addition to the sums owing to her from my late husband's estate" in a will which consists entirely of devises and bequests, where

no money was actually owing to the legatee by the husband, but he had given to the legatee an I O U for 500*l.* and a promissory note for 500*l.* without any consideration, and the testatrix knows those circumstances, and is herself in possession under his will of the whole of her late husband's estate, and therefore the person who must decide whether those sums are to be paid or not, is a gift to the legatee of the sums specified in the I O U and promissory note in addition to the 300*l.* *Rowe, In re; Pike v. Hamlyn*, 67 L. J. Ch. 87; [1898] 1 Ch. 153; 77 L. T. 475; 46 W. R. 357—C.A.

Sum "sufficient to pay and discharge all estate duty"—**Claim of Limited Owner to Charge Settled Estates in Respect of Estate Duty.**—A testator, by a codicil to his will executed after the passing of the Finance Act, 1894, bequeathed to his eldest son, to whom entailed estates would pass on the testator's death, a sum of money "sufficient to pay and discharge all estate duty" which might be payable by him. The residuary legatee claimed that the legacy was impressed with a trust to pay the estate duty, and that the legatee consequently lost his right to recoup himself by a charge on the settled estates under section 9, sub-section 6 of the Act, the object of the gift being to discharge the estate duty and so to free the settled estates from liability. The legatee, on the other hand, claimed that the legacy was one for his own benefit, being a gift to him measured by the amount which he would have to pay for estate duty:—*Held* (dissentiente STIRLING, L.J.), that, there being no words indicative of a desire on the part of the testator to give the legatee absolute property, the inference could not be drawn that he should take the legacy unfettered by any purpose of the testator; and that this was not a legacy with a motive added, but an imperative direction, the purpose here, as distinguished from a motive, being the discharge of the estate duty. *Mexborough, In re; Savile v. Mexborough*, 86 L. T. 331—C.A.

Gift to Grandchildren during their Lives—Implied Gift to Survivor.—A testator was possessed of a perpetual annuity of 33*l.* 4*s.* 8*d.* out of the lands of L. By his will the testator bequeathed to each of his grandchildren M., F., and B., 11*l.* 1*s.* 7*d.* yearly during their lives, and directed that after the death of all his said grandchildren, the L. annuity of 33*l.* 4*s.* 8*d.* was to devolve upon his son W. The annual sum of 11*l.* 1*s.* 7*d.* was one-third of the L. annuity. M. and F. died, leaving B. and W. surviving:—*Held*, that the annual sums of 11*l.* 1*s.* 7*d.* payable to M. and F. were not undisposed of after their deaths, and that B., the surviving grandchild, was entitled to them during her life. *McDermott v. Wallace* (5 Beav. 142) followed. *Lill v. Lill* (23 Beav. 446) distinguished. *Jennings v. Hanna*, [1904] 1 Ir. R. 540—M.R.

Gift of "any money that may be in my possession at my death"—**Reversionary Interests in Personality.**—Where a testatrix, entitled at her death to certain reversionary interests in personality, after directing payment of debts, funeral and testamentary expenses out of a particular fund, and after making certain bequests, gave absolutely "any money not men-

tioned in the aforesaid bequests that may be in my possession at my death after payment of my debts funeral and testamentary expenses," the reversionary interests were held to pass under the gift of "money . . . in my possession." *Egan, In re; Mills v. Penton*, 68 L. J. Ch. 307; [1899] 1 Ch. 688; 80 L. T. 153—Stirling, J.

Stock—Shares—Uncertainty of Subject of Bequest.—By his will made in 1878 a testator directed his trustees "to transfer" to the A. C. Curling Club "two five per cent. guaranteed shares of 100l. each of the G. & S. W. Railway Co." No part of the capital of that company consisted of guaranteed shares of 100l. each, but the testator held 460l. ordinary stock, 310l. preference consolidated stock, and 70l. perpetual guaranteed stock, interest at the rate of 5 per cent. being payable on the latter two stocks. The testator died in 1884. Between the date of his will and his death the testator borrowed money on the security of his estates, and executed an *inter vivos* trust-disposition and assignation under which his whole estates, including the railway stocks above-mentioned, were realised, the surplus, after payment of his debts, being handed over in 1896 to his testamentary trustees:—*Held*, first, that the bequest was not a specific legacy, but a legacy of such sum as might be required at the date of the testator's death to purchase the stock described in the will; and secondly, that the expression "guaranteed" as used by the testator meant other than ordinary, and included preference stock, and that the bequest was not therefore void for uncertainty. *Barr's Trustees v. Ardrossan Castle Curling Club*, 3 F. 903—Ct. of Sess.

"My 140 shares"—Larger Number, Some Fully, Some Partly Paid-up—Right of Selection.—Testatrix gave "my 140 shares in the C. Brewery" to trustees in trust for A for life with remainder over. At the date of her will and death testatrix had forty fully paid shares of 5l. each, and 240 similar shares on which 2l. 10s. only had been paid:—*Held*, that direct extrinsic evidence of intention was inadmissible to shew which of the shares the testatrix intended. *Held* also, that A had no right of selection, but that, having regard to the surrounding circumstances, the intention of the testatrix as shown by her will was to bequeath 140 partly paid shares. *Tapley v. Wagleton* (12 Ch. D. 683) distinguished. *Asten v. Asten* (63 L. J. Ch. 834; [1894] 3 Ch. 260) approved. *Cheadle, In re; Bishop v. Holt*, 69 L. J. Ch. 753; [1900] 2 Ch. 620; 83 L. T. 297; 49 W. R. 88—C.A.

Direction to Pay Legacies in Favour of Females Free of Legacy Duty—Gift of Residue to Males and Females as Tenants in Common.—After giving certain legacies to males and females, the testatrix declared that all legacies, devises, and bequests thereinbefore or thereafter given or made in favour of females should be free to legacy duty, the residue being given to three males and three females as tenants in common:—*Held*, that the legacy duty in respect of the shares of the females in the residue fell to be paid out of their respective shares. *Dabrymple, In re; Bircham v. Springfield*, 49 W. R. 627—Kekewich, J.

"Securities"—Primary and Secondary Meaning.—A testatrix made a bequest of "all securities for money standing invested in my name." Her personal property comprised the following items: Mortgage bonds, India stock, perpetual debenture stocks, perpetual preference stocks, and shares in a limited company. After the testatrix's death a list in her handwriting containing the above items and headed "Securities" was found. Upon summons to determine whether any of the items passed under the phrase "securities for money standing invested in my name,"—*Held*, upon the construction of the will, that all the items passed. The legal and general signification of the term "security" considered and explained. *Johnson, In re; Greenwood v. Robinson*, 89 L. T. 84—Kekewich, J. Affirmed, 89 L. T. 520—C.A.

Bequest to Trustees for the Benefit of Certain Persons and their Children—Direction to Carry on Testator's Business.—A testator gave all his real and personal estate to trustees upon trust as to one fourth part for the children of A. E. L., as to another fourth for A. B. F., as to another fourth the income thereof to P. H., and as to the remaining fourth for W. H., in each case for their lives, and he declared that if any of them died without issue their share should form part of his residuary estate:—*Held*, that the rule in *Howe v. Lord Dartmouth* (7 Ves. 137) was not applicable to any share except that given upon trust for P. H., and that, the testator having directed his trustees to carry on his business, the beneficiaries other than P. H. were entitled to the profits thereof as they arose. *Hammersley, In re; Heasman v. Hammersley*, 81 L. T. 150—Stirling, J.

Legacies Bequeathed by Predecessor in Title of Owner in Fee—Release.—A was the owner in fee of lands subject to (amongst other incumbrances) five legacies under the will of A's predecessor in title. These legacies were in equal priority *inter se*. A, through her agent B, raised money to pay off three of the legacies. No assignment or release was executed as to one of them. The other two legatees executed deeds releasing A and the lands from their legacies. A was not an executing party to these deeds, and made an affidavit stating that she had no notice that the charges so paid off by her were not to be kept alive for her benefit, and never intended that they should be extinguished:—*Held*, that the three legacies were subsisting charges for A's benefit. *Bayly's Estate, In re*, [1898] 1 Ir. R. 383—Ross, J.

Profit-Costs—Power to Charge—Solicitor-Trustee.—Where a solicitor is appointed executor and trustee of a will, and is empowered by his testator to make professional charges as solicitor to the estate, he will not be entitled to his profit-costs as against the creditors if the estate proves insolvent. The right to charge profit-costs is a legacy, and is liable to legacy duty. *White, In re; Pennell v. Franklin*, 67 L. J. Ch. 502; [1898] 2 Ch. 217; 78 L. T. 770; 46 W. R. 676—C.A.

Gift of Income to Two Persons "so that each shall receive half during their lives"—Gift Over—Death of One Person—Implied Gift to Other.—By his will a testator gave the income

of his residuary estate to E. and H. "in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons:—*Held*, that on the death of E., H. took by implication the income of the whole fund during her life. *Telfair, In re; Garrioch v. Barclay*, 86 L. T. 496—Farwell, J.

Residuary Gift to Executor.—The presumption that a legacy to an executor is *prima facie* given to him in that character for his trouble does not arise if the gift is of residue. *Griffiths v. Pruett* (11 Sim. 202) followed. *Maxwell, In re; Eivers v. Curry*, [1905] 1 Ir. R. 386—C.A.

Testator Solicitor in Partnership—Bequest to Partner of "all my share and interest in the business"—Whether Undrawn Capital and Profits Included.—Testator carried on the business of a solicitor with C. under partnership articles, C. being the active partner. The capital was a fixed sum, the profits to be divided equally after C. had taken 400*l.* a year. Accounts were submitted annually to the partners, but were not signed by them. In these circumstances the testator made his will, whereby he gave to C. all his share and interest in the business conditional on his acting as solicitor to his estate free of charge. At his death moneys were standing to the credit of the testator's capital account, and there were undrawn profits:—*Held*, that as goodwill had been held in such a business to be practically non-existent (*Arundell v. Bell*, 52 L. J. Ch. 537), to include that only would be to give no effect to the gift, and that accordingly, having regard to the facts known to the testator, his intention was that the gift should pass both the share of capital and the undrawn profits. *Beard, In re; Simpson v. Beard* (57 L. J. Ch. 887), distinguished. *Barfield, In re; Goodman v. Child*, 84 L. T. 28—Farwell, J.

Gift of Shares in Business—Rule in *Howe v. Dartmouth* (Earl).—For the purpose of the application of the rule in *Howe v. Dartmouth*, (Earl) (7 Ves. 137; 1 Wh. & T. L.C. (7th ed.), p. 68) there is no difference in principle between a trade involving risk and a leasehold burdened with onerous covenants. *Stanier v. Hodgkinson*, 73 L. J. Ch. 179; 52 W. R. 260—Buckley, J.

A testator, after giving to his wife "all my real and personal estate for her use as long as she remains a widow and at her death all to be divided" among his children, proceeded: "Also my shares and interest in the New Hem Heath Mining Company and the New Rose Vale Brick and Tile Company," which were two colliery businesses carried on by him in partnership with other persons:—*Held*, upon a consideration of the authorities and the construction of the will, that the rule in *Howe v. Dartmouth* (Earl) (*supra*) did not apply, and that the wife was entitled during widowhood to the profits of the shares of the business *in specie*. *Kirkman v. Booth* (18 L. J. Ch. 25; 11 Beav. 273) discussed. *Ib.*

Gift of Sums Exceeding 100*l.* each—Gift by Subsequent Codicil of 50*l.* Additional "so that each receives 100*l.*"—A testator bequeathed

1,000*l.* equally among "his godchildren." By a subsequent codicil he gave "50*l.* additional to each of my godchildren . . . so that each receives 100*l.*" The testator had nine godchildren living at his death:—*Held*, that the amount of the legacies was not limited to 100*l.*, but that each godchild was entitled to the legacy of 50*l.* in addition to his or her share of the 1,000*l.* *Dictum* of Lord HARDWICKE in *Milner v. Milner* (1 Ves. sen. 106) questioned. *Segelecke, In re; Ziegler v. Nicol*, 75 L. J. Ch. 494; [1906] 2 Ch. 301; 54 W. R. 624; 95 L. T. 708—Joyce, J.

Bequest for Education—Whether Minor Legatee Entitled to Capital as well as Income.—A testatrix bequeathed 250*l.* to A "for her education; should A die under age, to be given to her sister":—*Held*, that A was entitled during her minority as well to the capital as to the income of the legacy, so far as properly required for her education. *Falls v. Alford*, [1907] 1 Ir. R. 486—C.A.

To Servants—"One year's wages."—A testator bequeathed one year's wages to all servants who should be in his employment at his death, and should have been in his employment for five years previously thereto:—*Held*, that servants hired at a weekly wage paid monthly or fortnightly were not included in the bequest. *Blackwell v. Pennant* (22 L. J. Ch. 155; 9 Hare, 551) followed. *Ravenworth, In re; Ravenworth v. Tindale*, 74 L. J. Ch. 353; [1905] 2 Ch. 1; 92 L. T. 490; 21 T. L. R. 357—C.A.

Persons in Testator's Employment for a Named Period—Non-employment at Death.—S., by will, directed his trustees to pay to each man who should have been in his employment in London over ten years the sum of 10*l.* for each year beyond the said ten years:—*Held*, that a man who had been fifteen years in the testator's employment, but was not in such employment at the date of the testator's death or at the date of the will, was entitled to a legacy of 50*l.* *Sharland, In re; Kemp v. Rozey* (No. 1), 65 L. J. Ch. 280; [1896] 1 Ch. 517—North, J.

To Attesting Witness—Codicil.—A person to whom a gift is made by a will to which he is an attesting witness, and whose title to the gift is revived by a codicil which refers to the will but to which he is not an attesting witness, does not lose the benefit so conferred upon him by his attesting a subsequent codicil referring to and confirming the will and the preceding codicil. *Trotter, In re; Trotter v. Trotter*, 68 L. J. Ch. 363; [1899] 1 Ch. 764; 80 L. T. 647; 47 W. R. 477—Byrne, J.

Legacies to be Settled on Marriage on Daughters and on their Demise on their Issue—Issue read Children.—A testator bequeathed to each of his four unmarried daughters 10,000*l.* New Government Stock, to be paid and assigned to each as a marriage portion on their respective marriages, and 20,000*l.* Old Government Stock, to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry, and in case any of his said daughters dying and leaving no lawful issue to attain twenty-one or got married, then such share of old stock to be divided, share and

share alike, between the survivors of his said four daughters:—*Held*, that the word "issue" should be restricted to children. *Harris v. Loftus*, [1899] 1 Ir. R. 491—V.C.

Erroneous Recital of Indebtedness—Account.]

—A testator in his will recited that a son, to whom he had previously given a share of residue, was indebted to him in the sum of 5,000*l.*, and that he (the testator) was desirous of reducing the amount of such indebtedness to 3,000*l.*, and then proceeded to forgive the son the balance of his debt over and above 3,000*l.*, and to declare that the said sum of 3,000*l.*, or so much thereof as should remain unpaid at the period of distribution, should be deducted and taken into account as part of his son's share of residue. The recital was erroneous, and the son, in fact, was never indebted to his father in the sum of 5,000*l.* or any other sum as stated, the only sum his father had ever advanced on his account being a sum of 80*l.* for an indenture of apprenticeship:—*Held*, that on the true construction of the will, the testator only intended the son to bring into account so much, not exceeding 3,000*l.*, of the sum which the son owed the testator and as remained unpaid at the period of distribution. The only sum, therefore, for which the son was liable to account was the sum of 80*l.* *Taylor's Estate*, *In re*; *Tomlin v. Underhay* (22 Ch. D. 495), followed. *Kelsey, In re*; *Woolley v. Kelsey*, 74 L. J. Ch. 701; [1905] 2 Ch. 465; 93 L. T. 662; 54 W. R. 136—Swinfen Eady, J.

"Testamentary expenses"—Intestacy—Costs of Administration—Costs of Probate Action—Estate Duty.]—Under a direction by a testator to his executors to pay the "testamentary expenses" of his widow out of his residuary estate, which consisted of personalty, the executors are entitled to pay—first, the costs of, and incident to, and in connection with the administration of the estate of the widow, who died intestate; secondly, the costs of a probate action instituted by one of the next-of-kin of the widow, and incurred for the benefit of her estate; and thirdly, the estate duty payable on the death of the widow. *Clemow, In re*; *Yeo v. Clemow*, 69 L. J. Ch. 522; [1900] 2 Ch. 182; 82 L. T. 550; 48 W. R. 541—Kekewich, J.

The word "testamentary" is applicable to the administration of an estate, whether there is a testament or not. *Id.*

— Identity of Legatees—Costs.]—The costs of ascertaining the identity of the legatees of pecuniary bequests are "testamentary expenses," and where there is a general direction to pay funeral and testamentary expenses out of the residuary estate they are payable thereout, and not out of the pecuniary legacies. *Baumgarten, In re*; *Bevan v. Rosenbaum*, 82 L. T. 711—Farwell, J.

Directions as to Investment, Accumulation, and Survivorship—Residue.]—A testator bequeathed pecuniary legacies to four persons—Jane G., Matthew G., Margaret G., and Thomas G., respectively, and left the residue of his property to Thomas G. and Robert G., and their children in equal shares. He added certain directions, with reference to the legacies, as to investment, accumulation, and survivor-

ship:—*Held*, that the word "legacies" could not be extended so as to include the residue, and that therefore the directions as to investment &c. applied only to the pecuniary legacies. *Aiken, In re*; *Bolon v. Gilliland*, [1898] 1 Ir. R. 335—V.C.

Legacies Given by Will Free of Duty—Additional Legacies by Codicil, including One to a Legatee not Named in the Will—Duty on such Legacy.]—By her will a testator gave a number of legacies, and directed that "all the legacies and bequests given by this my will be paid and given free of all deduction for legacy or other duty." By codicil she said: "I give and bequeath the following legacies in addition to those named in my will." Then followed a number of legacies to legatees of the will and this legacy to a legatee not named in the will, and she added the words, "given in addition to those already bequeathed":—*Held*, that the legacy to the legatee not named in the will was also free of duty. *Early v. Benbow* (2 Coll. 342) and *Byne v. Currey* (2 Cr. & M. 603) discussed. *Sealy, In re*; *Tomkins v. Tucker*, 85 L. T. 451—Farwell, J.

Beneficial Interest or Trust.]—A testatrix bequeathed all her property to her "dearly beloved husband," whom she appointed sole executor, "to be applied" by him to the maintenance and education of her children:—*Held*, that the testatrix's husband took all the property so bequeathed to him as a trustee for the children, and not beneficially. *Delahunty, In re*; *O'Connor v. Butler*, [1907] 1 Ir. R. 507—C.

Estate Duty—General Power of Appointment by Will.]—Where a testatrix has made a will in exercise of a general testamentary power of appointment over a fund, and has directed her "testamentary expenses" to be paid by her executors, although the appointed fund will not be deemed to pass to the executors "as such," the estate duty payable in respect of it must be paid out of the residuary estate of the testatrix as a "testamentary expense," and not be charged upon the appointed fund. *Clemow, In re*; *Yeo v. Clemow* (69 L. J. Ch. 522; [1900] 2 Ch. 182), followed. *Treasure In re*; *Wild v. Stanham*, 69 L. J. Ch. 751; [1900] 2 Ch. 648; 83 L. T. 142; 48 W. R. 696—Kekewich, J.

(ii.) *Specific Legacies.*

"Moneys owing" to Testator at Death—Deposits in Banks—Withdrawable on Demand or by Notice.]—A bequest of "all moneys owing to" testator at death will pass moneys standing to his credit on deposit account with a banker, for the relation between them is that of debtor and creditor. This is so whether the moneys be withdrawable on demand or by notice, for in each case they are due, though not payable. *Derbyshire In re*; *Webb v. Derbyshire*, 75 L. J. Ch. 95; [1906] 1 Ch. 135; 94 L. T. 138; 54 W. R. 135—Buckley, J.

"Ready money" — Money on Deposit.]—Money on deposit at a bank which can be withdrawn on fourteen days' notice will not pass under a bequest of "ready money." *Mayne v. Mayne* ([1897] 1 Ir. R. 324) followed. *Weller, In re*; *Hankinson v. Hayter*, 73 L. J.

76; [1904] 2 Ch. 66; 91 L. T. 227; 52 J. 586—Warrington, J.

Money in banks after paying any lawful residue.—A testatrix by her will, after paying of certain special legacies, provided: "Any money in banks after paying my lawful debts, funeral expenses, etc., to be over to my stepdaughter." The will contained no other directions as to the disposal of the residue. After the date of the will she was not entitled to a legacy left to her by her father, but, owing to her state of health, she was not aware of it. The amount of the legacy deposited in bank by the law-agents of her father's executors in their own names in trust for the testatrix:—*Held*, that the bequest of money in banks after paying my lawful debts, etc., could not be construed as a bequest of the money left to the testatrix by her father, and that it fell to her next-of-kin as intestate succession. *Masson v. Smellie*, 6 F. & M. 201—Ct. of Sess.

All securities for money standing invested in my name.—A testatrix made a bequest of "all securities for money standing invested in my name." Her personal property comprised the following items: Mortgage bonds, India stock, perpetual debenture stocks, perpetual preference stocks, and shares in a limited company. On the testatrix's death a list in her handwriting containing the above items and headed "securities" was found:—*Held*, that the words of the bequest referred to the investments generally which were standing in the testatrix's name at the time of her death, the word "invested" referring to the word "money"; and that therefore all the stocks and shares were included in the bequest. *Johnson, In re; Greenwood v. Johnson*, 89 L. T. 520—C.A.

Picture—Use and Enjoyment—Letting Furd Flat.—A testator gave his pictures to his son upon trust to permit L. W. to have the use and enjoyment thereof during her life. She had some of the pictures in a flat, which was let furnished for a short time:—*Held*, that she was entitled to let the pictures together with her flat, and was not restricted to personal enjoyment. *Williamson, In re; Murray v. Williamson*, 94 L. T. 813—Swinfen Eady, J.

Use, Furniture, and Whatever is in House—of Money in House at Death.—By his will a testator bequeathed "my house, furniture, and whatever is in the house I now dwell in, and the house adjoining, so far as it belongs to, to my sister R." By codicil the testator directed the bequest to M., and substituted for a bequest in identical terms to M. the testator (amongst other legacies) gave 500*l.* to R. and M., and there was a residuary clause in the will by which the testator directed the residue of his property, which he valued at "over 5,000*l.*," should be divided amongst the pecuniary legatees in proportion to the amount bequeathed to them respectively. The testator was in the habit of keeping in a box in his house various sums of money, amounting in amount, and after his death a sum of 320*l.* in cash was found in this box:—*Held*, that the sum of money found in the box at the testator's house at his death did not pass under the bequest to M., but fell into the

residue. *O'Brien, In re; O'Brien v. O'Brien*, [1906] 1 Ir. R. 649—C.A.

"Other articles of household or domestic use and ornament"—Words ejusdem generis.—A testator by his will bequeathed "All my household furniture, plate, linen, china, glass, printed books, musical instruments, wines, liquors, horses, carriages, and other articles of household or domestic use or ornament" to his widow; he gave the residue of his property to trustees upon trust for sale and conversion, and to hold the proceeds of sale upon trust to provide an annuity for his widow, and subject to such annuity to divide the same among certain children of his deceased sisters. The testator died possessed of a large and valuable collection of orchids, which were kept outside the curtilage of his dwelling-house. It was proved that from time to time some of the plants were brought into the dwelling-house for ornament, and such plants were from time to time replaced by others. The orchids were sold for 3,271*l.*:—*Held*, that an enquiry must be directed as to what plants were from time to time used for ornament, and that the testator's widow was entitled to the proceeds of the sale of such plants. *Owen, In re; Peat v. Owen*, 78 L. T. 643—Stirling, J.

"All my household furniture and effects in my residence"—Wool in Store Forming Part of Residence.—A testator bequeathed his house in Abbey Street to his son for life, and bequeathed to him "all my household furniture and effects in my residence, Abbey Street aforesaid." At the time of the testator's death there was a large quantity of wool, part of his stock-in-trade, stored in a store which was at the rear of and admittedly formed part of his residence. The will contained a residuary bequest:—*Held*, that the wool did not pass under the bequest to the son, but was included in the residuary gift. *MacPhail v. Phillips*, [1904] 1 Ir. R. 155—Barton, J.

Plate in One Mansion-house at Testator's Death Given to One Legatee—Similar Gift to Another Legatee of Plate in Another Mansion-house—Plate Usually in One House Temporarily in the Other at Testator's Death.—A testator by his will gave all his pictures, plate, &c., in each of his two mansion-houses, Enville Hall and Bradgate House, to trustees upon trust to permit the same respectively to go along with and be used and enjoyed by the persons respectively for the time being entitled under the will to the possession of the respective mansion-houses in or about which the said pictures, plate, &c., should be at the time of the testator's death. The testator directed an inventory to be made of the said pictures, plate, &c., belonging to each of the mansion-houses, one copy to be kept by the trustees of the will and the other by the person entitled for the time being to the enjoyment of the same. Enville Hall was the testator's principal place of residence, Bradgate House being used by him during the hunting and shooting season. It was the testator's custom when he went to Bradgate House to take a quantity of plate from Enville Hall with him, and at the end of his residence at Bradgate House the plate was returned to Enville Hall. The plate taken on those occa-

sions was not always the same. A large quantity of plate which had been taken from Enville Hall was in this way in Bradgate House at the date of the testator's death, which took place at Bradgate House. Soon after the testator's death the plate was sent back to Enville Hall and kept there:—*Held*, on the construction of the will, that the whole of the plate actually in Bradgate House at the date of the testator's death passed to the devisee of that house. *Stamford (Earl), In re; Hall v. Lambert*, 22 T. L. R. 632—C.A.

"Money invested in" Lambeth Waterworks Co.—Transfer of Undertaking to Water Board—Metropolitan Water Stock—Will Speaking from Death—Ademption.]—A testator bequeathed to his wife "the interest during her life arising from money invested in" (amongst other things) the Lambeth Waterworks Co. At the date of his will in 1904 the testator was possessed of certain Lambeth Waterworks Co. 10l. per Cent. Stock. At the date of his death in 1905 the undertaking of the Lambeth Waterworks Co. had been transferred to the Metropolitan Water Board, and the testator's holding in the Lambeth Waterworks Co. 10l. per Cent. Stock had been converted into Metropolitan Water Stock, issued as compensation in accordance with a scheme made under the Fourth Schedule to the Metropolitan Water Act, 1902:—*Held* (KENNEDY, L.J., *hesitante*), that by virtue of section 24 of the Wills Act, 1837, the will must be construed as to the property comprised in the specific bequest as if it had been made immediately before the testator's death, and that the Metropolitan Water Stock was not comprised in the bequest. *Held*, also (KENNEDY, L.J., *dubitante*), that, if the will for this purpose was to be construed as at the date of the execution, then the bequest of the Lambeth Waterworks Co. 10l. per Cent. Stock had been adeemed. *Slater, In re; Slater v. Slater*, 76 L. J. Ch. 472; [1907] 1 Ch. 665; 97 L. T. 74—C.A.

"Stock or shares" in specified Railway Company—Testatrix Possessed of Stock in Distinct Undertaking—Misdescription.]—A testatrix by her will dated January 2, 1900, bequeathed to certain legatees "all the preference stock or shares in the Dublin, Wicklow, and Wexford Railway Co. of which I may at the time of my death be possessed." She died in March, 1901. The testatrix never had any stock or shares in the named railway, but she had at the time of her death a sum of 1,460l. capital stock of the Dublin and Kingstown Railway, which was not expressly dealt with by her will. She became entitled to this stock in 1871. In 1856 the Dublin and Kingstown Railway leased all their interest in their railway to the Dublin, Wicklow, and Wexford Railway at a rent; and the line from Dublin to Kingstown was managed and worked by the last-named company, forming an integral part of their railway system. It was stated on affidavit that the public did not as a rule distinguish between the two companies, and in previous testamentary documents the testatrix used the two designations interchangeably:—*Held*, that the 1,460l. capital stock held by the testatrix passed under the specific bequest to the legatees, and did not fall into the residuary gift contained in the will. *Flood v. Flood*, [1902] 1 Ir. R. 538—M.R.

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Insufficient Description — Ambiguity.]—A testator bequeathed "twenty Northern Bank shares" to a legatee. At the date of his death the testator was possessed of fifty-one "A" Northern Bank shares of the value of 26l. each, and seventy-two "B" Northern Bank shares of the value of 13l. each:—*Held*, that the legatee was entitled to select twenty of the "A" shares as constituting her legacy. *O'Donnell v. Welsh*, [1903] 1 Ir. R. 115—M.R.

Specific Bequest of Heritage—Sale of Subject-matter under Statutory Powers.]—A testator directed his trustees to convey to A. certain heritable subjects including certain property in N. Street, Glasgow, "so far as the same shall belong to me at my death, but under all burdens affecting the same." After the date of his will notice to acquire the property in N. Street was served on the testator by the Glasgow Corporation acting under statutory powers, and he thereafter sold the property to the corporation with entry at Martinmas following, but he died (before Martinmas) without having executed a conveyance to the corporation. After his death his trustees executed a conveyance in favour of the corporation, and received payment of the price:—*Held*, that, as the testator had died without executing a conveyance in favour of the corporation, the property in N. Street belonged to him at the time of his death under the burden of completing the sale to the corporation; that A.'s right under the will was a right to a conveyance of the subjects by the trustees under the same burden; and therefore that the trustees were bound to make over the price to him. *Pollok's Trustees v. Anderson*, 4 F. 455—Ct. of Sess.

(iii.) Payment of Legacies.

Direction to pay Legacy "six years after my decease"—Death of Beneficiary before Time for Payment—Lapse.]—A testator declared that his trustees should stand seised and possessed of his residuary personalty and realty upon trust to retain legacies to themselves, and to "pay the following legacies: To my brother, G. E., the annual sum of 50l. for the term of five years from my decease and the legacy of 1,000l. six years after my decease." The testator died on July 6, 1900, and G. E. on May 9, 1903:—*Held*, that, there being no gift except in this direction to pay, everything depended upon the expiration of six years, and that, G. E. not having survived this period after the testator's death, his estate did not take the 1,000l. *Eve, In re; Belton v. Thompson*, 93 L. T. 235—Kekewich, J.

Trust for Payment of Legacies in Futuro—Interest Thereon.]—A testatrix directed the trustees of her will to hold her residuary estate upon trust for investment thereof and to pay one moiety of the annual income to a niece during her life and the other moiety thereof to another niece during her life, with certain directions as to such income, her intention being that the income of each should not exceed 250l. per annum; and, subject to the payment of the income as aforesaid, she directed the trustees to hold her residuary estate upon trust thereout to pay certain legacies; and she directed the trustees to hold the ultimate

residue upon trust for certain named persons:—*Held*, that no special period was fixed by the will for the payment of the legacies; and that, therefore, interest thereon was payable from the end of one year after the testatrix's death. *Vates, In re; Throckmorton v. Pike*, 96 L. T. 758—C.A.

Legacy—Time Fixed for Payment—Interest.]—

A married woman, in exercise of a general power of appointment given by her marriage settlement over a trust fund subject to the life interest of her husband, appointed that after his death the trust fund should be held by the trustees upon trust to pay a number of legacies to various persons, some absolutely and some for life with remainders over, and appointed her husband residuary legatee. Her husband survived her. Upon his death the trust fund was transferred by the trustees of the settlement to her executor, who proceeded to pay the legacies. The executor of the husband, who was also executor of the wife, claimed that interest was not payable upon the legacies until the expiration of one year from the death of the husband. *Held*—first, that a time was fixed by the will for payment of the legacies—namely, at the date of the death of the tenant for life, and that, therefore, interest ran from that date; and secondly, that, even if no time was fixed by the will for payment of legacies, the fund out of which they were payable being a reversionary one the period of grace given to the executor for payment of legacies was extended from one year after the death of the testatrix to the date at which the reversionary fund fell into possession, and that interest began to run from the date of the death of the tenant for life. *Gibbon v. Chaytor*, [1907] 1 Ir. R. 65—M.R.

Contingent Legacy without Interest—Appropriation—Validity.]—Where a contingent legacy is given by a will, but interest is not given in the meantime, the executor is not entitled to invest the amount of the legacy and appropriate the investment to it in such a way that the legatee would receive any profit or bear any loss arising from the investment before the happening of the contingency. He can set apart and invest a reasonable sum to secure payment of the legacy if it should become payable, but the investment and the income thereof will, until the contingency happens, remain part of the estate of the testator. *Hall, In re; Foster v. Metcalfe*, 72 L. J. Ch. 554; [1903] 2 Ch. 226; 88 L. T. 619; 51 W. R. 529—C.A.

Infants—Appropriation—Payment into Court—Interest.]—A testator by his will, after giving a number of pecuniary legacies to infant legatees, gave all the residue of his estate to his trustees upon trust for sale and conversion, with a provision that they might in their absolute discretion postpone sale and conversion and payment of legacies; but he declared that all legacies not paid within a year from his decease should carry interest at 4 per cent.:—*Held*, that the provision for payment of 4 per cent. interest was operative until payment to the legatees of their legacies or payment into Court under section 42 of the Trustee Act, 1893, and that the trustees could not appropriate trust funds to meet the legacies so as to free the residue from liability to interest. *Salaman, In re; De Pass v. Sonnenthal*, 76 L. J. Ch. 419; [1907] 2 Ch. 46; 96 L. T. 809—Kekewich J.

Bequest of Moneys Due on Specified Mortgages “after payment of my just debts and funeral expenses and the expense of proving this my will”—Subsequently Acquired Personality—Intestacy—Legacies—Fund Applicable for Payment—Ambiguity—Extrinsic Evidence.]—A testator bequeathed “the residue and remainder” of two specified sums due on mortgage “after payment of my just debts and funeral expenses and the expense of proving this my will.” After the date of the will he became entitled to further personal estate. There was no bequest of residue; but there were legacies and an annuity:—*Held*, that the legacies and annuity were not to be paid out of the mortgage debts, which were subject only to the payment of debts and funeral and testamentary expenses, and, there being no ambiguity, that extrinsic evidence was not admissible. *Higgins v. Dawson*, 71 L. J. Ch. 132; [1902] A.C. 1; 85 L. T. 763; 50 W. R. 837—H.L. (E.)

Interest on Legacy—Gift to Adult—Obligation to Maintain Infants.]—A gift of a sum of money to be held on trust to pay the income to a widow during widowhood, subject to her maintaining and educating her infant children, does not carry interest from the testator's death. *Raven v. Waite* (1 Swanst. 553) followed. *Leslie v. Leslie* (Ll. & G. t. Sugd. 1) and *Richards, In re* (L. R. 3 Eq. 119), distinguished. *Crane, In re; Adams v. Crane*, 77 L. J. Ch. 212; [1908] 1 Ch. 379—Swinfen Eady, J.

Marshalling Assets—Personalty Insufficient for Payment of Debts—Pecuniary Legatees and Specific devisees.]—Where a will contains a general direction for the payment of debts and funeral and testamentary expenses, and the unbequeathed personality and undisposed-of realty are insufficient to pay the same, pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate. *Stokes, In re; Parsons v. Miller* (67 L. T. 223), and *Salt, In re; Brothwood v. Keeling* (64 L. J. Ch. 494; [1895] 2 Ch. 203), followed, as overruling *Bate, In re; Bate v. Bate* (59 L. J. Ch. 277; 43 Ch. D. 600). *Roberts, In re; Roberts v. Roberts*, 72 L. J. Ch. 38; [1902] 2 Ch. 834; 87 L. T. 523; 51 W. R. 89—Kekewich, J.

Appropriation of Sum to meet Legacy.]—See EXECUTOR, col. 842.

Bequest of Leaseholds—Tenant for Life—Liability for Repairs.]—See ESTATE, col. 796.

Payment of Estate and Legacy Duty.]—See REVENUE, cols. 2060, 2092.

Payment of Legacies Free from Duty.]—See REVENUE, cols. 2094–5.

(ee) *Life Interest.*

Successive Limitations—Life Estates.]—A testator by his will devised “all my real estate to P. H. for his life, with remainder to his first and other sons successively in tail, with remainder to the eldest and every other son of C. H. for life, with remainder to the first and

other sons of such sons of C. H. in tail, with remainder to my own right heirs." C. H. had several sons, of whom P. H. was the second. P. H. died without issue:—*Held*, that the first and other sons of C. H. took successive life estates one after the other, and that the remainder to the first and other sons of the eldest son of C. H. did not take effect till after the deaths of all the successive tenants for life. *Honywood v. Honywood*, 92 L. T. 814—H.L. (E.)

Gift to Some of Several Co-heiresses after Death of A—Life Estate—Necessary Implication.]—A gift of real estate after the death of A to persons who are some, but not all, of the co-heiresses of the testator does not confer upon A a life estate by necessary implication. *Hutton v. Simpson* (2 Vern. 722) and *Willis v. Lucas* (1 P. Wms. 472) examined and explained. The reasoning in *Ralph v. Carrick* (48 L. J. Ch. 801; 11 Ch. D. 873) applied. *Willatts, In re*; *Willatts v. Artley*, 74 L. J. Ch. 269; [1905] 1 Ch. 878; 92 L. T. 195; 21 T. L. R. 194—Farwell, J. See s.c. in C.A., 74 L. J. Ch. 564; [1905] 2 Ch. 135; 93 L. T. 256; 21 T. L. R. 571.

Life Rent—Property given to Wife for Life—Optional Power to Sell given to Life Tenant—Intention for Enjoyment in Specie.]—A testator who was, at his decease in 1901, entitled to freeholds and leasehold houses, held at a ground rent and let to weekly tenants, for a term of which thirty-nine years was unexpired, after bequeathing legacies, gave to his widow a life rent of all his property with power to sell and re-invest the proceeds on good security, after her death his property to be divided amongst his children:—*Held*, that, although no indication of the testator's intention could be drawn from the use of the expression "life rent," which merely indicated the testator's intention to give his widow a life interest in his property, yet that, according to the rule in *Pitcairn, In re*; *Brandreth v. Colvin* (65 L. J. Ch. 120; [1896] 2 Ch. 199), the optional power of sale given to the widow, the life tenant, furnished sufficient indication of the testator's intention that she should enjoy his leasehold property *in specie* to exclude the operation of the rule of conversion in *Howe v. Dartmouth (Earl)* (7 Ves. 137). *Bentham, In re*; *Pearce v. Bentham*, 94 L. T. 307—Kekowich, J.

Discretionary Trust for Benefit of Person for Life—"Accumulation" of Surplus Rents—Devolution—Income or Capital of Residuary Estate.]—Where a testator, who died in 1865, gave certain freehold houses to his trustees upon trust to receive the rents, and after making certain payments thereout to apply the residue at their discretion for the benefit of his daughter for her life, and after her decease to stand seised of the premises with any surplus or accumulation of rents that might not be applied for the benefit of his daughter in trust for her children with limitations over in default of children, and he also gave his residuary real and personal estate to his trustees upon trust for, amongst other persons, his daughter for life, and after her decease upon trust for other persons, it was held that by means of the Accumulations Act, 1800, the surplus rents after the expiration of twenty-one years from the testa-

tor's death formed part of the capital of the testator's residuary estate, and must be invested, and that the income only of such investment was payable to the tenants for life. *Pope, In re*; *Sharp v. Marshall*, 70 L. J. Ch. 26; [1901] 1 Ch. 61; 49 W. R. 22—Farwell, J.

To direct the accruing income of a fund to be invested and the income of the investment to be paid to a tenant for life is not to direct an accumulation. *Ib.*

Crawley v. Crawley (4 L. J. Ch. 265; 7 Sim. 427) and *O'Neill v. Lucas* (2 Keen, 313) followed. *Phillips, In re*; *Phillips v. Levy* (49 L. J. Ch. 198), commented on and not followed. *Ib.*

Gift in Will to Father for Life—Remainder to his Children—Revocation by Codicil of all Gifts "to or for the benefit of" Father—Acceleration of Children's Interest.]—A testator directed the trustees of the will to carry on his business during the minority of his sons for their benefit, with liberty to employ any of his sons in the business at a salary; and subject thereto to hold the business in trust for the sons equally when the youngest attained twenty-one. If any of the sons should then be unwilling to join in the business, or be dead, the testator gave the other sons an option to purchase his share. The testator devised certain freeholds on trust as to one equal fourth part or share for his son G. W. for life, with remainder to his children, and as to the other three fourth shares on similar trusts for his other sons and their children. By a codicil reciting that he was dissatisfied with G. W., and had ceased to employ him in his business, he revoked each and every devise, bequest, gift, and legacy contained in the will to or for the benefit of G. W., and every provision and benefit thereby given, intended, or made to or for him, and directed that every clause of the will purporting to entitle G. W. to share any part of the estate with any other person or persons should be construed and the directions and trusts carried out as if G. W.'s name had never appeared therein. The testator further gave by the codicil 500*l.* for the maintenance or benefit of G. W.'s children:—*Held*, that the words "for the benefit of" G. W. were satisfied by the power given to the trustees to employ the sons in the business, and by the option to purchase; that the revocation of gifts to G. W. extended only to his life interest, and not to the interests of his children, which remained and were accelerated; and that the gift of the 500*l.* to them was additional and not substitutional. *Love, In re*; *Green v. Tribe* (47 L. J. Ch. 783), and *Alt v. Gregory* (8 De G. M. & G. 221) applied. *Tabor v. Prentice* (32 W. R. 872) distinguished. *Whitehorne, In re*; *Whitehorne v. Best*, 75 L. J. Ch. 537; [1906] 2 Ch. 121; 94 L. T. 698; 54 W. R. 580—Buckley, J. See also *ESTATE*, col. 795, and *TENANT FOR LIFE AND REMAINDERMAN*, col. 2514.

(ff) *Next-of-Kin.*

Foreign Law—Whole and Half Blood—Next-of-Kin of a German Subject.]—The expression

next-of-kin means, in English law, the nearest blood relations in an ascending and descending line, whether of the whole or half blood, and this construction will be placed on that expression in the will of an English testator giving a legacy to the next-of-kin of a legatee who is a subject of a foreign State, under the law of which relations of the half blood are not deemed next-of-kin. *Fergusson's Will, In re*, 71 L. J. Ch. 360; [1902] 1 Ch. 488; 50 W. R. 312—Byrne, J.

(gg) *Precatory Trust; Secret Trust.*

“**Desire**” — **Annual Allowance.**]—Testatrix by will gave her property equally between her two daughters for their own absolute use, and expressed her “desire” that each of them should during the lifetime of her son pay to him one-third of the respective incomes of her said two daughters accruing from the moneys and investments under her will:—*Held*, that the will created no trust enforceable by the son. *Oldfield, In re; Oldfield v. Oldfield*, 73 L. J. Ch. 435; [1904] 1 Ch. 549; 90 L. T. 392—C.A.

In the rule laid down by LORD ALVANLEY in *Makin v. Keighley* (2 Ves. 333, 335), and adopted by the HOUSE OF LORDS in *Knight v. Boughton* (11 Cl. & F. 513, 548, 549)—namely, “Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it,” the words “the way in which it shall go” are to be read in the imperative sense, and there is nothing in the decisions of the COURT OF APPEAL in *Diggles, In re; Gregory v. Edmondson* (39 Ch. D. 253), *Hamilton, In re; Trench v. Hamilton* (64 L. J. Ch. 799; [1895] 2 Ch. 370), and *Williams, In re; Williams v. Williams* (66 L. J. Ch. 485; [1897] 2 Ch. 12), which is contrary to the rule so affirmed in the HOUSE OF LORDS. *Id.*

“**In full confidence**” — **Gift in Default of Disposition.**]—A testator gave to his wife the whole of his real and personal estate “absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces”:—*Held* (LORD LINDLEY dissenting), that there was a gift in favour of the surviving nieces on the widow's death, subject to a power of testamentary appointment by the widow to one or more of the nieces, who in default of appointment were to share equally; and that if the nieces predeceased the widow the latter would become absolutely entitled. *Comiskey v. Bowring-Hanbury*, 74 L. J. Ch. 263; [1905] A. C. 84; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252—H.L. (E.)

Secret Trust Binding Part of Residue—Payment of Debts.]—Where residuary personal

estate has been given by will and a specific part of it is bound in the hands of the residuary legatee by a secret memorandum of trust not executed as a will, the Court will, as between the residuary legatee and the beneficiary, give effect to the secret trust as if the part of the residue bound by it had been specifically bequeathed. *Maddock, In re; Llewellyn v. Washington*, 71 L. J. Ch. 567; [1902] 2 Ch. 220; 86 L. T. 644; 50 W. R. 598—C.A.

Testatrix gave her real estate and residuary personal estate to W., whom she appointed one of her executors, and by a subsequent memorandum (admitted by W. to create a valid trust) directed that a specific part of the residuary personal estate should be held in trust for other persons. The residuary personal estate, exclusive of the part bound by the memorandum, was insufficient for the payment of debts. There was real estate:—*Held*, that (as between W. and the beneficiaries under the memorandum) the residuary personal estate unaffected by the memorandum was primarily liable, and that the deficiency must be borne rateably by the part of the residuary personal estate bound by the memorandum and real estate. *Id.*

— **Gift to Legatee “to be distributed as he thinks right.”**]—A testator bequeathed personalty to O. “to be distributed as he thinks right.” He appointed no executor. O. was the person who prepared the testator's will and was verbally informed at the time of its execution by the testator that he wished him to do “as he thought fit with the money, to distribute it after payment of debts, &c.” among five named persons. O. accepted the trust:—*Held*, that O. was under the terms of the will entitled for his own benefit, but that, as a secret trust had been accepted by him, he took on a trust enforceable by the Court for the beneficiaries named by the testator. *O'Brien v. Condon*, [1905] 1 Ir. R. 51—M.R.

— **Absolute Bequest—Joint Tenants—Communication of Trust to one Joint Tenant only after Execution of Will.**]—A secret trust intended to affect an absolute bequest to two persons as joint tenants, and communicated after the date of the will to and accepted by one of them only, will not be binding on the other if he has no notice of the trust until after the testator's death, because his interest in the bequest is not tainted with any fraud in procuring the execution of the will. *Stead, In re; Whitham v. Andrew*, 69 L. J. Ch. 49; [1900] 1 Ch. 237; 81 L. T. 751; 48 W. R. 221—Farwell, J.

Secus when the will is made on the faith of an antecedent promise to perform the trust by one alone of two joint tenants, for in that case the other joint tenant, although ignorant of the trust until after the testator's death, cannot claim an interest under a fraud committed by his co-legatee. *Id.*

(hh) *Remoteness.*

Trust for Sale beyond Limits—Beneficiaries Ascertained within Limits—Conversion—Election to take Real Estate as Realty.]—Testator, who died in 1854, by his will made in 1848 gave

his real and leasehold estates upon trust, in the events which happened, to pay the income thereof to his daughter during her life, and after her death to her then or any future husband who should survive her, during his life, and after the death of the survivor of his daughter and any husband of hers, and the failure of the children of his daughter, upon trust for sale, and to hold the proceeds thereof upon trust for certain persons in the will designated. There was no express gift of the income of the property pending sale to the persons to whom the proceeds of sale were given. The daughter and her husband were both dead, and there was no issue of the daughter:—*Held*, that the trust for sale was bad, as the sale might take place beyond the period allowed by law, but the will shewed an intention to benefit the particular persons designated who were ascertainable and ascertained within the period, and the gift to them was good and remained unaffected by the failure of the trust for sale, which was mere machinery for passing the property; and the persons entitled took the property in the form in which it was without conversion. *Appleby, In re; Walker v. Lever; Walker v. Nisbet*, 72 L. J. Ch. 332; [1903] 1 Ch. 565; 88 L. T. 219; 51 W. R. 455—C.A.

Decisions of STIRLING, J., in *Goodier v. Edmunds* (62 L. J. Ch. 649; [1893] 3 Ch. 455), and of CHITTY, J., in *Daverson, In re; Bowen v. Churchill* (63 L. J. Ch. 54; [1893] 3 Ch. 421), and dictum of JESSEL, M.R., in *Goodier v. Johnson* (51 L. J. Ch. 369, 370; 18 Ch. D. 441, 446), approved and applied. *Id.*

Gift to Grandchildren "Absolutely" upon Attaining Twenty-five—Gift over—Power of Maintenance—Vesting.]—Testator gave a sum of 12,000*l.* upon trust for a daughter for life, and after her death upon trust for all her children "when they shall attain the age of twenty-five years but not before," and in case there should not be "any such child," the fund was to fall into residue. Until the said sum was invested as directed, interest was to be paid to his daughter or her children "on their respective portions." The testator also gave one moiety of his residuary real and personal estate upon trust for his son N. for life, and after his death upon trust "for his child or children absolutely upon their attaining the age of twenty-five years, and in the event of the death of either or all the children of my said son before attaining the age of twenty-five years, then upon trust to pay the share of the child or children so dying" to testator's son H. absolutely. The will contained a power for the trustees to apply all or any part of the income of the expectant share of a grandchild of the testator, after the death of the preceding owner for life of such share, for the maintenance and education of the grandchild:—*Held*, that the grandchildren of the testator took vested interests, and the gifts were not void for remoteness. *Turney, In re; Turney v. Turney*, 69 L. J. Ch. 1; [1899] 2 Ch. 789; 81 L. T. 548; 48 W. R. 96—C.A.

Fox v. Fox (L. R. 19 Eq. 286) approved—*per* LINDLEY, M.R., and SIR F. H. JEUENE. *Semble*, the suggestion in *Wintle, In re; Tucker v. Wintle* (65 L. J. Ch. 863; [1896] 2 Ch. 711), that the decision in *Fox v. Fox* was not good law, is not warranted. *Id.*

Gift Over—Splitting up—Absolute Gift—Cutting down—Void Limitations.]—A testator, after giving a life interest to his wife, gave two-fifths of his residuary personal estate to S. D., and declared that the portion so given should remain in trust for her during her life, and after her death for the benefit of any child or children of hers, who being a son or sons should attain twenty-five, or being a daughter or daughters should attain twenty-one or marry under that age, and in default of any such issue should be divided among the children of his brother C.:—*Held*, first, that the gift over was void for remoteness; and secondly, that the gift to S. D. was an absolute gift in the first instance, and the settlement by which it was sought to restrict it having failed, the absolute gift remained and the share belonged to S. D.'s personal representatives. *Evers v. Challis* (29 L. J. Q.B. 121; 7 H.L. C. 531) distinguished. *Hancock v. Watson*, 71 L. J. Ch. 149; [1902] A.C. 14; 85 L. T. 729; 50 W. R. 321—H.L. (E.)

Gift of Minerals "if they should be worked"—Condition Precedent.]—A testator, who died in 1858, by his will dated in 1845, devised certain freehold property to his son for life, with remainder to his grandson in fee. Subsequently the testator became entitled to the payment of a sum of money for certain lands taken by a railway company for the purposes of their undertaking. Accordingly, by a codicil dated in 1857, the testator bequeathed this sum to his son and his two daughters in equal shares, and he directed that "if the minerals" under the devised property "should be worked," the same should "be divided in the same manner as before mentioned in three parts equal shares":—*Held*, that the gift of the minerals to the testator's son and daughters, not being a present one, so that the minerals should pass to them immediately, but a conditional one, the division of the proceeds depending on the working and sale of the minerals, which condition might not happen within the period allowed by law, the gift was void under the rule against perpetuities. *Thomas v. Thomas*, 87 L. T. 58—C.A.

Repair of Tomb—"Longest period allowed by law"—Twenty-one Years from death of Survivor of all Persons living at Testator's Death—Void Gift—Uncertainty—Perpetuity.]—A testatrix bequeathed a legacy to trustees upon trust for the maintenance and repair of a tomb "for the longest period allowed by law, that is to say until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—*Held*, that, whether the bequest was void as a perpetuity or not, it was, at any rate, void for uncertainty. *Moore, In re; Prior v. Moore*, 70 L. J. Ch. 358; [1901] 1 Ch. 936; 84 L. T. 501; 49 W. R. 484—Joyce, J.

—Out of Income of Legacy—Remainder of Income Given for Good Charitable Purpose—Object Partly Illegal—Whole of Income Applicable to Charity.]—Where a legacy has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, then, the trust for repair of the tomb being void, the result of the failure of that trust is that the whole of the income of the fund becomes applicable for the charitable purposes.

Fisk v. Att.-Gen. (L. R. 4 Eq. 521), *Birkett, In re* (4th L. J. Ch. 846; 9 Ch. D. 576), and *Vaughan, In re*; *Vaughan v. Thomas* (33 Ch. D. 187), followed. *Rogerson, In re*; *Bird v. Lee*, 70 L. J. Ch. 444; [1901] 1 Ch. 715; 84 L. T. 200—Joyce, J. And see PERPETUITIES, col. 1811.

(ii) Residue.

General Residuary Gift of Property "not hereinbefore disposed of"—**Second Residuary Clause—Lapsed Legacies and Devises.**—A testator, after several legacies and devises of land which failed, devised and bequeathed to his executors on certain trusts "the remainder of his property which he described as follows: "All my railway and other shares, stock and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, not hereinbefore disposed of, and all securities, bonds, coupons, cash in bank or elsewhere." At the end of his will he appointed C. S. his residuary legatee:—*Held*, that the words of the first general residuary clause were sufficiently wide to capture not only property undisposed of, but also lapsed legacies and devises, although there was apparently in that case nothing left for the second residuary clause to operate upon. *Jones v. Wilson*, [1900] 1 Ir. R. 342—V.C.

"What is left"—Intestacy during Life of A.]—A testator gave his household effects to his wife absolutely, and directed that at his death his wife was to have power to sell all property and land belonging to him, and that at her death "what is left" was to be divided between two out of his five daughters:—*Held*, that the words "what is left" meant the net residue after payment of debts and costs of realisation, and that the testator died intestate during the life of his widow as to his personal estate (other than his household effects) and as to all his real estate. *Willatts, In re*; *Willatts v. Artley*, 74 L. J. Ch. 269; [1905] 1 Ch. 378; 92 L. T. 195; 21 T. L. R. 194—Farwell, J. See s.c. in C.A., 74 L. J. Ch. 564; [1905] 2 Ch. 135; 93 L. T. 256; 21 T. L. R. 571.

"Estate and effects"—Trusts—Real Estate Passing.]—A testator "gave and bequeathed" all his ready-money, securities for money, stocks, and all the rest of his "estate and effects," upon certain trusts for his wife and children, with a gift over. Trusts were declared of the "interests dividends and annual proceeds" or "produce" "of the said trust moneys stocks funds and securities," "the income of the said trust moneys stocks funds and securities," and "the said trust moneys." There was no power of sale. Power was given to vary "the securities of the trust money." On appointment of new trustees "the said trust moneys stocks funds and securities" were to be transferred:—*Held*, that real estate passed under the residuary gift and that the trusts applied to it. *Kirby-Smith v. Parnell*, 72 L. J. Ch. 468; [1903] 1 Ch. 483; 51 W. R. 493—Buckley, J.

D'Almaine v. Moseley (22 L. J. Ch. 971; 1 Drew. 629) and *Fullerton v. Martin* (22 L. J. Ch. 893) followed. *Dunnage v. White* (1 J. & W. 583), *Coard v. Holderness* (24 L. J. Ch. 388;

20 Beav. 147), and *Longley v. Longley* (41 L. J. Ch. 168; L. R. 13 Eq. 133) distinguished. *Ib.*

"Remainder of my property"—Residuary Legatee Appointed—Destination of Lapsed Pecuniary Legacy.]—Where, in a will, pecuniary legacies are followed by a gift of "the remainder of my property" to one or more, this is a good residuary bequest, and is not revoked by the subsequent appointment of a residuary legatee in the will. *Isaac, In re*; *Harrison v. Isaac*, 74 L. J. Ch. 277; [1905] 1 Ch. 427; 92 L. T. 227—Buckley, J.

A lapsed pecuniary legacy will fall into the first, and not the second of such residuary dispositions; but a lapse, in whole or in part, of the first residuary disposition will ensure for the benefit of the person entitled under the second. *Ib.*

Named Person—Lapse—Limited Survivorship Clause—Revocation of Gift by Codicil.]—A testatrix left her residuary estate to four named persons, A, B, C, and D, "as tenants in common, and if only one of them shall survive me, then to such one absolutely." By a codicil, after referring to the death of D, the testatrix revoked whatever interest D had in her will. A, B, and C survived the testatrix:—*Held*, that the gift of survivorship was intended to be general, and not confined to the case of only one legatee dying, and that in any event the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D was not one of the residuary legatees; and, consequently, that in the events that had happened D's share was not disposed of, but went to the other legatees. *Radcliffe, In re*; *Young v. Beale*, 51 W. R. 409—Buckley, J.

"Residuary legatee"—After-purchased Real Estate—Extrinsic Evidence.]—The words "residuary legatee" in a will, being *prima facie* referable to personal and not to real estate, do not in the absence of a context sufficient to modify that *prima facie* reference constitute a residuary devise of real estate not otherwise disposed of by the will, even where the property in question is shown to have been acquired after the date of the will. *Gibbs, In re*; *Martin v. Harding*, 76 L. J. Ch. 238; [1907] 1 Ch. 465; 96 L. T. 423—Joyce, J.

The fact that at the date of the will the testator has no real estate other than that of which the will contains a specific and complete disposition may and must be borne in mind in considering whether the naming of a residuary legatee constitutes a residuary devise. *Ib.*

Gift of Residue without Words of Severance—Power of Advancement—Joint Tenancy or Tenancy in Common.]—A testator devised the residue of his property to trustees for the benefit of six of his children, with power to his said trustees to advance such sum or sums as they might think fit for the education and advancement in life of his said children:—*Held*, that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that consequently a tenancy in common was created in the residue. *L'Estrange v. L'Estrange*, [1902] 1 Ir. R. 372—V.C.

Gift of Residue to Six Children now Living—

All but One Dead at Date of Will—False Enumeration—Mistake—Intestacy.—Testator gave the residue of his estate to five persons and the six children of S. F. O. in equal shares as tenants in common. By a codicil he declared that by the words "the six children" he meant "the six children now living." Five of the children died before the date of the will:—*Held*, that there was no intestacy, but that the residue was divisible between the five other persons and the surviving child in equal shares. *Sharp, In re; Maddison v. Gill*, 77 L. J. Ch. 251; [1908] 1 Ch. 372—Joyce, J.

Contingent Gift—Intermediate Income.—The testator made a residuary gift in trust for all the children of his sister who being sons should attain the age of twenty-one years, or being daughters should attain that age, or marry under that age, in equal shares, and if there should be only one such child, the whole to be in trust for that one child; and in the event of his sister not having any children or child who should attain a vested interest then over. The sister had never had any children who lived more than a few hours, and was forty-six years of age:—*Held*, that the gift carried with it the intermediate income, and that the income undisposed of must be accumulated for twenty-one years from the testator's death, or until the fund became divisible. *Love, In re; Green v. Tribe* (47 L. J. Ch. 783), dissented from on this point. *Taylor, In re; Smart v. Taylor*, 70 L. J. Ch. 585; [1901] 2 Ch. 184; 84 L. T. 758; 49 W. R. 615—Cozens-Hardy, J.

Lapsed and Revoked Shares of Particular Residue—Gift to Wife and Children then Living—Class.—A testator bequeathed certain articles consisting of works of art, &c., specifically to individuals, and directed that all his furniture, objects of art, and household goods not by his will or any codicil thereto otherwise bequeathed, should be sold within six months after his decease, and that the money arising from the sale should be divided equally between his wife and all his children then living, share and share alike; and after other dispositions he bequeathed the residue of his property to one of his children. By a codicil he revoked all gifts to another child, D. The specific legatees and the testator's wife died in his lifetime:—*Held*, first, that the specific legacies fell into the particular residue; secondly, that the shares of the wife and D. of that residue did not pass to the general residuary legatee, but went to the children other than D. living at the period of distribution. *M'Kay v. M'Kay*, [1900] 1 Ir. R. 213—V.C.

Gift of Residue Subject to Annuities—Children—Advances—Hotchpot—Rate of Interest.—Where a testator, having by his will given his residuary estate subject to annuities to his children, has made advances to children in his lifetime and directed the same to be brought into hotchpot, interest at the rate of 4 per cent. per annum, and not 3 per cent. per annum, is to be calculated on such advances as from the date of the death of the testator. *Stewart v. Stewart* (49 L. J. Ch. 763; 15 Ch. D. 539) and *Hargreaves, In re; Hargreaves v. Hargreaves* (86 L. T. 43), followed. *Whiteford, In re; Inglis v. Whiteford* (72 L. J. Ch. 540; [1903] 1 Ch. 839), overruled. *Davy, In re; Hollingsworth v.*

Davy, 77 L. J. Ch. 67; [1908] 1 Ch. 61; 97 L. T. 654—C.A.

Direction that Share of Residue shall Sink into Residue—Mode of Distribution—Accrued Shares.

—A testator gave his residuary estate upon trust for conversion and investment, and as to one fourth part thereof upon trust for the separate use of his daughter M. during her life, and after her decease upon trust for the children or child of his said daughter living at her decease, provided that, if any one or more of the children of his said daughter should die in her lifetime leaving lawful issue, such issue should be entitled to the share which their parent would have been entitled to if he or she had survived the testator's daughter. And he gave one other fourth part of his residuary estate upon similar trusts for the benefit of each one of his three daughters C., S., and E., and their respective children and issue. And he declared that if any one or more of his said four daughters should die without leaving any child or the issue of a child living at their respective deceases the shares or share of his said daughters or daughter so dying should fall into and become part of his residuary estate, and be held and disposed of on the same trusts as were therein before declared thereof:—*Held*, that, on the death of a daughter of the testator without issue her share ought to be divided into thirds, and one third held upon trusts for the benefit of each one of the surviving daughters and her children and issue similar to those declared by the will as to her original share; and on the death of another daughter without issue her share, both original and accrued, ought to be divided into halves, and one half held upon similar trusts for the benefit of each of the remaining two daughters and her children and issue, and so on, so that in the event of there being issue of one daughter only such issue would ultimately take the whole residue. *Palmer, In re; Palmer v. Answorth* (62 L. J. Ch. 988; [1893] 3 Ch. 369), which overruled *Humble v. Shore* (33 L. J. Ch. 188n.; 7 Hare, 247; 1 H. & M. 550n.), followed. *Allan, In re; Dow v. Cassaigne*, 72 L. J. Ch. 159; [1903] 1 Ch. 276; 88 L. T. 246; 51 W. R. 403—C.A.

Division between Two Unequal Classes—Mode of Distribution.—A testator gave his residuary estate upon trust as to three equal seventh parts for three members of a class in equal shares, and as to four equal seventh parts for four members of another class in equal shares; and he directed that in a certain event which happened the share of one of the three should lapse and form part of his residuary estate:—*Held*, that each of the remaining six members took an equal seventh share, and that the lapsed share must be divided as the residue was directed to be divided, three sevenths of it going to the two of the first class in equal shares and four to the four of the second in equal shares. *Ward, In re; Escrib v. Ward*, 76 L. J. Ch. 253; [1907] 1 Ch. 391; 96 L. T. 425—Swinfen Eady, J.

Sum Directed to be Set Apart out of Residue—Devolution—Gift Over of Residue as a Whole.—If the will of a testator shews an intention that the entirety of his residue should go over as a whole, a sum directed to be set apart out of residue will, on the failure of the trusts affect-

ing it, fall back into and follow the destination of the remainder of the residue, and will not devolve upon the next-of-kin of the testator. *Skrymsher v. Northcote* (1 Swanst. 566; 1 Wils. C.C. 248) observed upon. *Parker, In re*; *Stephenson v. Parker*, 70 L. J. Ch. 170; [1901] 1 Ch. 408; 84 L. T. 116; 49 W. R. 215—Farwell, J.

Advance—Hotchpot—Interest—Rate.—A testator gave annuities to his wife and his residue in trust for two of his three sons and the persons entitled under the marriage settlement of the third, in thirds, and declared that, as he had settled 4,000*l.*, and covenanted to settle further 6,000*l.* within six months of his death on the trusts of the marriage settlement of the married son, the sum of 10,000*l.* should on payment of the 6,000*l.* be brought into hotchpot. The 6,000*l.* was paid within six months of his death. Payments were made from time to time in respect of the shares of the two unadvanced sons, as between whom and the testator's trustees part was regarded as capital and part as income.—*Held*, on the distribution of the money which had been set apart to answer the wife's annuities, that as to the advanced son, 4,000*l.* and 6,000*l.* must be brought into hotchpot with interest from the testator's death and date of payment respectively; and as to the two unadvanced sons, the payments made to them must be accounted for (without distinction between capital and interest) with interest from the respective dates of payment. *Rees, In re*; *Rees v. George* (50 L. J. Ch. 328; 17 Ch. D. 701), *Dallmeyer, In re*; *Dallmeyer v. Dallmeyer* (65 L. J. Ch. 201; [1896] 1 Ch. 372), and *Lambert, In re*; *Moore v. Middleton* (66 L. J. Ch. 624; [1897] 2 Ch. 169), applied. *Whiteford, In re*; *Inglis v. Whiteford*, 72 L. J. Ch. 540; [1903] 1 Ch. 889; 51 W. R. 491—Buckley, J.

Held, also, that the rate of interest must be 3 per cent. *Hargreaves, In re*; *Hargreaves v. Hargreaves* (86 L. T. 43), dissented from. *Ib.*

Gift of Income of Residue to Children for Life Subject to Annuity to Widow—Death of Widow—Advances—Hotchpot—Interest on Advance.—A testator by his will and codicil dated May 5, 1880, and July 12, 1882, respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of 2,000*l.* to his widow during her life, and subject thereto to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of 1,000*l.*, these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly. The testator died on July 3, 1887, and left surviving him six children; of whom three had received advances and three had not. The widow died in March, 1900.—*Held*, that, in bringing the advances into hotchpot for the purpose of determining the respective shares of the six children, the shares of the advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the

testator's death down to the time when the estate ought, or should be deemed, to have been divided. *Hargreaves, In re*; *Hargreaves v. Hargreaves*, 86 L. T. 43—Joyce, J.

Direction to Divide Residue among Children on Death of Life-renter, and subsequent Direction to Retain Shares till Death of another Person—Accumulations—Repugnancy.—A testator in his settlement directed his trustees, on the expiry of a life-rent, to divide his estate among the children of his brothers and sisters; further, by a codicil, he directed his trustees to retain in their own hands the shares destined to the children of his sisters, and to pay to them neither the capital thereof nor the revenues (which meantime were to be accumulated) so long as their fathers should be alive. On the expiry of the life-rent, more than twenty-one years after the death of the testator.—*Held*, by a majority of the whole Court (*dis. Lord Young and Lord Moncreiff*), that the sisters' children had an unqualified and indefeasible right of fee in their shares, and were entitled to demand immediate payment thereof, notwithstanding that their fathers were still alive. *Yuill's Trustees v. Thomson*, 4 F. 815—Ct. of Sess.

Gift of Residue with an Exception—Failure of Exception—Passing by Residuary Gift.—A testator gave his residuary estate to his wife absolutely, except as to a sum of 1,000*l.*, in which he gave her a life interest, with remainder as to 500*l.* to "my nephew James Jupp," and as to the other 500*l.* to certain other nieces and nephews. It appeared from the evidence that the testator had, so far as was known, no nephew named James Jupp, and though he had a brother of that name the brother had predeceased him.—*Held*, that, the gift to James Jupp failing, the beneficiaries of the wife were entitled to the 500*l.* bequeathed to him, subject to a liability to refund it should a nephew of the testator bearing that name establish a claim. *Jupp, In re*; *Gladman v. Jupp*, 87 L. T. 739—Joyce, J.

Exception.—The doctrine of *Blight v. Harcourt* (52 L. J. Ch. 672; 23 Ch. D. 218)—namely, that where specific property is expressly excepted from a residuary bequest for the purpose of bequeathing it to a particular legatee, the property so excepted will, if the particular bequest fails to take effect, fall back into the residue—does not apply where the particular legatee dies in the lifetime of the testator, who then makes a codicil referring to such legatee's death and confirming his will containing the exception. *Fraser, In re*; *Lowther v. Fraser*, 73 L. J. Ch. 481; [1904] 1 Ch. 726; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414—C.A.

Administration—Insufficient Personalty for Debts, &c.—Specific Bequest—Secret Trust.—Where residuary personalty has been given by will, and a specific part of it is found in the hands of the residuary legatee by a secret memorandum of trust not executed as a will, the property comprised in the memorandum does not pass by way of specific bequest, but *dehors* the will, and must therefore bear its proportion of the debts of the testator rateably with the other residue. *Maddock, In re*; *Llewellyn v. Washington*, 70 L. J. Ch. 660; [1901] 2 Ch. 372; 85 L. T. 12; 50 W. R. 54—Kekewich, J.

Appointment of Executors—Direction for Sale and Division of Household Property, including Leasehold House—Residuary Personal Estate.]

—A testatrix by her will appointed executors and trustees, and, after giving certain specific legacies, continued: "With the exception of the above legacies, I direct that the remainder of my household property, including house in W., should be sold, and, after paying funeral, testamentary expenses, and debts, be equally divided" as therein mentioned. The testatrix's personal estate comprised two leasehold houses, shares, money on deposit at the bank, and household furniture:—*Held*, that under the above bequest the entire residue of the testatrix's personal estate passed. *Johnson, In re; Sandy v. Reilly*, 92 L. T. 357—Farwell, J.

Gift of Residue to Executors—Implied Trust for Next-of-Kin—Secret Trust—Parol Evidence—Admissibility.]

—A testator by his will bequeathed to his executors legacies for their trouble in administering his estate, and disposed of the residue as follows: "I bequeath all the residue of my property of every kind to my executors, to apply the same as they shall think fit, and I appoint as my executors A. and B." The testator's next-of-kin were his brother T. and the ten children of his late brother C. After the execution of the will one of the executors asked the testator how he would like the residue spent. The testator replied that he would like the six younger children of his late brother C. to get it, and that he did not wish the elder children of C. to get any, and that he would not like his brother T. to get a penny. The six younger children of C. claimed that the above conversation created a secret trust of the residue in their favour, to the exclusion of the rest of the next-of-kin:—*Held*, that, upon the face of the will, the executors did not take beneficially, but upon an implied trust for the next-of-kin; that such a trust could not be varied by a conversation between the testator and one of the executors after the execution of the will, and that the doctrine of secret trust had no application to the facts of the case. *Balfe v. Halpenny*, [1904] 1 Ir. R. 486—Barton, J.

Receipt of Residuary Estate by Testatrix—Payment into Bank—Exercise of Control over Fund.]

—By a codicil to her will a testatrix devised and bequeathed "all monies and property devolving upon or receivable by me under the will of W." to A and B upon trust to pay certain legacies. During her lifetime the testatrix received a sum of 693*l.* in respect of the residuary estate of W., and thereupon opened an account with a bank and lodged the money to her own credit. She from time to time drew out sums of money for the payment of the testamentary expenses of W., for making gifts to persons (some of whom were beneficiaries under the trust in her codicil), and for other purposes of her own. Previous to this lodgment of 693*l.* the testatrix had no banking account. After the payments to her there remained a balance to her credit of 149*l.* Subsequently a further sum of 151*l.* was received by the testatrix in respect of the residuary estate of W., and this was lodged by her in the bank, making in all the sum of 300*l.*, which remained intact to the credit of her account at the date of her death:—*Held*, that the bequest of A and B was admeasured only as regards money paid out of the

bank to the testatrix, but that as regards the sum of 300*l.* remaining intact at her death, to the credit of her account there was no ademption, and that the same passed under the bequest in her codicil. *Toole v. Hamilton*, [1901] 1 Ir. R. 383—M.R.

(jj) Restraint on Anticipation.

Married Woman—Rule against Perpetuities—Severance of Class.]

—A restraint on anticipation, imposed by a general clause in a will upon all the shares of daughters of the testator's children, is good as to the shares of those members of the class who are born in the testator's lifetime, though void as to the shares of those born afterwards. *Herbert v. Webster* (49 L. J. Ch. 620; 15 Ch. D. 610) followed. *Michael's Trusts, In re* (46 L. J. Ch. 651), and *Ridley, In re* (48 L. J. Ch. 563; 11 Ch. D. 645), not followed. *Ferneley's Trusts, In re*, 71 L. J. Ch. 422; [1902] 1 Ch. 543; 86 L. T. 413; 50 W. R. 346—Swinfen Eady, J.

—**Remoteness—Duration of Restraint.]**—A testator by his will gave his residuary estate to his wife, two daughters, and a son for life, the interests of the wife and daughters to be without power of anticipation, and after the death of the survivor he gave his estate to the then and future children of his son in equal proportions. By a codicil the testator declared that the bequests to any female taking any beneficial interest under his will should be for her separate use, but so that she might not anticipate any part of the property to which she might become entitled; and he also declared the receipt of any female taking an interest under his will should be a good and sufficient discharge to his trustees for the money after the same should have actually accrued due. The survivor of the wife, daughters, and son died in January, 1902. The son left five children living at his death, of whom two were married women:—*Held* (following *Herbert v. Webster*, 15 Ch. D. 610), that the restraint on anticipation was valid, not being void for remoteness, but that it only lasted during the existence of the prior life interests both as to income and corpus, and determined when the property fell into possession in January, 1902. *Millward, In re; Steedman v. Hobday*, 87 L. T. 476—Joyce, J. *And see* col. 988.

(kk) Satisfaction.

Bequest of Legacies to Several Persons of Sums Equal to Debts Secured by Promissory Notes—

Time for Payment of Legacies.]

—Pecuniary legacies, which by the express terms of the will were not payable until a period of four years after testator's decease, are not a satisfaction for debts of equal amount secured to the legatees by a negotiable instrument made by the testator. *Roberts, In re; Roberts v. Parry*, 50 W. R. 469—Byrne, J.

Legacy to Creditor—Debt Bearing Interest—

Creditor also Executrix.]

—A testatrix bequeathed to her executrix a legacy of 400*l.* No time was specified for the payment of this legacy, and no mention was made of interest. The will contained no direction to pay debts. At the time of her death the testatrix was indebted to her executrix in the sum of 150*l.*, payable on demand. The debt bore interest at 5 per cent.

per annum, payable half-yearly:—*Held*, that the debt was satisfied by the legacy. *Rattenberry, In re*; *Ray v. Grant*, 75 L. J. Ch. 304; [1906] 1 Ch. 667; 94 L. T. 475; 54 W. R. 311; 22 T. L. R. 249—*Swinfen Eady, J.*

Abatement—Legacy in Satisfaction of Debt—Forgiveness of Debt—Specific Legacy.]

—A legacy given to a creditor in satisfaction of the testator's debt to him abates with the general legacies in case of insufficiency of assets. A debt forgiven by a will is a specific legacy, and does not abate with the general legacies. *Wedmore, In re*; *Wedmore v. Wedmore*, 76 L. J. Ch. 486; [1907] 2 Ch. 277; 97 L. T. 26; 23 T. L. R. 547—*Kekewich, J.*

Father and Child—Absolute Legacy—Settled Legacy—Subsequent Settlement on Legatee's Marriage.]

—A father bequeathed a legacy of 20,000*l.* to his daughter, a spinster—as to 5,000*l.* to her absolutely and as to 15,000*l.* upon trust for her for life with remainder to her children, and in default of children upon trust for her next-of-kin. Subsequently, upon her marriage, he settled a sum of about 7,000*l.* upon trusts in favour of her and her children, with ultimate trusts in default of children, not corresponding with the trusts of the settled legacy:—*Held*, that the marriage settlement fund must be taken in satisfaction *pro tanto* of the settled portion of the legacy, and that the daughter was entitled to the 5,000*l.* absolute legacy without diminution. *Furness, In re*; *Furness v. Stalkartt*, 70 L. J. Ch. 680; [1901] 2 Ch. 346; 84 L. T. 680—*Joyce, J.*

Particular Purpose—Satisfaction by Gift.]

A testator bequeathed "To the trustees of the endowment fund" of a hospital 10,000*l.* After the date of his will he sent a cheque for 10,000*l.* to the chairman of the trustees of the hospital. Shortly before sending the money the testator had written to the chairman, "I am desirous of redeeming a promise which I think I made some time ago, viz., to advance a sum of 10,000*l.* (ten thousand pounds) in addition to the sum I have already advanced to endow the hospital in which I am interested at Stourbridge." There was also some evidence that the testator regarded the latter gift to have been made in satisfaction of the legacy:—*Held*, that the legacy was a legacy for a particular purpose, and was adeemed by the gift of the same amount in the testator's lifetime. *Corbett, In re*; *Corbett v. Cobham (Viscount)*, 72 L. J. Ch. 775; [1903] 2 Ch. 326; 88 L. T. 591; 52 W. R. 74—*Farwell, J.* And see ADEMPITION, col. 2811.

Secret Trust.]—See PRECATORY TRUST, col. 2881.

(11) *Settlement.*

Chattels to go with Mansion-house—Proviso that Chattels not to Vest Absolutely in Tenant in Tail until Twenty-one—Gift Over.]—Where there is a strict settlement and chattels are directed to go with the mansion-house, and there is also a proviso that the chattels are not to vest absolutely until some tenant in tail attains twenty-one, then if a tenant in tail comes into existence and dies under twenty-one the chattels are carried over to the persons entitled to the mansion-house for the time

being until some tenant in tail becomes absolutely entitled to them. *Dayrell, In re*; *Hastie v. Dayrell*, 73 L. J. Ch. 795; [1904] 2 Ch. 496; 91 L. T. 373—*Joyce, J.*

Altering Words in Will—"Of" Read for "Or."]—The word "or" will be read "of" in order to effectuate the obvious intention of the testator. *Id.*

Hotchpot Clause.]—A testator directed his executors and trustees to convert his whole estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. In the case of his son, he had covenanted with the trustees of the son's marriage settlement that his executors would pay to them 10,000*l.* to be held upon trust for the son for life, with remainder to the son's wife for life, with remainder as to the capital for the children of the marriage, and in case of there being no child the capital was to be in trust for the testator absolutely. By a hotchpot clause in the will, any sum given "to or with any child" on his or her marriage was to be taken in or towards satisfaction of the share of such child, and brought into hotchpot. The son died without issue:—*Held*, that the testator's trustees must specifically appropriate and allot to the son's share under the will the testator's contingent reversionary interest in the 10,000*l.*, not under the hotchpot clause, but under the directions in the earlier part of the will, as the only way to effect an equal division as directed between the son and the daughter. *Wheeler v. Humphreys*, 67 L. J. Ch. 499; [1898] A.C. 506; 78 L. T. 799; 47 W. R. 17—*H.L. (E.)*

Successive Limitations—Life Estates and Estates Tail.]—By his will a testator made the following gifts: "I devise all my real estate to my godson P. C. H. for his life with remainder to his first and other sons successively in tail, with remainder to the eldest and every other son of the said Sir C. H. for life with remainder to the first and other sons of such sons of Sir C. H. in tail, with remainder to my own right heirs." The testator died in 1859. Sir C. H. had several sons, of whom P. C. H. was the second and Sir J. W. H. the eldest. P. C. H. died in 1902 without ever having been married. Sir J. W. H. thereupon became entitled to the estates for his life. He had three sons. C. J. H., the eldest son of Sir J. W. H., had attained the age of twenty-one years and had disentailed, or purported to disentail, his father joining in the deed, and, by virtue of that deed and of a transfer of the life interest of his father, he now claimed to be entitled in fee-simple in possession to the hereditaments comprised in the testator's will, and petitioned for a declaration accordingly:—*Held*, that the gift in remainder to the eldest and every other son of Sir C. H. for life, being expressed to be to the eldest and other sons, imported a succession; that accordingly, applying the reasoning of *Jewis d. Ormond v. Waters* (6 East, 336), and *Craddock v. Craddock* (4 Jur. N.S. 626), the eldest and every other son of Sir C. H. took successive life estates; that the remainder to the first and other sons of such sons of Sir C. H. in tail also imported succession, and that such first and other sons took successive estates tail in remainder one after the other; but that

the limitations did not enable the first and other sons of the eldest son of Sir C. H. to take until after the death of all the tenants for life. *Honywood v. Honywood*, 89 L. T. 378—C.A.

Bequest of Chattels in Trust for Person in "actual possession" of Settled Estate—Bequest of Trust Funds in Trust for Person in Possession of Settled Estate—Death of First Tenant in Tail in Remainder—Vesting.]—Real estate was devised (in the events which had happened) upon trust for the plaintiff for life, and subject thereto upon trust for her first or other sons successively according to seniority in tail. The testator bequeathed his pictures, plate, and other chattels to the trustees upon trust to go along with and be used and enjoyed so far as the rules of law and equity would permit, by the person who should for the time being be in actual possession or entitled to the receipt of the rents and profits of the settled land. He further bequeathed his residuary personalty and a legacy of 70,000*l.* to the trustees upon trust to pay or apply the annual income thereof to or for the benefit of the person for the time being entitled to the possession or receipt of the rents of the settled land, and otherwise to hold the same upon such trusts that the annual income thereof should as far as possible be enjoyed in like manner as if it had formed part of the rents and profits of the settled land, it being the testator's intention that the said income should assist in keeping up and be in augmentation of the rents and profits of the settled land. The plaintiff had three sons. The eldest, the first tenant in tail in remainder, died in her lifetime, a bachelor and intestate, and without having executed a disentailing assurance:—*Held*, first, following *Scarsdale (Lord) v. Curzon* (29 L. J. Ch. 249; 1 J. & H. 40) and *Angerstein In re; Angerstein v. Angerstein* (65 L. J. Ch. 57; [1895] 2 Ch. 883), that the chattels did not vest absolutely in the deceased tenant in tail in remainder, as he never came into "actual possession" of the rents and profits; and secondly, that there was no expression of intention in the will sufficient to oust the application of the general rule established by *Moley v. Burnell* (1 Bro. C.C. 274; 4 Bro. P.C. 319) and *Scarsdale (Lord) v. Curzon (supra)*; that accordingly the residue and legacy became absolutely vested in the first tenant in tail in remainder at birth; and that his legal personal representative was now entitled to them, subject to the plaintiff's interest therein. *Fothergill's Estate, In re; Price-Fothergill v. Price*, 72 L. J. Ch. 164; [1903] 1 Ch. 149; 87 L. T. 677; 51 W. R. 203—Swinfen Eady, J.

Trust for Sale and Conversion—Postponement—Wasting Security—Mixing Royalties—Notional Conversion—Apportionment between Tenant for Life and Remainderman—Rate of Interest to Tenant for Life—Income on Invested Surplus.]—Where wasting property settled by a will has been retained by the trustees under a power to postpone conversion, the tenant for life of such property will now only be entitled to interest at the rate of 3 per cent. upon the estimated value thereof at the death of the testator. The surplus income from the retained investment must be invested as capital for the remainderman, and the income paid to the tenant for life.

Meyer v. Simonson (21 L. J. Ch. 673; 5 De G. & Sm. 723), *Lynch Blossie, In re; Richards v. Lynch Blossie* (34 L. J. N.C. 136; W. N. (1899), p. 27), and *Rovells v. Bebb* (69 L. J. Ch. 562; [1900] 2 Ch. 107) followed. *Woods, In re; Gabellini v. Woods*, 73 L. J. Ch. 204; [1904] 2 Ch. 4; 90 L. T. 8—Kekewich, J.

Covenant to Settle Sum of Money—Gift by Will.]—Where a settlor covenanted to settle a sum of money on the usual trusts for his daughter, her husband, and their children, the daughter taking the first life interest, and he subsequently bequeathed to his daughter a third share of his residuary personalty absolutely, this gift of residue was held to be a satisfaction of his daughter's life interest in the sum covenanted to be settled. *Blundell, In re; Blundell v. Blundell*, 75 L. J. Ch. 561; [1906] 2 Ch. 222; 94 L. T. 818; 22 T. T. R. 570—Swinfen Eady, J.

—After-acquired Property Clause—Double Portions—Election—Persons Derivatively Entitled.]—Although the gift of residue to the settlor's daughter was bound by her covenant to settle after-acquired property and went upon similar trusts to those of the settled fund, the interests of the children of the marriage in the sum covenanted to be settled were held not satisfied by the bequest because they took no interest under the settlor's will, but were only derivatively entitled. *Id.*

Covenant on Marriage of Daughter to Pay Share of Estate to Trustees—Subsequent Will Confirming Covenant—Election by Life Tenant against Will—Satisfaction of Ulterior Interest—Differences in Limitation—Acceleration of Subsequent Interests.]—V. on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, executors, and administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share (which ultimately became one-sixth), ascertained by the number of his children, of his real and personal estate upon trusts for his daughter for life for her separate use without power of anticipation, then to her husband J. H. for life, and subject to a joint power of appointment among their issue, and in default of such appointment as the survivor should appoint, to the children of the marriage at twenty-one or marriage. The settlement contained an agreement and declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will, whereby he confirmed the covenant in the settlement, and, after a trust for payment of his debts, directed his trustees to stand possessed of an equal share of his residuary estate upon trust for his daughter for life, and then for her children at twenty-one or marriage, in default of children for any husband of his daughter for life and subject thereto such share to fall into residue. The daughter having elected against the will, the question arose whether her husband and children could claim under the will and as to their rights having regard to the provisions of the settlement and will:—*Held*, following a dictum of Bacon, V.C., in *Bennett v. Houldsworth* (40 L. J. Ch. 646; 6 Ch. D. 671), that the

liability under the covenant in the settlement was not a debt within the meaning of *Chichester v. Coventry* (36 L. J. Ch. 673; L. R. 2 H.L. 71) to be deducted before ascertaining the testator's residue. That on the construction of the agreement and declaration in the settlement there was no satisfaction of the covenant. That having regard to the recital by the testator of his covenant in his daughter's marriage settlement and its confirmation by his will, and to the substantial distinctions between the limitations in the settlement and will, an intention was manifested that the covenant should not be abrogated by the will, and that the testator intended to perform it, and that there was no satisfaction as regards any of the parties claiming under the settlement, the children of the daughter not being put to their election. *Tussaud's Estate, In re*; *Tussaud v. Tussaud* (47 L. J. Ch. 849; 9 Ch. D. 363), followed. *Vernon, In re*; *Garland v. Shaw*, 95 L. T. 48—Kekewich, J.

Per CURIAM.—The result of the daughter not claiming under the will was not to accelerate the interests of those claiming in remainder as if she had been an attesting witness to the will, and as before the event she could not be regarded as leaving or not leaving children there was held to be an intestacy as regards her life interest under the will. *Id.* And see SETTLEMENT, col. 2261.

(mm) Shifting Clause.

Exception of Eldest Son Entitled to other Estates.—Testator devised his real estates to the use of his nephew for life, with remainder to all and every the son and sons of the nephew born in the testator's lifetime, or in due time afterwards ("other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents issues and profits of certain estates" situate at C. "after the decease" of the nephew, "as tenant for life or any greater estate or interest whatsoever"), severally and successively in remainder, one after another for their respective lives. The nephew's eldest son, who was tenant in tail of the C. estates in remainder expectant on the death of his father, joined with his father in disentailing them. They were sold, and the proceeds of sale settled upon trusts, in which the eldest son took some benefit. He subsequently became bankrupt, and his interest in the proceeds was sold:—*Held*, that on the nephew's death his eldest son was not within the exception, and was entitled to the first life interest, after his father's death, in the estates devised by the testator's will. *Law Union and Crown Insurance Co. v. Hill*, 71 L. J. Ch. 602; [1902] A.C. 263; 86 L. T. 773—H.L. (E.)

(nn) Substitutional Gift.

Children—Gift over "failing such issue"—Death "leaving no issue"—Vested Interest.—Testator gave his estate to trustees on trust to sell and pay the income to his widow for life, and after her death directed that his estate should be transferred to his younger daughter, but if she should be then dead, then to any

child or children of his younger daughter, and "failing such issue" then to his elder daughter, but if she should be then dead then to any child or children of his elder daughter; but should his two daughters be then both dead "leaving no issue" then, in case of each or either of them leaving a husband surviving, the testator's estate was to be transferred to their husbands or the survivor of such husbands. The widow was living. The younger daughter was living and had three children. The elder daughter was dead leaving a husband and child, who brought this action for administration:—*Held*, that on the true construction of the will the children of the younger daughter took vested substitutional interests at birth not liable to be divested by their deaths in such daughter's lifetime, and that, as either the younger daughter or her children must take absolutely in remainder on the widow's death, the plaintiffs had no interest to maintain the action. *Treharne v. Layton* (44 L. J. Q.B. 202; L. R. 10 Q.B. 459) followed and applied. *Bradbury, In re*; *Wing v. Bradbury*, 73 L. J. Ch. 591; 90 L. T. 824—C.A.

— **Provision for Grandchildren in Case any Child "shall" Die—Child Dead at Date of Will, Leaving Children.**—A testator gave the residue of his estate "in trust for all or any of my children who shall be living at my death, and being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry under that age, and if more than one in equal shares, provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of any deceased child shall take the share which his, her, or their parent would have taken if such parent were living, and over the age of twenty-one at my decease." One of the sons, referred to in the will as "my deceased son," was dead at the date of the will, and left children:—*Held*, that the children of the deceased son were not entitled to share in the residue. *Gorringe v. Mahlstedt*, 76 L. J. Ch. 527; [1907] A.C. 225; 97 L. T. 111—H.L. (E.)

— **Die Without "leaving" Issue.**—A testator gave his residuary personal estate upon trust for his two daughters in equal shares during their respective lives, with remainder to their children as they should appoint, and in case either should "die without leaving lawful issue or being such none of such issue shall live to attain the age of 21 years," then he gave the share of his daughter so dying to her surviving sister; and in case both should "die without leaving lawful issue as aforesaid," then he gave his said estate to all his nephews and nieces in equal shares. One daughter died, after the death of the testator, unmarried; the other, having married, had one child, a son, who had now attained twenty-one:—*Held*, that according to the rule laid down in *Maitland v. Chalie* (6 Madd. 243), the words "die without leaving" must be read "die without having" lawful issue, and that the son of the married daughter was therefore entitled, to the exclusion of such nephews and nieces as were before the Court. *Ball, In re*; *Slattery v. Ball* (58 L. J. Ch. 232; 40 Ch. D. 11), explained. *Barkworth v. Barkworth*, 75 L. J. Ch. 754—Joyce, J.

"Instead of"—Revocation—Whether Total or Partial only—Substitutionary Bequest.]—A trust declared by codicil of residuary personal estate, and expressed to be "instead of" an absolute bequest thereof by will to a legatee, who was the first tenant for life under the trust, construed, not as revoking the bequest altogether, but only as modifying the nature of the legatee's enjoyment to the extent shewn by the codicil, so that, upon failure of the trust, the original absolute bequest took effect. *Wilcock, In re; Kay v. Dewhirst*, 67 L. J. Ch. 154; [1898] 1 Ch. 95—Romer, J.

Gift out of Proceeds "on any sale"—Repugnancy.]—An absolute gift of property in a will was followed by a direction that, on any sale by the beneficiary, sums were to be paid to other persons out of the proceeds of such sale:—*Held*, that the direction was repugnant and void. *Elliott, In re; Kelly v. Elliott*, 65 L. J. Ch. 753; [1896] 2 Ch. 353—O'Harty, J.

On Death Leaving Issue—Period of Vesting.]—Testator directed that subject to the payment of the income of the proceeds of the conversion of his residuary real and personal estate to his wife during widowhood, and of an annuity to her on re-marriage, and subject also to the maintenance of his children until the youngest living should attain twenty-one, or being a daughter attain that age or marry, the trust fund and the income thereof, and all accumulations of income, should be held "in trust for all my children who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common." The testator died, leaving surviving him his wife and three children. Two of the children had attained twenty-one, one of them having attained that age at the date of the will:—*Held*, that the divesting clause in the event of death leaving issue referred to the death at any time of a child of the testator, and might take effect upon the death of a child not only during the lifetime of the widow, but also after her death. *O'Mahony v. Burdett* (44 L. J. Ch. 56n.; L. R. 7 H.L. 388) followed. *Schnadhorst, In re; Sandkuhl v. Schnadhorst*, 71 L. J. Ch. 454; [1902] 2 Ch. 234; 86 L. T. (426; 50 W. R. 485)—C.A.

Death "before becoming entitled" to a Share—Entitled in "Possession" or in "Interest."]—In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate,"—*Held*, upon the construction of the will, without reference to any authorities, that "becoming entitled" meant becoming entitled in possession, not becoming entitled in interest. *Maunder, In re; Maunder v. Maunder*, 72 L. J. Ch. 367; [1903] 1 Ch. 451; 88 L. T. 280; 51 W. R. 549—C.A.

Revocation by Codicil—Gift by Implication.]—By his will dated October 19, 1867, M. devised the lands of N. to trustees upon trust to the use of his son D. M. and his heirs upon his attaining the age of twenty-six, and in the

meantime, and until his said son should attain that age, to apply the rents and profits for his maintenance. The will also contained a power of advancement. The will then provided that in case D. M. should die before he attained twenty-six, then from and immediately after his death to the use of the testator's eldest son W. M., and the testator appointed his daughter residuary legatee and devisee. By a codicil dated July 15, 1868, the testator revoked all the gifts in his will to D. M. and in lieu thereof gave him a rentcharge charged upon all the testator's real estate in the county of D., and the testator declared the same to be in full substitution of all absolute and reversionary interests to which his said son or his heirs would or might have been entitled under his said will, which the testator thereby confirmed in all respects, save in so far and as to such parts thereof as were thereby revoked. The testator died on February 8, 1899. At the date of the codicil D. M. was under twenty-six, but he had attained that age at the date of the testator's death:—*Held*, that W. M. did not take any interest in the lands of N., but that the same passed under the residuary clause in the will. *M'Kay v. M'Kay*, [1901] 1 Ir. R. 109—C.A.

Fideicommissum.]—A testator bequeathed the residue of his property to his two sons; but in the event of either of them dying before the other without legitimate issue his share was to become the property of the other:—*Held*, that the event contemplated was not the death of one of the sons in the testator's lifetime, but death at any time; and that the sons were entitled equally, but "subject to a fideicommissum in the events and in favour of the objects mentioned in the clause of substitution." *Duffill v. Duffill*, 72 L. J. P.C. 97; [1903] A.C. 491; 89 L. T. 82—P.C.

Gift of Real and Personal Estate to Son for Life—Remainder to his Children "or their heirs"—Substitutional or Alternative.]—The testator, by his will dated in 1877, devised and bequeathed unto his wife absolutely all his real and personal estate, and, at the death of his said wife to his two sons J. and H. to be divided equally between them, and at their death their or his portions or portion if married to their or his child or children or their heirs. The testator died in 1890; his wife had died in 1879. J. died in 1895; he had two children—M. G., now living, and L. L., who died in 1888. L. L. had one child S., born in 1888 and now living:—*Held*, that S. was not entitled under the will, and that accordingly M. G. was absolutely entitled to the share in which J. had a life estate. *Ibbetson, In re; Ibbetson v. Ibbetson*, 88 L. T. 461—Joyce, J.

Gift to Issue of Deceased Brothers and Sisters—Sister Dead at Date of Will Leaving Issue—Substitutional Gift.]—A testator gave the residue of his estate upon trust for his brothers and sisters. The share of one brother was directed to be settled, and this clause was immediately followed by a proviso that "if any of my other brothers or sisters shall die in my lifetime leaving issue any of whom shall be living at my death, such issue so living shall take equally amongst themselves if more than one the share which such other brother or

sister would have taken if then living":—*Held*, that the gift to issue was substitutional, and that the children of a sister who was dead at the date of the will were not entitled to share in the residuary. *Offiler, In re; Offiler v. Offiler*, 38 L. T. 758—Buckley, J.

(oo) *Survivorship.*

"Surviving."—A testator gave on trust for each of his children certain real and leasehold property for life, and then for such child's children or grandchildren, if there were no children then living; and in case any of his children should die, childless, the testator directed that such child's share should go over to his or her "then surviving brothers and sisters" in equal shares for life, and after them to their children:—*Held*, that the words "then surviving" must be construed literally, and that the children of a predeceased child were not entitled to share. *Inderwick v. Tatchell*, 72 L. J. Ch. 893; [1903] A.C. 120; 88 L. T. 399—H.L. (E.)

There is no general rule as to the construction of the word "survivors" or "surviving" in the terms of the third proposition laid down by KAY, J., in *Bowman, In re; Lay, In re; Whytehead v. Boulton* (41 Ch. D. 525, 531)—namely, that the children of a predeceased tenant for life "participate, although there is no general gift over, where the limitations are to A, B, and C, equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares." *Harrison v. Harrison* (70 L. J. Ch. 551; [1901] 2 Ch. 136) approved. *Inderwick v. Tatchell; Inderwick v. Linder; Inderwick v. Inderwick*, 71 L. J. Ch. 1; [1901] 2 Ch. 738; 85 L. T. 432; 50 W. R. 100—C.A.

"Survivors"—Life Estate—Absolute Gift—Restriction as to Mode of Enjoyment—Settlement.]—A testator bequeathed to each of his four unmarried daughters 10,000*l.* New 3½ per cent. Government Stock to be paid on marriage; and 20,000*l.* Old 3½ per cent. Government Stock to be settled on marriage strictly on each daughter, and on her demise on her lawful issue; and in case any of his four daughters should die without leaving lawful issue who should attain the age of twenty-one or get married, then her 20,000*l.* Old 3½ per cent. Stock was to be divided between the survivors of his four daughters. The longest liver of the four daughters was a widow aged eighty-one without children. On her marriage a settlement was executed, the ultimate limitation of which was to the persons who, by virtue of the will, should be entitled to the same:—*Held*, that, in the events which had happened, she was absolutely entitled to the 20,000*l.* Stock bequeathed by her father's will and put in settlement on her marriage. *Olphert v. Olphert*, [1903] 1 Ir. R. 826—M.R.

Survivor—Other—Gift Over—Context.]—By his will a testator gave legacies in trust for his three illegitimate children, 400*l.* for T., 300*l.* for R., and 400*l.* for E., a married woman, for

her separate use. The will then provided as follows: "And in case of the decease of any or either of them, the said T., R., and E., without issue, or leaving issue who shall not live to attain his, her, or their age of twenty-one years, I order and direct that the said several and respective sum and sums of money so hereby left and bequeathed to and for them, the said T., R., and E., shall go and be equally divided between the survivors and survivor of them, for and during the term of their natural lives, and to their issue after their respective deaths who shall live to attain the age of twenty-one years." There was no gift over in the event of all the three legatees dying without issue. The will appointed a brother of the testator (who predeceased him) residuary legatee. R., who was unmarried, predeceased the testator. A suit was brought for the administration of testator's estate, and the assets were lodged in Court, and proved insufficient to pay the legacies, which had to abate rateably. E. died in 1865, leaving children, all of whom attained twenty-one. T. died in 1900 unmarried. At the date of T.'s death the funds in Court represented a moiety of the legacy of 300*l.* given to R., with a bequest over, and the legacy of 400*l.* originally bequeathed to T. with a gift over. The children of E. applied for payment out of the funds in Court:—*Held*, on the construction of the will, that the children of E. took no interest in the funds in Court, in which T. had a life interest, because their mother did not survive him, and that the word "survivor" must be read in its ordinary signification, and not as meaning "other," with the result that there was an intestacy as regards these funds. *Garland v. Smyth*, [1904] 1 Ir. R. 35—C.A.

"Surviving"—Tenants for Life—Settled Shares—Stirpital Survivorship.]—A testatrix gave a life interest in a one-third share of a money fund to each of her three daughters, M., C., and E., with remainder to the children of each tenant for life surviving their mother and attaining twenty-one, with a gift over on the death of any tenant for life without leaving such children to the "surviving" tenants for life for their lives, and then to the children of the "said surviving" tenants for life in like manner as their original shares were given, with an ultimate gift over on the failure of issue of all the tenants for life. E. survived her sisters, and died without leaving children. At her death there were living two of M.'s children who had attained twenty-one, but no children of C., although she had left two children surviving her, both of whom had attained twenty-one before their death:—*Held*, adopting the reasoning of LORD SELBORNE in *White v. Littlewood* (42 L. J. Ch. 275; L. R. 8 Ch. 70), and of SIR GEORGE JESSEL, M.R., and COTTON, L. J., in *Lucena v. Lucena* (47 L. J. Ch. 203; 7 Ch. D. 255), that the word "surviving" must be construed neither in its strict sense, nor as meaning "others," but as meaning "surviving by issue," and that consequently M.'s children were alone entitled to the accruing share. *O'Brien v. O'Brien* ([1896] 2 Ir. R. 459) not followed. *Bilham, In re; Buchanan v. Hill*, 70 L. J. Ch. 518; [1901] 2 Ch. 169; 84 L. T. 499; 49 W. R. 483—Joyce, J.

Gift of Defeasible Interest to Daughter A.—

Devise and Bequest to "my two nieces" Equally—Death Leaving no Issue—Share to the "Survivor."—A testator devised certain freeholds and bequeathed shares, stock, and moneys to his daughter L. D., and, in case she should happen to die leaving no issue (which event happened), he bequeathed the whole of his real and personal estate to his two nieces H. J. and R. A., their heirs and assigns, equally to be divided between them share and share alike for their separate use, "and, in case either of my said two nieces shall happen to die leaving no issue," he directed that "the part or share of her so dying shall go to the survivor." L. D. died leaving no issue, having outlived both nieces, of whom H. J. had died leaving issue in the lifetime of R. A., who, however, left no issue. The question being whether the moiety of R. A. passed on her death to the other niece, H. J., under the will, went as on an intestacy, or was not divested, — *Held*, that the use of the word "survivor" imported the contingency of there being a survivor into the gift to R. A., and that, there being no survivor, although she died without leaving issue, her moiety was not forfeited, but the two nieces took absolutely. *Deacon's Trusts, In re; Deacon v. Deacon*, 95 L. T. 701—Kekewich, J.

Cross-remainders by Implication—"Survivor or survivors," when to be construed "other or others."—A gift of property to take effect "after the death of my son C. and my daughters E. and S. A.," as to one-third thereof to the children of C., another third to the children of E., and the remaining third to the children of S. A., must not be construed to mean upon their respective deaths or after the decease of each of them, according to the rule referred to in *Hutchinson's Trusts, In re* (21 Ch. D. 811), when the application of the rule (having regard to the context of the will) might have the effect of cutting down by one-third a clear gift of the income in favour of tenants in common for life manifest in the earlier part of the will. Upon the death of a tenant for life of a share in income before the period of distribution, the accumulations of income of such share follow the destination of the *corpus*, provided the time described by statute for accumulations of income is not exceeded. *Rubbins, In re; Gill v. Worrall*, 78 L. T. 218—Stirling, J.

Life Gifts to A, B, and C—Remainders to Respective Children—Referential Gifts to Survivors and Respective Issue—Intestacy.—A testator bequeathed three shares in his property to his three sons respectively for their respective lives, and after the death of any of them the testator directed that the share of the one so dying should go to such of his children as should attain the age of twenty-one years or (being females) marry, with a proviso that, in case any of his said sons should die without leaving issue who should acquire a vested interest in the share of their father, then the share of such son should go to the surviving sons and their respective issue "upon such and the like trusts and to and for such and the like intents and purposes . . . as are herein declared with respect to their respective original" shares. There was no general gift over on the death of all three sons without issue. A and B predeceased C, each of them leaving issue. C died without ever having had issue:—*Held*, that, on

the true construction of the will, there was an intestacy as to the share of C on his death. *Harrison v. Harrison*, 70 L. J. Ch. 551; [1901] 2 Ch. 136; 85 L. T. 39; 49 W. R. 613—Cozens-Hardy, J.

The third rule of construction laid down by KAY, J., in *Bowman, In re; Lay, In re; Whythead v. Boulton* (41 Ch. D. 525), examined and dissented from. *Hodge v. Foot* (84 Beav. 349); *Arnold's Estate, In re* (89 L. J. Ch. 875; L. R. 10 Eq. 252), and *Walker's Estate, In re; Church v. Tyacke* (48 L. J. Ch. 598; 12 Ch. D. 205), not followed. *Id.*

"Heirs and assigns" of Survivor for Ever.—A testator by will devised a farm, after the determination of terms of ninety-nine years previously created, to the use of a nephew, and the four sons of such nephew, with an ultimate devise upon trust to and for the use of the heirs and assigns of the survivor of the four sons for ever. The survivor of such sons, during his lifetime, sold and conveyed the farm in fee-simple to the defendant, and died leaving the plaintiff his heiress-at-law. In an action by the plaintiff to recover possession of the farm, — *Held*, that, as the ultimate limitation to the heirs and assigns of the survivor of the four sons must be construed as being one to the heirs of the survivor and their assigns, the plaintiff, as heiress-at-law of the survivor of such sons, was entitled to succeed. *Quested v. Michell* (24 L. J. Ch. 722; 1 Jur. (N.S.) 488), *Tapner v. Merlott* (Willes, 177), and *Brookman v. Smith* (40 L. J. Ex. 161; L. R. 6 Ex. 291) considered. *Milman v. Lane*, 70 L. J. K.B. 731; [1901] 2 K.B. 745; 85 L. T. 180; 49 W. R. 545—C.A.

(pp) Vesting.

Gift of Moiety Contingent in Terms—Discretionary Gift of Income of Whole as Maintenance.—Although a testamentary gift of property contingent in its terms, coupled with a gift of the income of the property till the happening of the contingency, will be construed as conferring a vested interest, yet a testamentary gift of property to A and B in equal moieties on their attaining twenty-one, coupled with a direction that the income of the property during their respective minorities shall be applied for the maintenance of A and B, will not be construed as conferring vested interests on A and B before they attain twenty-one, since this direction is not equivalent to a gift to A and B of the income of their respective moieties within the meaning of the rule above stated. *Fox v. Fox* (L. R. 19 Eq. 286) distinguished. *Gosling, In re; Gosling v. Elcock*, 71 L. J. Ch. 680; [1902] 1 Ch. 915; 87 L. T. 63—Swinfen Eady, J.

Gift on Attaining Twenty-one—Gift of Income as Maintenance.—Testator by will gave his residuary real and personal estate in trust to pay and divide the same between his two children by name on their severally attaining the age of twenty-one years, the income during the respective minorities of his said two children to be applied in and towards their maintenance and support; and he also conferred a power of advancement on the trustees:—*Held*, that on

the true construction of the will the gift of income for maintenance was a gift of the income attributable to each share, and not an indiscriminate gift of the whole income, and therefore, according to the well-settled rule, each child took a vested interest though dying under the age of twenty-one years. *Gossling, In re; Gossling v. Gossling*, 72 L. J. Ch. 433; [1903] 1 Ch. 448; 88 L. T. 279—C.A.

Severance—Interest—Direction to Set Apart—Direction for Payment at Subsequent Dates.]—A testatrix directed her executors to set apart the sum of 200*l.* for a legatee, to be paid as to part at twenty-one, a further part at twenty-five, and the balance at thirty. The legatee survived the testatrix, and died before the age of twenty-five, having received part payment on attaining twenty-one:—*Held*, that the legacy vested absolutely at the death of the testatrix, and was payable at twenty-one, with interest from one year after her death. *Gosling v. Gosling* (Johnson, 265) followed. *Couturier, In re; Couturier v. Shea*, 76 L. J. Ch. 296; [1907] 1 Ch. 470; 96 L. T. 560—Joyce, J.

Gift to Life Tenants, then to their Respective Children or Legal Representatives—Alternative Gift.]—By his will a testator gave to two of his daughters three shares each of the twenty shares into which he directed his residuary estate to be divided, to be secured to them for the term of their lives, and after their deaths their respective three shares were “to be equally divided between their respective children or legal representatives.” One daughter had no children, the other had children who survived the testator, but all predeceased their mother. Upon the death of the mother,—*Held*, that the words “or legal representatives” referred to the legal representatives of the deceased tenant for life and not of her children, and that these words had not the effect of a substitutionary or divesting clause, but constituted an alternative gift to arise in the event of there being no child who took a vested interest. Consequently the children of the testator’s daughter took vested interests which passed to their legal personal representatives. *Roberts, In re; Percival v. Roberts*, 72 L. J. Ch. 597; [1903] 2 Ch. 200; 88 L. T. 505—Joyce, J.

Direction to Convey at Postponed Period—Gift over to Survivors and Issue of Predeceasing—Vesting in Issue.]—A testator directed his trustees, on the death or second marriage of his widow, to pay the residue to such of the children as had arrived at the age of twenty-one, or as they respectively reached that age, declaring that the issue of children dying leaving issue should be entitled “to the shares, original and accruing, which their parent would have taken by survivorship,” and that the share of any child dying without leaving issue should be divided among the surviving children and the issue of such children as might have died leaving issue, equally *per stirpes*. A, a son of the testator, survived the testator, but predeceased the widow, leaving a child, B. It was found that no right had vested in A:—*Held*, that the share destined to A did not vest in B on the death of her father, the issue of children predeceasing the period of payment being substituted to their parent and being subject to the

contingencies as regarded survivorship which qualified his right; and that vesting in B was postponed until the death or second marriage of the widow, but not until B attained twenty-one. *Martin v. Holgate* (35 L. J. Ch. 789; L. R. 1 H.L. 175) distinguished. *Banks’s Trustees v. Banks’s Trustees*, [1907] S.C. 125—Ct. of Sess.

Life Rent—Issue Predeceasing Parent.]—A testator bequeathed to trustees a fund upon trust to pay the income thereof equally to each of his daughters, and directed as follows: “On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters” the fund of which such daughter was life-rentrix. One of the daughters had four children, two of whom died before their mother:—*Held* (Lord Watson and Lord HERSHELL dissenting), that the predeceasing children took a vested interest in the fund which passed to their representatives. *Hickling v. Fair*, 68 L. J. P.C. 12; [1899] A.C. 15—H.L. (Sc.). And see ABSOLUTE GIFT, *supra*.

Future Gift—Discretionary Trust of Intermediate Income.]—Where a testator directed his trustees to hold a third share of his residuary estate in trust to pay the income thereof, or such part thereof as they should think fit, to his son for his advancement, preferment, or benefit, by equal weekly instalments, until he should attain the age of thirty-five years, and then directed his trustees to pay the corpus of such share of residue to his son on attaining that age, it was held that upon the death of the testator the son took an immediate vested interest, although he had not then attained the age of thirty-five years. The rule of law enunciated by SIR G. JESSEL, M.R., in *Parker, In re; Barker v. Barker* (16 Ch. D. 44, 46), approved and applied. *Williams, In re; Williams v. Williams*, 76 L. J. Ch. 41; [1907] 1 Ch. 180; 95 L. T. 759—Neville, J.

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— See *Bristol (Marquess) v. Inland Revenue Commissioners*, col. 2150.

"Conveyed."—See *Lancashire and Cheshire Coal Association and London and North-Western Railway, In re*, col. 2021.

"Cook's shop."—See *Bullen v. Ward*, col. 2508.

"Cops."—See *Eianfstaengl v. W. H. Smith & Son*, col. 553.

"Correct weighing instrument."—See *Crick v. Nicholls*, col. 2750.

"Costs of execution."—See *Beeston, In re*, col. 123.

— See *English and Ayling, In re*, col. 123.

"Court of competent jurisdiction."—See *Rex v. Garrett*, col. 1665.

"Covenant."—See *Boyce v. Eddbrooke*, col. 2236.

"'Creation' of charge."—See *Harrogate Estates, Lim., In re*, col. 424.

"Creditor."—See *Blackpool Motor-Car Co., In re*, col. 127.

— See *Warren, In re; Tranter, ex parte*, col. 126.

"Criminal cause or matter."—See *Robson v. Biggar*, col. 19.

— See *Southwark and Vauxhall Water Co. v. Hampton Urban Council*, col. 18.

"Crossed cheque."—See *Capital and Counties Bank v. Gordon*, col. 164.

"Customer."—See *Great Western Railway v. London and County Banking Co.*, col. 167.

"Daily."—See *London County Council v. South Metropolitan Gas Co.*, col. 910.

"Damage by collision."—See *The Normandy*, col. 2447.

"Dangerous."—See *Williams v. Richards*, col. 7.

"Dealer in spirits."—See *Timwell v. Mayhook*, col. 2104.

"Debenture."—See *Speyer v. Inland Revenue Commissioners*, col. 2155.

"Debt, claim or demand lawfully incurred or become due."—See *Sharphington v. Fulham Guardians*, col. 1824.

"Deck cargo."—See *Cairn Line v. Trinity House Corporation*, col. 2433.

"Deck cargo at merchant's risk."—See *Diedrichsen v. Farquharson*, col. 2349.

"Deer 'kept or being in' forest."—See *Threkelde v. Smith*, col. 635.

"Delivered in execution."—See *Harrison and Bottomley, In re*, col. 827.

"Demurrage."—See *Rex v. Marylebone County Court Judge*, col. 2018.

"Dependent."—See *Main Colliery Co. v. Davies*, col. 1588.

— See *Coulthard v. Consett Iron Co.*, col. 1590.

"Dependants."—See *Williams v. Ocean Coal Co.*, col. 1589.

— See *Simmons v. White*, col. 1588.

"Description of nets."—See *Clayton v. Peirse*, col. 862.

"Deserted by her husband."—See *Southwark Union v. City of London Guardians*, col. 1835.

"Desertion."—See *Huxtable v. Huxtable*, col. 929.

— See *Koch v. Koch*, col. 928.

— See *Sickert v. Sickert*, col. 927.

— See *Synge v. Synge*, col. 927.

"Die without ever having been married."—See *Smith, In re; Wilkins v. Smith*, col. 2277.

"Difference."—See *Rex v. Marylebone County Court Judge and Great Western Railway; Phillips, Ex parte*, col. 2018.

"Direction in an action or matter."—See *Kniveton v. Northern Employers' Mutual Indemnity Co.*, col. 616.

"Disclaimer."—See *Owen's Patent, In re*, col. 1787.

"Dispute."—See *Miller v. Solomon*, col. 641.

"Distinctive mark."—See "Apollinaris" Trade Mark, *In re*, col. 2532.

"Distinctive or fancy word."—See *Burroughs, Wellcome & Co.'s Trade Marks, In re*, col. 2533.

"Distinctive word."—See *Faulder & Co.'s Trade Mark, In re*, cols. 2532, 2533.

"Distressed Seaman."—See *Board of Trade v. Sailing Ship "Glenpark"*, col. 2304.

"Disused burial ground."—See *Bosworth and Gravesend Corporation, In re*, col. 755.

"Dividend."—See *Kent Waterworks Co. v. Lamplough*, col. 2682.

"Dock."—See *Hennessy v. McCabe*, col. 1521.

"Dock, wharf, or quay."—See *Kenny v. Harris*, col. 1523.

"Domestic purposes."—See *Barnard Castle Urban Council v. Wilson*, col. 2688.

— See *South-West Suburban Water Co. v. St. Marylebone Guardians*, col. 2685.

— See *Harrogate Corporation v. Mackay*, col. 2686.

"Drain."—See *Webb v. Knight*, col. 1369.

— See *Att.-Gen. v. Copeland*, col. 781.

— See *St. Matthew, Bethnal Green, Vestry v. London School Board*, col. 1650.

"Drain or sewer."—See *Heaver's Executors v. Fulham Borough Council*, col. 1647.

"Drains."—See *Ystradgynog and Pontypridd Main Sewerage Board v. Bensted*, col. 2123.

"Due under this Act."—See *The Fulham*, col. 2423.

"Duties."—See *Farlow v. Stevenson*, col. 1246.

"Dwelling-house."—See *Robertson v. King*, col. 1326.

"Dwelling-house to be inhabited by persons of the working class."—See *Crow v. Davis*, cols. 1628, 1629.

"Earnings."—See *Great Northern Railway v. Dawson*, col. 1572.

— See *Houghton v. Sutton Heath and Lea Green Colliery Co.*, col. 1572.

— See *Pomphrey v. Southwark Press*, col. 1571.

— See *Midland Railway v. Sharpe*, col. 1572.

"Ecclesiastical charity."—See *Ross's Charity, In re*, col. 226.

— See *Perry Almshouses, In re*, col. 226.

"Eldest son."—See *Amyot v. Dwarries*, col. 2841.

"Emoluments."—See *The Elmville*, col. 2293.

"Employment for the purposes of gain."—See *Mather v. Lawrence*, col. 2204.

"Employment in agriculture."—See *Smith v. Coles*, col. 1492.

"Endowment."—See *Church Army, In re*, col. 246.

"Enfranchisement."—See *Bruce, In re; Halsey v. Bruce*, col. 2255.

"Engage and employ."—See *Turner v. Sawdon & Co.*, col. 1456.

"Engineering work."—See *Tulloch v. Waygood & Co.*, col. 1517.

— See *Back v. Dick Kerr & Co.*, col. 1517.

"Enjoyed with."—See *International Tea Co.'s Stores v. Hobbs*, col. 734.

"Entitled."—See *Maunder, In re*, cols. 2853, 2890.

"Equality of votes."—See *Bland v. Buchanan*, col. 564.

"Equipment."—See *Unite, In re; Edwards v. Smith*, col. 225.

"Estate duty."—See *Leveridge, In re*, col. 2088.

"Event."—See *Hoyes v. Tate (Lady)*, col. 585.

"Ex cars from alongside steamer."—See *Isis Steamship Co. v. Bahr, Behrend & Ross*, col. 2317.

"Exclusive power."—See *Young v. Cuthbert*, col. 2198.

"Exemption from prosecution or punishment acquired by lapse of time."—See *Rex v. Brixton Prison (Governor); Calberla, In re*, col. 857.

"Exercise."—See *Saccharin Corporation v. Reitmeyer*, col. 1784.

"Express provision to the contrary."—See *Lewis, In re; Lewis v. Smith*, col. 2081.

"Express stipulation."—See *Meredith, In re; Stone v. Meredith*, 2822.

— See *Lysaght, In re*, col. 2822.

"Factory."—See *Nash v. Hollinshead*, col. 1525.

— See *Law v. Graham*, col. 1464.

— See *Barrett v. Kemp*, col. 1521.

— See *Dyer v. Swift Cycle Co.*, col. 1519.

— See *Houlder Line, Lim. v. Griffin*, col. 1491.

— See *Spacey v. Dowlais Gas and Coke Co.*, col. 1524.

— See *Mile End Old Town Guardians v. Hoare*, col. 1463.

— See *Handford v. Clarke (No. 2)*, col. 1515.

— See *Spencer v. Livett, Frank & Son*, col. 1533.

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— See *Cattermole v. Atlantic Transport Co.*, col. 1534.

— See *Kenny v. Harrison*, col. 1523.

— See *McNicholas v. Dawson*, col. 1525.

— See *Hall v. Snowden, Hubbard & Co.* (No. 2), col. 1523

— See *Flowers v. Chambers*, col. 1534.

“False or unjust.”—See *London County Council v. Payne* (No. 1) and (No. 2), col. 2748.

“False or unjust scale.”—See *London County Council v. Payne*, col. 2748.

“False or unjust weights.”—See *Lane v. Rendall*, cols. 2748.

“False trade description.”—See *Fowler v. Cripps*, col. 2544.

“Families or friends.”—See *Keith v. Twentieth Century Club*, col. 683.

“Fancy word.”—See *Gestetner's Trade Mark, In re*, col. 2530.

“Faults or errors in management of vessel.”—See *Rowson v. Atlantic Transport Co.*, col. 2363.

“Fictitious or non-existing person.”—See *Macbeth v. North and South Wales Bank*, col. 162.

“Fictitious person.”—See *Vinden v. Hughes*, col. 164.

“Filed with the Registrar.”—See *Yolland, Husson & Birkett, Lim., In re*, col. 428.

“Final judgment.”—See *Owen, In re; Peters, ex parte*, col. 80.

— See *Bankruptcy Notice, In re* (No. 1), col. 81.

“Final order.”—See *Bozon v. Altrincham Urban Council* (No. 1), col. 22.

— See *McDonald v. Belcher*, col. 302.

— See *Kydd v. Liverpool Watch Committee*, col. 1172.

“Final settlement.”—See *Palace Shipping Co. v. Caine*, col. 2300.

“Fine, or sum of money in the nature of a fine.”—See *Waite v. Jennings*, col. 1219.

— See *Jenkins v. Price*, col. 1230.

“First appointment of trustee.”—See *Cohen, In re*, col. 117.

“First refusal.”—See *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, col. 2623.

“Floating charge.”—See *Yorkshire Woolcombers Association, In re*, col. 416.

— See *Mlingworth v. Houldsworth*, col. 416.

“Flotation.”—See *Torva Exploring Syndicate v. Kelly*, col. 255.

“Franchise.”—See *Bow v. Hart*, col. 602.

— See *Att.-Gen. v. British Museum Trustees*, col. 663.

“Freight and all other conditions as per charterparty.”—See *Diederichsen v. Farquharson*, col. 2349.

“Fresh evidence.”—See *Johnson v. Johnson*, col. 961.

“Front or nearest external wall.”—See *Att.-Gen. v. Metcalf*, col. 1615.

“Full and complete cargo.”—See *Isis Steamship Co. v. Bahr, Behrend & Ross*, col. 2318.

“Full compensation.”—See *Barnett v. Eccles Corporation*, col. 1419.

“Furniture.”—See *Hoggarth v. Walker*, cols. 1040, 1049.

“Future estate.”—See *Walter v. Yalden*, col. 1296.

“Gift.”—See *Att.-Gen. v. Holden*, col. 2075.

“Given in substitution for a like security.”—See *Mount Lyell Mining Co. v. Inland Revenue Commissioners*, col. 2155.

“Gold and silver plate.”—See *Goldsmiths' Co. v. Wyatt*, col. 2059.

“Good and sufficient evidence.”—See *Harvey v. Regem*, col. 293.

“Good cause.”—See *Granville v. Firth*, col. 569.

— See *Morley v. Bevington*, col. 609.

— See *Tipping v. Jepson*, col. 569.

“Good consideration.”—See *Stackeman v. Paton*, col. 554.

“Good faith.”—See *Gilbey v. Rush*, col. 2237.

“Goods taken in execution.”—See *St. Mary-lebone Vestry v. London County (Sheriff)*, col. 1672.

“Grade.”—See *Perry v. Wright*, col. 1567.

“Guilty of any default.”—See *Bath v. Bath*, col. 1926.

“Habitual drunkard.”—See *Robson v. Robson*, col. 958.

“Hackney carriage.”—See *Hawkins v. Edwards*, col. 915.

— *Yorkshire Electric Tramways v. Ellis*, col. 914.

"Handicraftsman."—See *Smith v. Associated Omnibus Co.*, col. 1489.

"Harsh and unconscionable."—See *Samuel v. Newbold*, col. 877.

"Heirs."—See *Tringham's Trusts*, *In re*; *Tringham v. Greenhill*, col. 2270.

"Hereditament capable of actual occupation"—See *Ystradgofedwg &c. Sewerage Board v. Bensted*, col. 2123.

"Holder in due course."—See *Lewis v. Clay*, col. 170.

"Holder in his own right."—See *Nash v. De Freville*, col. 171.

— See *Sutton v. English and Colonial Produce Co.*, col. 349.

"Home."—See *Purves v. Straits of Dover Steamship Co.*, col. 2297.

"Honestly."—See *Second East Dulwich 745th Star Bowkett Building Society*, *In re*, col. 2615.

"Honestly and reasonably."—See *Grindey*, *In re*; *Clews v. Grindey*, col. 2610.

— See *Perrins v. Bellamy*, col. 2607.

"Hospital."—See *Ormskirk Union v. Chorlton Union*, col. 1844.

"House."—See *Lewin v. End*, col. 1669.

— See *Kimber v. Admans*, col. 2668.

"Immoral act."—See *Fitzmaurice v. Heskelth*, col. 752.

"Immoral habit."—See *Moore v. Oxford (Bishop)*, col. 752.

"Impositions."—See *Warriner*, *In re*; *Brayshaw v. Ninnis*, col. 1246.

"Impositions and outgoings."—See *Goldstein v. Hollingsworth*, col. 1467.

"Inaccessible on account of ice."—See *Tillmanns v. Knutsford Steamship*, col. 2365.

"In actual military service."—See *Gattward v. Knee*, col. 2755.

"In England or Ireland or elsewhere."—See *Rea v. Russell*, col. 623.

"In his own right."—See *Boschoek Proprietary Co. v. Fuks*, col. 349.

"In over or under any street."—See *Escott v. Newport Corporation*, cols. 1258, 1325.

"In the character of trustee."—See *A.*, *In re*, col. 1434.

"In the employment of."—See *Normandy v. Ind, Coope & Co.*, col. 404.

"In the meantime."—See *Clifden (Viscount)*, *In re*, col. 1294.

"Inadvertence."—See *Pihs, Ex parte*, col. 183.

— See *Jackson & Co.*, *In re*, col. 379.

"Inclined plane."—See *Lancashire Brick and Terra-Cotta Co. v. Lancashire and Yorkshire Railway*, col. 2005.

"Income."—See *Att.-Gen. v. Strange*, col. 2069.

"Incoming tenant."—See *Flack*, *In re*; *Berry, ex parte*, col. 2692.

"Incorporeal hereditament."—See *Brotherton*, *In re*; *Brotherton v. Brotherton*, col. 2240.

"Infamous or disgraceful in a professional respect."—See *Hill v. Clifford*, col. 1769.

"Injurious affect."—See *Roberts v. Gwyrfa Rural Council*, col. 597.

"Injurious affected."—See *Long Eaton Recreation Grounds Co. v. Midland Railway*, col. 1266.

"Instituted prosecution."—See *Brooks v. Bagshaw*, col. 1354.

"Instrument whereby any property is transferred or vested."—See *Kemp v. Inland Revenue Commissioners*, col. 2149.

"Insufficient or unreasonable."—See *Mansfield Corporation v. Butterworth*, col. 1410.

"Intent to evade the payment of duty."—See *Payne v. Regem*, col. 265.

"Interest."—See *Bond v. Barrow Hamatite Steel Co.*, col. 389.

"Interest in land."—See *Warr v. London County Council*, col. 1261.

"Interest purchased or provided by deceased."—See *Lethbridge v. Att.-Gen.*, col. 2073.

"Interested in."—See *Gophir Diamond Co. v. Wood*, col. 532.

"Interested or concerned in any contract."—See *City of London Electric Lighting Co. v. London Corporation*, col. 561.

"Interference."—See *Sykes v. Barraclough*, col. 1680.

"Interlocutory order."—See *Jerome*, *In re*, col. 23.

"Interlocutory matter or thing."—See *Pepperell v. Hird*, col. 1917.

"Interruption."—See *Smith v. Baxter*, col. 725.

"Invented word."—See *Christy v. Tipper*, col. 2530.

— See *National Biscuit Co.'s Application*, *In re*, col. 2531.

— See *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, col. 2531.

— See *Gestetner's Trade Mark*, *In re*, col. 2530.

— See *Linotype Co.'s Trade Mark*, *In re*, col. 2531.

"Inventory subscribed by the lodger."—See *Godlonton v. Fulham and Hampstead Property Co.*, col. 1198.

"Issue."—See *Edyvane v. Archer*, col. 2857.

— See *Birks*, *In re*; *Kenyon v. Birks*, col. 2862.

— See *Coulden*, *In re*; *Coulden v. Coulden*, col. 2863.

"Issue of Debentures."—See *Perth Electric Tramways*, *In re*, col. 415.

"Judgment or order."—See *Llewellyn v. Rowland*, col. 613.

"Just and equitable."—See "*Chic*," *Lim.*, *In re*, col. 451.

— See *Williams v. Midland Railway*, col. 2019.

— See *Farmers' United, Lim.*, *In re*, col. 379.

— See *Melson & Co.*, *In re*, col. 454.

"Keep and conduct"—See *Palethorpe v. Home Brewery*, col. 1228.

"Knowingly engaged or interested in" contract.—See *Norton v. Taylor*, col. 1306.

"Knowingly issuing prospectus."—See *Hoole v. Speak*, col. 334.

"Laid out and used."—See *Young v. Kingston-on-Thames &c. Burials Committee*, cols. 754, 761.

"Land."—See *Sidebottom*, *In re*; *Beeley v. Waterhouse*, col. 233.

— See *Ryland*, *In re*; *Roper v. Ryland*, col. 233.

"Land covered with water."—See *Hampton Urban Council v. Southwark and Vauxhall Water Co.*, col. 1424.

— See *Smith's Dock Co. v. Tynemouth Corporation*, col. 1424.

"Land used only as a railway."—See *Wakefield and District Light Railway v. Wakefield Corporation*, col. 1423.

"Lands."—See *Newton, Chambers & Co. v. Hall*, col. 2139.

"Lawfully detained."—See *Whalley*, *In re*, col. 1441.

Legacy "in addition to sums owing."—See *Rowe*, *In re*, col. 2366.

"Lessees and sub-lessees or tenants."—See *Keith v. Twentieth Century Club*, col. 683.

"Lessees or holders of the present leases."—See *King v. Rymill*, col. 2856.

"Lessor, his heirs and assigns."—See *Matthews v. Usher*, col. 1203.

"Let for a term not exceeding three months."—See *Hammond v. Farrow*, col. 2864.

"Let out in separate tenements."—See *Western v. Kensington Assessment Committee*, col. 1667.

"Liable."—See *Saunders v. Newbold*, col. 881.

"Liable to be seized."—See *Grivell v. Malpas*, col. 1631.

"Lights enjoyed."—See *Godwin v. Schweppes*, col. 718.

"Limits of the port."—See *Assheton-Smith v. Owen*, cols. 2426, 2429.

"Loading in regular turn."—See *Jones v. Green*, col. 2336.

— See *Quilpué (Barque) v. Brown*, col. 2325.

"Local or private Act."—See *London and North-Western Railway v. Runcorn Rural Council*, col. 1373.

"Loss of the ship."—See *Sivewright v. Allen*, col. 2303.

"Luggage."—See *Britten v. Great Northern Railway*, col. 197.

"Man in possession."—See *Scott v. Denton*, col. 1866.

"Maintain and keep efficient."—See *Att.-Gen. v. Yorkshire (W.R.) County Council*, col. 2196.

"Managed in the way of his trade or employ."—See *Challoner v. Robinson*, col. 1196.

"Manual labour."—See *Hoare v. Green*, col. 1466.

"Manufacture."—See *McNichol v. Pinch*, col. 2103.

"Market gardens."—See *Smith v. Richmond*, col. 1421.

"Marketable security."—See *Speyer v. Inland Revenue Commissioners*, col. 2155.

— See *Revelstoke (Lord) v. Inland Revenue Commissioners*, col. 2155.

"Matter of practice and procedure."—See *Long v. Great Northern and City Railway*, col. 21.

— See *Frere and Staveley Taylor & Co. and North Shore Mill Co.*, *In re*, col. 20.

"Merely auxiliary."—See *Rea v. Carter*, col. 1125.

"Mineral."—See *Todd and North-Eastern Railway, In re*, cols. 1675, 2000.

"Minerals."—See *Scott v. Midland Railway*, col. 1675.

— See *Great Western Railway v. Blades*, col. 2000.

"Misbehaviour."—See *Mile End Guardians v. Sims*, col. 1839.

"Misdelivery."—See *Mallett v. Great Eastern Railway*, col. 197.

"Misdemeanour."—See *Du Cros v. Lam-bourne*, col. 648.

"Mistake."—See *Prescott v. Lee*, col. 778.

"Molestation."—See *Hunt v. Hunt*, col. 980.

"Money."—See *Bramley, In the goods of*, col. 2789.

"Money-lender."—See *Litchfield v. Dreyfus*, col. 878.

"Money liable to be laid out in the purchase of land."—See *Soltani's Settled Estate, In re*, col. 2248.

"Moneys owing."—See *Derbyshire, In re; Webb v. Derbyshire*, col. 2872.

"Month."—See *Bruner v. Moore*, col. 534.

"Mortgage or debenture."—See *City of London Brewery Co. v. Inland Revenue Commissioners*, col. 2157.

"Narrow channel."—See *The Kaiser Wilhelm der Grosse*, col. 2398.

— See *The Ashton*, col. 2396.

— See *The Glengarriff*, col. 2399.

"Naval service."—See *Westhorpe v. Powley*, col. 50.

"Navigating."—See *Gardner, Locket & Hinton v. Doe*, col. 2443.

"Necessary or proper party."—See *The Duc D'Aumale (No. 1)*, col. 1909.

"Neglect."—See *Reg. v. Senior*, col. 642.

"Neglect or default in the execution of any public duty."—See *Sharpington v. Fulham Guardians*, col. 1823.

— See *Lyles v. Southend-on-Sea Corporation*, col. 1990.

"Negligence clause."—See *The Northumbria*, col. 2349.

"Negotiating loan."—See *Furber, In re*, col. 2469.

"Nephews and nieces."—See *Corse v. Napper, In re; Freeborn v. Napper*, col. 2828.

"New building."—See *Southend-on-Sea Corporation v. Archer*, col. 1323.

"New street."—See *Att.-Gen. v. Rufford*, col. 1391.

— See *Allen v. Fulham Vestry*, cols. 1657, 1660.

— See *Clerkenwell Vestry v. Edmondson*, col. 1645.

— See *Property Exchange (No. 1) v. Wandsworth Board of Works*, col. 1664.

— See *Devonport Corporation v. Tozer*, cols. 671, 1392.

"Nominal share capital."—See *Att.-Gen. v. Midland Railway*, col. 2154.

"Non-textile factory."—See *Hoare v. Truman, Hanbury & Co.*, col. 1464.

"Not actually producing income."—See *Lewis, In re; Davies v. Harrison*, col. 2517.

"Not less than 14 days."—See *McQueen v. Jackson*, col. 1355.

"Not under command."—See *The Ballanoch*, col. 2394.

"Noise or nuisance."—See *Wauton v. Cop-pard*, col. 2670.

"Nuisance."—See *Midwood & Co. v. Manchester Corporation*, col. 2502.

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"Obliged to resign."—See *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*, col. 290.

"Occupation lease."—See *Browne v. Peto*, col. 1714.

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— See *Wolfe v. Surrey County Council (Clerk)*, col. 770.

— See *Smith v. Standard Steam Fishing Co.*, col. 1541.

"Occupier" of Road.]—See *Rea v. Somers; General Estates Co., Ex parte*, col. 2736.

"Offer to the public."—See *Burrows v. Matabele Gold Reefs Co.*, col. 369.

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"On sale or return."—See *Weiner v. Gill*, col. 2174.

"One building only."—See *Humphery v. Young*, col. 1369.

"One house."—See *Ilford Park Estates, Lim. v. Jacobs*, col. 2669.

"One messuage or dwelling-house."—See *Rogers v. Hosegood*, col. 2664.

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"Option of renewal."—See *Lewis v. Stephenson*, col. 1189.

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"Outgoings."—See *Greaves v. Whitmarsh, Watson & Co.*, col. 1234.

— See *Stock v. Meakin*, cols. 1412.

— See *Harris v. Hickman*, col. 1234.

— See *Morris v. Beal*, col. 1232.

— See *Stockdale v. Ascherberg*, col. 1234.

— See *McClure's Trusts, In re*, col. 2517.

"Overtime."—See *Smith v. Sibray Hall & Co.*, col. 1471.

"Owner."—See *Broadbent v. Shepherd*, col. 1364.

— See *Hackney Borough Council v. Lee Conservancy Board*, cols. 1659, 1661.

— See *Sydney Municipal Council v. Terry*, col. 262.

— See *The Steam Hopper No. 66*, col. 2406.

— See *Wix v. Rutson*, col. 1658.

— See *Hampstead Borough Council v. Midland Railway*, col. 1660.

— See *Driscoll v. Battersea Borough Council*, col. 1659.

— See *London County Council v. Wandsworth Borough Council*, col. 1659.

"Owners."—See *The Steam Hopper No. 66*, col. 2406.

— See *Von Freeden v. Hull*, col. 2291.

"Owners of land."—See *Hampstead Borough Council v. Midland Railway*, col. 1660.

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"Park."—See *Pease v. Courtney*, col. 2237.

"Party interested."—See *Roberts-Jones and Everett, In re*, col. 2459.

"Passage home."—See *Purves v. Straits of Dover Steamship Co.*, col. 2297.

"Pattern."—See *Heath v. Rollason*, col. 555.

"Pay."—See *Goodwin v. Sheffield Corporation*, col. 1819.

— See *Henderson v. Arthur*, col. 816.

— See *Upperton v. Ridley*, col. 1819.

"Payable."—See *Young v. Kingston-on-Thames &c. Burials Committees*, col. 754.

"Pecuniary investment."—See *Evan Price, In re*, col. 2861.

"Penalty for non-execution of contract."—See *Diestel v. Stevenson*, col. 1809.

"Periodical payments in the nature of income."—See *Rochester (Bishop) v. Le Fanu*, col. 662.

"Permitting."—See *Korten v. West Sussex County Council*, col. 1341.

"Perquisites or profits."—See *Cooper v. Blakiston*, col. 2116.

"Person."—See *Fulham Union v. Woolwich Union*, col. 1832.

— See *Pearks v. Ward*, col. 1334.

— See *Hirst v. West Riding Union Banking Co.*, col. 509.

"Person accounting."—See *Rea v. Carson Roberts* [1908], col. 220.

"Person aggrieved."—See *Moss v. Hancock*, col. 1160.

— See *Rea v. Groom*, col. 1113.

— See *Stokes v. Mitchesen*, col. 1174.

"Person duly licensed."—See *Reg. v. Yorkshire (W.R.) Justices*, col. 1126.

Person "in loco parentis."—See *Ashton, In re*, col. 1877.

"Person offending."—See *Blackpool Corporation v. Johnson*, col. 1328.

"Person residing in the United Kingdom."—See *Goerz v. Bell*, col. 2107.

— See *De Beers Consolidated Mines v. Howe*, col. 2106.

"Person through whose act or default the nuisance was caused."—See *Nathan v. House*, col. 1638.

"Personal earnings."—See *Mercer v. Vans Colina*, col. 108.

"Personal estate."—See *Grassi, In re*, col. 2754.

"Personal property."—See *Att.-Gen. v. Bondesborough (Earl)*, col. 2060.

"Personal representatives."—See *Pawley and London and Provincial Bank's Contract, In re*, col. 2654.

— See *Cohen's Executors and London County Council, In re*, col. 832.

— See *Pawley and London and Provincial Bank's Contract, In re*, col. 2654.

"Personally or by proxy."—See *McMillan v. Le Roi Mining Co.*, col. 406.

"Persons interested."—See *Toronto City v. Canadian Pacific Railway* [1908], col. 285.

"Persons riotously and tumultuously assembled together."—See *Field v. Metropolitan Police District Receiver*, col. 2165.

"Pilotage district."—See *The Assaye*, col. 2385.

"Pistol."—See *Bryson v. Gamage*, col. 1817.

"Place."—See *Maritime Insurance Co. v. Alianza Insurance Co. of Santander*, col. 1040.

— See *Charnock v. Court*, col. 626.

— See *Powell v. Kempton Park Racecourse Co.*, col. 894.

— See *Brown v. Patch*, col. 896.

— See *Reg. v. Yorkshire (West Riding) Justices*, col. 1176.

— See *Reg. v. Humphreys*, col. 895.

— See *Rex v. Warwickshire Justices*, col. 1128.

"Place of public resort."—See *Kitson v. Ashe*, col. 1320.

"Plant."—See *Hall & Co. v. Rickman*, col. 2125.

"Policy of life insurance."—See *Prudential Assurance Co. v. Inland Revenue Commissioners*, col. 2159.

"Poor rate."—See *Islington Borough Council v. London School Board*, col. 1844.

"Port charges."—See *Whittall v. Rahitkens Shipping Co.*, col. 2334.

"Portion."—See *Stephens, In re*; *Kilby v. Betts*, col. 3.

"Power in or over or in respect of property."—See *Rose, In re*; *Hasluck v. Rose*, col. 105.

"Premises."—See *Metropolitan Water Board v. Paine*, col. 2688.

"Premises at the time of the passing of this Act licensed."—See *Igoe v. Shann*, col. 1122.

"Prerogative."—See *Att.-Gen. v. British Museum Trustees*, col. 663.

"Prescribed rate."—See *Chelsea Water Co. and Metropolitan Water Board, In re*, col. 2683.

"Present form of investment."—See *Smith, In re*; *Smith v. Lewis*, col. 2587.

"Present right to receive."—See *Hervey v. Wynn*, col. 1298.

"Preserved."—See *Turner, In re*; *Wood v. Turner*, col. 2475.

"Pretext of monopoly."—See *Pick v. Hindes*, col. 1784.

"Private dwelling-house."—See *McNair v. Baker*, col. 1633.

"Private residence."—See *Rogers v. Hosegood*, col. 2664.

— See *Hobson v. Tulloch*, col. 2669.

"Proceeding in the Supreme Court."—See *Appleton, French & Scrafton, In re*, col. 470.

"Proceeding instituted."—See *Gordon v. Gordon*, col. 995.

— See *Nunn & Co. v. Tyson*, col. 989.

"Proceeds of sale."—See *Garner, In re*; *Pedley, ex parte*, col. 101.

"Process of loading."—See *Lysons v. Knowles*, col. 1565.

"Professional misconduct."—See *Clifford v. Timms*, col. 1778.

— See *Hill v. Clifford*, col. 1769.

"Profits available for dividend."—See *Fisher v. Black and White Publishing Co.*, col. 388.

"Profits available for dividends."—See *Crichton's Oil Co., In re*, col. 478.

"Profits derived from or received in New Zealand."—See *Income Tax Commissioner for New Zealand v. Eastern Extension Telegraph Co.*, col. 299.

"Promissory note."—See *Smith v. Dean*, col. 2143.

— See *Speyer v. Inland Revenue Commissioners*, col. 2155.

"Promoter."—See *Olympia, Lim., In re*, col. 327.

"Promotion of science."—See *Royal College of Surgeons, In re*, col. 2058.

"Proper outgoings."—See *Wrexham, Mold, and Connah's Quay Railway, In re* (No. 3), col. 2053.

"Property and effects."—See *Leas Hotel Co., In re*, col. 411.

"Property except lands."—See *West London Syndicate v. Inland Revenue Commissioners*, col. 2146.

"Property of the company."—See *Lake George Mines, Limited, In re*, col. 461.

"Property recovered or preserved."—See *Tweed, Ex parte*, col. 2474.

"Property settled."—See *Blood v. Blood*, col. 948.

— See *Dormer v. Ward*, col. 974.

"Proprietor of author's manuscript."—See *Macmillan v. Dent*, col. 550.

"Provable left."—See *Buckwell v. Norman*, col. 134.

"Providing."—See *Ward v. Portsmouth Corporation*, col. 754.

"Provisional."—See *Otto Electrical Manufacturing Co., In re; Jenkins' Claim*, col. 365.

"Public authority."—See *The Johannesburg*, col. 1989.

"Public building."—See *Mile End Old Town Guardians v. Hoare*, col. 1468.

—See *Moses v. Marsland*, col. 1629.

"Public company."—See *Castlehow, In re; Lamond v. Carter*, col. 2588.

"Public duty or authority."—See *Ambler v. Bradford Corporation*, col. 2471.

—See *Parker v. London County Council*, col. 1990.

"Public trade."—See *Challoner v. Robinson*, col. 1196.

"Published."—See *MacFarlane v. Hulton*, col. 1755.

"Punctually paid."—See *Leeds Theatre of Varieties v. Broadbent*, col. 1699.

"Purchase-money."—See *Rex v. Birmingham County Court Judge*, col. 632.

"Purchaser in default."—See *Jones v. Gardiner*, col. 2633.

"Railroad."—See *Fletcher v. London United Tramways Co.*, col. 1517.

"Railway."—See *Att.-Gen. v. Yorkshire (Woollen District) Electric Tramways*, col. 2101.

—See *Milner v. Great Northern Railway*, col. 1530.

—See *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban Council*, col. 1423.

"Railway company."—See *London and India Docks Co. v. Great Eastern Railway*, col. 2044.

"Rate made under this Act."—See *Elliott v. Russell*, cols. 1165, 1425, 2692.

"Rates, taxes, and assessments."—See *Baylis v. Jiggins*, col. 1245.

"Ready money."—See *Wheeler, In re; Hankinson v. Hayter*, col. 2872.

"Real resident holder and occupier."—See *Reg. v. Manchester Justices*, col. 1112.

"Reasonable notice."—See *Lowe v. Adams*, col. 1182.

"Receipt."—See *London and Westminster Bank v. Inland Revenue Commissioners*, col. 2160.

—See *Att.-Gen. v. Carlton Bank*, col. 2162.

—See *General Council of the Bar v. Inland Revenue Commissioners*, col. 2160.

"Recompense for services."—See *Robinson v. Giffard*, col. 798.

"Reconstruction."—See *South African Supply and Cold Storage Co., In re; Wild v. South African Supply and Cold Storage Co.*, col. 443.

—See *Dunraven's (Earl) Settled Estates, In re*, col. 2255.

"Redeemable."—See *Chicago &c. Granaries Co., In re*, col. 428.

"Relief relating to or connected with the original subject of the cause or matter."—See *Edge v. Weigel*, col. 1899.

"Rent."—See *Skene v. Cook*, cols. 2139, 2140.

"Rent payable."—See *Hancock v. Gillard*, col. 2122.

"Repair."—See *Wood v. Walsh*, col. 1511.

"Residing" on the Premises.]—See *Wright, In re; Mott v. Issett*, col. 496.

"Residuary devise."—See *Mason v. Ogden*, col. 2854.

"Residuary legatee."—See *Gibbs, In re; Martin v. Harding*, col. 2886.

"Residue."—See *Stokes v. Prance*, col. 1713.

"Resisting or wilfully obstructing."—See *Bastable v. Little*, col. 647.

"Sailing."—See *Sea Insurance Co. v. Blogg*, col. 1047.

"Salary."—See *Klein, In re; Goodwin, ex parte*, col. 183.

"Say about 2,800 tons."—See *Miller v. Borne*, col. 2326.

"Scaffolding."—See *Wood v. Walsh*, col. 1511.

—See *Hoddinott v. Newton Chambers & Co.*, col. 1508.

—See *Maule v. Brook*, col. 1507.

—See *O'Brien v. Dobbie*, col. 1512.

—See *Elvin v. Wolward*, col. 1510.

—See *Feazey v. Chatte*, col. 1511.

—See *Marshall v. Rudeforth*, col. 1510.

"Scheme legally established."—See *Att.-Gen. v. National Epileptic Hospital*, col. 245.

"Sealed."—See *Mitchell v. Crawshaw*, col. 1138.

"Seamea."—See *Reg. v. Lynch*, col. 627.

—See *Corbett v. Pearce*, col. 1485.

"Seashore."—See *McNair v. Walmesley*, col. 185.

"Securities."—See *Gent and Eason's Contract*, *In re*, col. 2585.

— See *Tapp and London and India Docks Co.'s Contract*, *In re*, col. 2584.

"Seizure."—See *Robinson Gold-Mining Co. v. Alliance Marine and General Assurance Co.*, cols. 1058, 1080.

"Separate dwellings."—See *London County Council v. Cook*, col. 2131.

"Separately published."—See *Lawrence & Bullen v. A. G. & Cook*, col. 547.

"Serious and wilful misconduct."—See *Johnson v. Marshall, Sons & Co.*, col. 1547.

— See *Bist v. London and South-Western Railway*, col. 1547.

"Set up in practice."—See *Robertson v. Buchanan*, col. 618.

"Settlement."—See *Marshall's Settlement*, *In re*; *Marshall v. Marshall*, col. 2226.

— See *Tankard*, *In re*, col. 127.

"Seven weather working days (Sundays and holidays excepted)."—See *Nelson & Sons v. Nelson Line (No. 3)*, col. 2332.

"Several."—See *Hanbury v. Jenkins*, col. 861.

"Sewer."—See *Silles v. Fulham Borough Council*, col. 1650.

— See *Wilkinson v. Llandaff Rural Council*, col. 1371.

— See *Kinson Pottery Co. v. Poole Corporation*, col. 1371.

— See *Wood v. Ealing Tenants, Lim.*, col. 1375.

— See *Wood Green Urban Council v. Joseph*, cols. 1368, 1370.

— See *Bullock v. Reeve*, col. 1635.

— See *Webb v. Knight*, col. 1369.

— See *Graham v. Wroughton*, col. 1380.

— See *King's College, Cambridge v. Uxbridge Rural Council*, col. 1374.

— See *Thompson v. Eccles Corporation*, col. 1380.

— See *Jackson v. Wimbledon Urban Council*, col. 1369.

— See *St. Matthew, Bethnal Green, Vestry v. London School Board*, col. 1650.

— See *Geen v. Newington Vestry*, col. 1648.

— See *London and North-Western Railway v. Runcorn Rural Council*, col. 1378.

"Sewer made for 'profit.'"—See *Croysdale v. Sunbury-on-Thames Urban Council*, col. 1377.

— See *Sykes v. Sowerby Urban Council*, cols. 1377, 1380.

"Sewered property."—See *Melbourne and Metropolitan Board of Works v. Melbourne Gas Co.*, col. 266.

"Shall and may."—See *Burton and Blinkhorn*, *In re*, col. 2479.

"Shall die."—See *Gorringe*, *In re*; *Gorringe v. Gorringe*, col. 2825.

"Shall thenceforth cease and determine."—See *Chapman*, *In re*; *Perkins v. Chapman*, col. 489.

"Shape."—See *Heath v. Rollason*, col. 555.

"Ship's furniture."—See *Hoggarth v. Wulker*, cols. 1040, 1049.

"Shop."—See *Savoy Hotel Co. v. London County Council*, col. 1472.

— See *Smith v. Kyle*, col. 1471.

"Single private drain."—See *Haedcke v. Friern Barnet Urban Council*, and other cases, col. 1380.

— See *Thompson v. Eccles Corporation*, cols. 1369, 1380.

"Sinking fund."—See *Chicago & C. Granaries Co.*, *In re*, col. 428.

"Sledge, drag or such like carriage."—See *Smith v. Kymerley*, cols. 1522, 1523.

"Snare or other like instrument."—See *Jones v. Davies*, col. 863.

"Society instituted for purposes of fine arts exclusively."—See *Royal College of Music v. St. Margaret & C. Vestry*, col. 1855.

"Solemnised."—See *Garnett*, *In re*; *Richardson v. Greenep*, col. 2283.

"Special and distinctive word."—See *Pearson's Application*, *In re*, col. 2538.

"Special circumstances."—See *Collyer-Bristow*, *In re*, col. 2462.

"Sporting paper."—See *McFarlane v. Hulton*, col. 1755.

"Statutory defence."—See *Willis v. Lovick*, col. 605.

"Statutory provision regulating service of process."—See *Logan v. Bank of Scotland*, col. 1904.

"Step in the proceedings."—See *County Theatres and Hotels v. Knowles*, col. 35.

— See *Richardson v. Le Maitre*, col. 35.

— See *Zalinoff v. Hammond*, col. 35.

"Stock or shares in a public company."—See *Sellar v. Bright & Co.*, col. 825.

"Street."—See *Jones v. Short*, col. 914.

— See *Armstrong v. London County Council*, col. 1655.

— See *Simmonds v. Fulham Vestry*, col. 1658.

— See *Finchley Electric Light Co. v. Finchley Urban Council*, col. 1390.

— See *Rishton v. Haslingden Corporation*, col. 1372.

— See *Walthamstow Urban Council v. Sandell*, col. 1389.

“Structure.”—See *London County Council v. Schewzik*, cols. 1626.

— See *London County Council v. Hancock*, col. 1615.

“Subject to be invested in the purchase of lands.”—See *Harvey, In re*, col. 799.

“Submission.”—See *Austrian-Lloyd Steamship Co. v. Gresham Life Assurance Society*, col. 31.

“Sub-purchaser.”—See *Brookes v. Hansen*, col. 336.

“Substantially commenced.”—See *Att.-Gen. v. Bournemouth Corporation*, col. 2561.

“Substituted security.”—See *City of London Brewery Co. v. Inland Revenue Commissioners*, col. 2157.

“Successors.”—See *Rex v. Inland Revenue Commissioners; Silvester, Ex parte*, col. 1801.

“Suffer to be done.”—See *Wilson v. Twamley*, col. 1228.

“Sufficient cause.”—See *Batt & Co.'s Trade Marks, In re*, col. 27.

“Sufficient evidence.”—See *Board of Trade v. Sailing Ship “Glenpark,”* col. 2305.

— See *Garbutt v. Durham Joint Committee*, col. 1820.

Sum employed “as capital.”—See *Alianza Co. v. Bell*, col. 2127.

“Sunset.”—See *Gordon v. Cann*, cols. 1331, 2521.

“Surcharge.”—See *Rex v. Carson Roberts*, col. 220.

“Surplus assets.”—See *Crichton's Oil Co., In re*, col. 478.

“Surviving.”—See *Inderwick v. Tatchell*, col. 2901.

— See *Bilham, In re; Buchanan v. Hill*, col. 2903.

“Survivor.”—See *Inderwick v. Tatchell*, col. 2901.

“Survivors.”—See *Friend's Settlement, In re; Cole v. Allcot*, col. 2269.

“Taken in execution.”—See *St. Marylebone Vestry v. County of London (Sheriff)*, col. 1672.

“Taking of land.”—See *Escott v. Newport Corporation*, cols. 1258, 1325.

“Temporary.”—See *Burrows v. Lang*, col. 780.

“Tenant.”—See *Moore v. Smea*, col. 1207.

“Tenement factory.”—See *Brass and London County Council, In re*, col. 1465.

— See *Toller v. Spiers & Pond*, col. 1527.

“Tenement.”—See *Att.-Gen. v. Richmond (Duke) (No. 1)*, col. 2069.

“Testamentary expenses.”—See *Dixon, In re; Penfold v. Dixon*, col. 2086.

— See *Prince, In re*, col. 2779.

— See *Betts, In re; Doughty v. Walker*, col. 845.

— See *Treasure, In re; Wild v. Stanham*, col. 2872.

“The deceased.”—See *Gibbs, In re; Thorne v. Gibbs*, col. 2082.

“Therewith occupied.”—See *Nichols v. Malim*, col. 2136.

“Thing done or to be done in the United Kingdom.”—See *Inland Revenue Commissioners v. Maple & Co.*, col. 2147.

“Timber at measurement weight.”—See *Great Western Railway v. Caswell*, col. 206.

“Tons burden.”—See *The Brunel*, col. 2407.

“Tools and implements of trade.”—See *Lavell v. Ritchings*, col. 1195.

“Trade mark.”—See *Gestetner's Trade Mark, In re*, col. 2530.

“Trade refuse.”—See *Westminster City Council v. Gordon Hotels, Lim.*, cols. 1635, 1639.

“Tradesman.”—See *Palmer v. Snow*, col. 2509.

“Trading in or selling plate.”—See *Scott v. Solomon*, col. 2103.

“Trading or other companies.”—See *Irysaght, In re*, col. 2822.

“Tramroad.”—See *Blackpool and Fleetwood Tramroad Co. v. Thornton Urban Council*, col. 1423.

“Transaction.”—See *Thomas, In re; Evans v. Griffiths*, col. 2470.

“Transmitted.”—See *Mackinnon v. Clark*, col. 781.

“Trawl or trawl-net.”—See *Colbeck v. Ashfield*, col. 865.

“Tributary.”—See *Moses v. Iggo*, col. 863.

“Trust estate.”—See *Travis, In re; Frost v. Grecores*, col. 2810.

"**Undertaker.**"—See *Smith v. Standard Steam Fishing Co.*, col. 1541.

— See *McCabe v. Jopling & Palmer's Traveling Crane*, col. 1540.

— See *Weavings v. Kirk & Randall*, col. 1544.

— See *Carrington v. Bannister*, col. 1544.

— See *Raine v. Jobson*, col. 1542.

— See *Percival v. Garner*, col. 1540.

— See *Mason v. Dean*, col. 1540.

— See *Cass v. Butler*, col. 1541.

"**Undertakers.**"—See *Knight v. Cubitt*, col. 1545.

"**Undistributed assets.**"—See *Land Mortgage Bank of Florida, In re*, col. 481.

"**Undue influence.**"—See *Baudains v. Richardson*, cols. 295, 2761.

"**Undue or fraudulent preference.**"—See *Stenotyper, Lim., In re; Hastings v. Stenotyper, Lim.*, col. 473.

"**Unfair dealing.**"—See *Brenchley v. Higgins*, col. 877.

"**Unmarried.**"—See *Chant, In re*, col. 2843.

"**Unrecorded water.**"—See *Esquimalt Waterworks Co. v. City of Victoria Corporation*, col. 282.

"**Unseaworthiness.**"—See *Rathbone v. McIver*, col. 2866.

"**Urban district.**"—See *Kirkdale Burial Board v. Liverpool Corporation*, col. 1329.

"**Used in connection with.**"—See *Commissioners of Taxation v. St. Mark's Glebe Trustees*, col. 265.

"**Using.**"—See *Stone v. Tyler*, col. 2749.

"**Using house for purpose of betting.**"—See *Tromans v. Hodgkinson*, col. 898.

"**Using " Office.**"—See *Vogt v. Mortimer*, col. 904.

"**Utility.**"—See *Welsbach Incandescent Gas Light Co. v. New Incandescent Gas Lighting Co.*, col. 1787.

"**Valid nomination.**"—See *Hobbs v. Morey*, col. 565.

Vessel "lost."—See *The Craftsman*, col. 2404.

"**Vested by way of sale.**"—See *Att.-Gen. v. Felixstowe Gas Light Co.*, col. 2149.

"**Voyage.**"—See *The Scarsdale*, col. 2297.

"**Wages.**"—See *The Elmville*, col. 2293.

"**Warehouse.**"—See *Green v. Britten & Gilson*, col. 1538.

— See *Wilmott v. Paton*, col. 1525.

— See *Moreton v. Reeve*, col. 1537.

"**Waste land or common ground.**"—See *Scott v. Towyn Rural Council*, col. 2739.

"**Waters.**"—See *Stead v. Nicholas*, col. 863.

"**Wharf.**"—See *Ellis v. Cory*, col. 1522.

— See *Haddock v. Humphrey*, col. 1535.

"**Wholly dependent.**"—See *Senior v. Fountains & Burnley*, col. 1539.

"**Widow.**"—See *Wagstaff, In re; Wagstaff v. Jalland*, col. 2845.

"**Wife.**"—See *Drew, In re*, col. 2844.

"**Wife and children.**"—See *Browne's Policy, In re*, col. 994.

"**Wilful default.**"—See *Bennett v. Stone*, cols. 2632, 2652.

— See *North v. Percival*, col. 2676.

"**Wilful refusal to receive.**"—See *Leeds Grammar School, In re*, col. 1274.

"**Wilfully withholding.**"—See *Madden v. Rhodes*, col. 2557.

In Wills.—See WILL.

"**Window.**"—See *Easton v. Isted*, col. 722.

"**With all dispatch as customary.**"—See *Lyle Shipping Co. v. Cardiff Corporation*, col. 2326.

"**Without reasonable cause.**"—See *Wandsworth Borough Council v. Baines*, col. 1640.

"**Wooden structure.**"—See *Westminster City Council v. London County Council*, col. 1619.

"**Word . . . having no reference to the character or quality of the goods.**"—See *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, col. 2531.

"**Words having no reference to quality.**"—See *National Biscuit Co.'s Application, In re*, col. 2531.

"**Work.**"—See *Prior v. Slaitwaite Spinning Co.*, col. 1469.

"**Work extending over a long period.**"—See *Bromley Rural Council v. Croydon Corporation*, col. 2723.

"**Working day.**"—See *Mein v. Ottmann*, col. 2332.

"**Workman.**"—See *Fitzpatrick v. Evans*, col. 1486.

— See *Ellis v. Ellis & Co.*, col. 1491.

— See *Simpson v. Ebbw Vale Steel, Iron, and Coal Co.*, col. 1489.

— See *Squire v. Midland Lace Co.*, col. 1476.

— See *Bagnall v. Levinstein*, col. 1491.

— See *Vamplew v. Parkgate Iron and Steel Co.*, col. 1485.

— See *Cortell v. Pearce*, col. 1485.

"Workplace."—See *Bennett v. Harding*, col. 1641.

"Works."—See *Att.-Gen. v. Bournemouth Corporation*, col. 2561.

"Workshop."—See *Curtis v. Shinner*, col. 1465.

— See *Fullers, Lim. v. Squire*, col. 1471.

"Yearly interest or other annual payment."—See *Craven's Mortgage, In re; Davies v. Craven*, col. 2120.

WORK AND LABOUR.

Building Contract—Penalties—Building Owner to make Allowances for Delay—Default by Building Owner.—By a building contract certain matters causing delay and "other causes beyond the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon and make due allowance therefor if necessary, and their decision shall be final":—*Held*, that the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time; and so, such interference and defaults being made out, the building owners could not recover penalties. *Wells v. Army and Navy Co-operative Society*, 86 L. T. 764—Wright, J.

— **Reputed Ownership—Order and Disposition.**—A clause in a building contract whereby it is provided that "all plant work or materials brought to and left upon the ground by the contractor shall be considered the property" of the building owners, does not constitute them the true owners thereof for the purpose of consent to reputation of ownership by the contractor. *Keen, In re; Collins, ex parte*, 71 L. J. K.B. 487; [1902] 1 K.B. 555; 86 L. T. 235; 50 W. R. 334; 9 Manson, 145—D.

— **Default of Builder—Re-entry of Landowner—Damages.**—A builder having made default under a building agreement, the landowner exercised the right reserved to him in such case by the agreement to re-enter and take possession of the land and premises, with all the buildings, plant, and materials thereon:—*Held*, that an action would lie at the suit of the landowner against the builder to recover damages for the builder's breach of the agreement. *Marshall v. Mackintosh*, 78 L. T. 750; 46 W. R. 580—Kennedy, J.

— **Delay in Giving Possession—Damages.**—By a contract entered into between the plaintiff and defendant, and dated July 4, the former contracted to pull down certain old houses and erect new ones on the site, the work to be com-

pleted within six months. By the contract all the brickwork for the whole houses was to be built up simultaneously, no part being raised more than five feet higher than the remainder. The plaintiff agreed, at the request of the defendant, to a delay of a fortnight from July 4 in getting possession, but it was not till some weeks after the expiration of the fortnight that possession of a part of the property was given, and not till about five months thereafter that possession of the whole was given. In an action to recover damages for breach of contract, —*Held*, that there was to be implied in the contract a term that the defendant would give possession forthwith, but that the agreement to allow a fortnight's delay relieved the defendant from that obligation, and substituted a reasonable time, and that possession not having been given within a reasonable time the plaintiff was entitled to damages for loss sustained by him by reason of the delay. *Freeman v. Hensler*, 64 J. P. 260—C.A.

— **Surveyor's Fees for Taking Out Quantities**

—**Custom of Building Trade.**—The defendant, desiring to build certain houses, employed an architect to make out plans. The architect having done so, instructed the plaintiff, a quantity surveyor, to take out quantities, and when these were completed the architect invited tenders, all of which exceeded the limits of the defendant's proposed expenditure. No tender was accepted. It did not appear that the defendant had authorised the application for tenders. The plaintiff sued for the amount of his charges for taking out the quantities, and relied on the alleged custom in the building trade throwing on the building owner the liability for the surveyor's fees where no tender is accepted, or for other reasons the work is not proceeded with. The jury found at the trial that the employment of the surveyor was neither within the scope of the architect's authority nor sanctioned by the defendant, and that there is no custom authorising such employment without the consent of the building owner:—*Held*, that the defendant was entitled to judgment. *Per O'Brien, J., and Gibson, J.*, that the custom relied on was not one of which the Court must take notice; that even if the alleged custom was reasonable, as to which *quære*, the verdict against the custom could not be interfered with. *Antisell v. Doyle*, [1899] 2 Ir. R. 275—Q.B. D.

— **Abandonment of Contract by Builder before Completion—Completion by Building Owner**

—**Action on Quantum Meruit.**—The plaintiff, a builder, in consideration of a lump sum to be paid to him by the defendant, agreed to erect certain buildings upon the defendant's land. Before the completion of the buildings the plaintiff abandoned the contract, and thereupon the defendant took possession of the buildings which had been erected and completed them himself. In an action by the plaintiff, in respect of so much of the agreed work as had been executed before the abandonment of the contract, to recover as for the value of work done and materials provided,—*Held*, that, in the absence of evidence of a fresh agreement by the defendant to pay the plaintiff the value of the work done and materials provided prior to the abandonment of the original contract, the plaintiff was not entitled to recover; and

that the mere fact of the defendant taking possession of the buildings and completing them himself was not evidence from which such a fresh agreement could be inferred. *Sumpter v. Hedges*, 87 L. J. Q.B. 545; [1899] 1 Q.B. 673; 78 L. T. 378; 46 W. R. 454—C.A.

— Alleged Wrongful Cancellation—Contract Preventing Contractor from Carrying out Contract.]—The plaintiff sued the defendants for having prevented him carrying out his part of a certain contract entered into between them to construct a dock, and for wrongfully renouncing the contract. The defendants pleaded that it was a term of the contract that the manager named therein had power to cancel the contract if dissatisfied with the works, and that he did cancel the contract on that ground. Replication that the manager's dissatisfaction was caused by the defendant's default in not giving the plaintiff possession of the site of the proposed dock so as to enable him to perform the contract:—*Held*, that the plaintiff on this replication was bound to prove that the specific matter therein alleged—that is, the not giving possession of the site—was the cause of the delay in carrying out the contract which in fact operated on the manager's mind and caused him dissatisfaction, and that as there was no evidence of that or of the plaintiff's readiness and willingness to perform the contract, the defendants were entitled to a verdict. *Mort's Dock and Engineering Co. v. Wade*, 22 T. L. R. 61—P.C.

— Non-fulfilment—Work Done Equivalent to Work Contracted for.]—Where a contract provides for stipulated work at a lump sum, and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be sustained. *Forman v. The "Liddesdale"*, 69 L. J. P.C. 44; [1900] A.C. 190; 82 L. T. 331; 9 Asp. M.C. 45—P.C.

Authority of Agent—Variation—Ratification.]—Where there is a provision that there is to be no alteration or deviation from the agreed specification or claim made for extras without the written sanction of an agent, work so ordered must be within the scope of the agent's authority to order. *Id.*

The fact that the owner of the chattel thus repaired has sold it at a price enhanced by such unauthorised labour does not amount to acquiescence on his part or acceptance of liability for the work done. *Id.*

Representations not Intended to be Solely Acted upon—Provision as to Verification by Contractor of Matters which could Influence Tender.]—In a contract to execute certain sewage works the plaintiffs covenanted to do the works described in the drawings and specifications according to the drawings, specifications, &c., and the defendants covenanted to pay for the works on the receipt of the certificate in writing of their engineer as provided by the conditions. The specification provided that (4) the drawings and specifications were to be considered explanatory of each other, and any discrepancies should be explained by the engineer; (5) the contractor should sink trial holes, &c., and set out and keep correct the works; (38) provisions as to

the engineers' certificate of completion; (39) all disputes as to the works, the construction of the contract, &c., were to be referred to the engineer, whose decision should be final, other differences to be referred to arbitration; (43) the contractor should satisfy himself, as to the levels, character, and nature of all existing works, &c., of the nature of the strata, &c., and should obtain his own information on all matters which could in any way influence his tender; no charge for extra work, or otherwise, was to be allowed in consequence of any incorrect information or inaccuracies in the drawings, specifications, or estimate of quantities; (46) the contractor was to verify for himself the particulars of existing matters shown on the drawings; (48) the information given as to existing walls, &c. was given as the best in the defendants' possession, but the defendants did not hold themselves in any way responsible for its accuracy. On completion the plaintiffs claimed 36,574l. from the defendants on the grounds—First, That the plans shewed a certain existing wall extending nine feet below the Ordnance datum line which could be utilised for the purposes of the works; that this wall did not exist, and that consequently the plans for the works had been altered, and the plaintiffs, at the direction of the engineer, had completed the works at this extra cost. Secondly, That the defendants had fraudulently misrepresented the structure and existence of this wall, and had thereby induced the plaintiffs to enter into the contract to their detriment. The defendants relied on the absence of a certificate from their engineer and on the conditions of the specification, and they denied the making of any representation and any fraud:—*Held*, that clause 43 and other like clauses in the specification did not protect the defendants from liability. *Held*, also, that the defendants, though innocently delivering the plans and specifications to the plaintiffs, could not escape liability for any fraudulent representations made by their agents therein. *Cornfoot v. Fowke* (6 L. J. Ex. 297; 6 M. & W. 358) explained. *Pearson v. Dublin Corporation*, 77 L. J. P.C. 1; [1907] A.C. 351—H.L. (Ir.)

Fraudulent Representation—Principal and Agent—Clause Disclaiming Responsibility for Representations Made—Questions for the Jury.]—A clause in the contract by which the employer disclaims responsibility for the accuracy of the statements and information with which he supplies the contractor, and as to which the contractor is to satisfy himself, does not confer exemption on the employer for statements fraudulently or recklessly made by the employer or his agent. Whatever be the form of the contract, the party who makes an allegation of fraud is entitled to have the question submitted to a jury. *Pearson v. Dublin Corporation*, 77 L. J. P.C. 1; [1907] A.C. 351; 97 L. T. 645—H.L. (Ir.)

Builder and Building-owner—Completion of Building at Given Date—Delay by Default of Sub-contractors and Specialists—Rights of Parties.]—Where a builder contracts with a building-owner to complete a building for one entire sum, and to enter into sub-contracts for certain portions of the work and materials with sub-contractors and specialists appointed by the building-owner, but to be paid by the builder

out of the contract price, and as a basis of the whole contract the builder accepts the primary obligation of completing the building at a given date, there is no implied promise on the part of the building-owner that the sub-contractors' or specialists' work shall be performed and materials supplied by them without unreasonable delay, nor is any duty cast upon the building-owner to provide against such delay; so that where, under such a contract, the completion of a building has been delayed by the default of the sub-contractors and specialists, the builder cannot maintain an action for damages against the building-owner upon the footing that there was an obligation upon the building-owner to see that the work was done and materials supplied by the sub-contractors and specialists within a reasonable time. *Mitchell v. Guildford Union*, 1 L. G. R. 857; 68 J. P. 84. — *Phillimore, J.*

Architect—Contract for Designing and Carrying out Building Operation—Plans—Property in Building Owner.]—An architect was employed by a building owner to do all the things which were necessary to be done by an architect for the purpose of designing and carrying out certain building operations, at a remuneration of 5 per cent. upon the contract price of the work. In pursuance of the employment the architect prepared plans and duly carried out the work, and the building owner paid him the agreed remuneration:—*Held*, that the property in the plans was in the building owner, and that the architect was not entitled to retain them. *Gibbon v. Pease*, 74 L. J. K.B. 502; [1905] 1 K.B. 810; 92 L. T. 433; 53 W. R. 417; 69 J. P. 209; 3 L. G. R. 461; 21 T. L. R. 365—C.A.

— Certificate—Building Contract—Architect in Position of Arbitrator—Negligence.]—A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after their completion, upon certificates of the architect, and that a certificate of the architect, shewing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance:—*Held* (ROMER, L.J., dissenting), that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions. *Chambers v. Goldthorpe*, 70 L. J. K.B. 482; [1901] 1 K.B. 624; 84 L. T. 444; 49 W. R. 401—C.A.

— Finality—Claim by Employer against Contractor for Defective Materials—Decision of Architect that Contractor ought not to be Paid—Arbitration Clause.]—A building agreement provided that the contractor should be entitled under certificates to be issued by the architect to payment by the employer by instalments, but that "no certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects

as provided by this agreement." It further provided that, save as to certain specially excepted matters, any dispute or difference arising between the employer and the contractor as to the construction of the contract, or as to any matter or thing arising thereunder, should be referred to arbitration, and that the arbitrator should have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice (save as to the specially excepted matters), and to determine all matters submitted to him, as if no such certificate, opinion, &c., had been given. The architect by the agreement had power during the progress of the works to order the removal and re-execution of any work executed with materials or workmanship not in accordance with the drawings and specification, and any faults appearing within twelve months from the completion of the works arising in the opinion of the architect from materials or workmanship not in accordance with the drawings or specification were, upon the directions in writing of the architect, to be amended and made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. The architect gave his final certificate as to what was due by the employer under the contract:—*Held*, that this certificate was not conclusive as to the rights of the parties, and that the employer was entitled to set up a counter-claim for damages in respect of alleged defective work and the supply of improper materials under the contract. *Robins v. Goddard*, 74 L. J. K.B. 167; [1905] 1 K.B. 294; 92 L. T. 10; 21 T. L. R. 120—C.A.

— Deviations from Contract—Architect's Authority.]—A having contracted with B to use cement mortar in building the walls of a house which he was erecting for B, —*Held*, that B's architect had not authority, without B's consent, to sanction the use of milled lime instead of cement mortar. *Steel v. Young*, [1907] S.C. 360—Ct. of Sess.

Engineer to Fix Price of Work Done—Death of Engineer—Successor.]—Under a contract with a local authority, "J. M., of the firm of J. M. & Sons, or other the engineers of the corporation," was appointed to fix the price of extra work done. During the contract J. M. died, and his son, E. M., a member of the firm of J. M. & Sons, was appointed by the local authority as his successor:—*Held*, that E. M. could fix the price of work which had been begun before he was appointed, and that in doing so E. M. was bound to act as arbitrator and not as a servant of the local authority. *Kellett v. Stockport Corporation*, 70 J. P. 154—Walton, J.

Contractors—Power to Dismiss—Determination by Engineer as to Performance of Contract—Reference of Matters to Arbitrator.]—On a motion to restrain the defendants from acting on a notice given by them or their engineer pursuant to a contract between plaintiffs and defendants from entering on or taking possession of works in course of execution under such contract and for damages, it appeared that the defendants were carrying out a scheme for a water supply, and had contracted with the plaintiffs to sink certain wells. The work was to be performed to the satisfaction of the de-

defendants' engineer, and any dispute was to go to arbitration, and if in the judgment of the engineer sufficient dispatch was not used the council or their engineer might dismiss the contractors and their workmen. Difficulties having arisen in carrying out the work, and delay being thereby occasioned, the council gave notice dismissing the contractors and their men:—*Held*, that the terms of the contract were consistent as a whole, and that the reference to arbitration was engrafted upon them, and that the contractors were not bound to give up to the engineer the decision of every question. That the Court ought to imply that the defendants would not act upon the summary clauses until the arbitrators had affirmed the judgment of the engineer. Injunction granted accordingly to preserve the *status quo* until trial or an award should be made. *Foster v. Hastings Corporation*, 87 L. T. 736—Farwell, J.

Contract to Execute Works—Wrongful Seizure of Works by Defendants—Plaintiff Entitled to Determine the Contract.—Where the appellants, having guaranteed the due performance of a contract made with a municipal corporation for the execution of works on its land, agreed on the contractor's default with the respondent to complete the execution of the works on the terms of the original contract, and in effect delegated the supervision of the contract and all incidental arrangements to the corporation, and the corporation, according to the findings of the jury, improperly prevented the respondent from proceeding with the stipulated expenditure and wrongfully seized the works and extruded the respondent,—*Held*, that, the appellants, having by their conduct constituted the corporation their agents and the delay being attributable to their acts, could not justify the seizure and re-entry; and that the respondent was entitled to treat the contract as at an end and sue on a *quantum meruit*. *Lodder v. Slowey*, 73 L. J. P.C. 82; [1904] A.C. 442; 91 L. T. 211; 53 W. R. 181; 20 T. L. R. 597—P.C.

Contract in Two Separate Parts—Breach—Penalty or Liquidated Damages.—A contractor agreed with the owner of a house to carry out certain work for an electric light installation in the house in accordance with a certain specification for a fixed sum, and consented to pay 5*l.* as liquidated damages for each day exceeding the number of days within which the work had to be completed. By the specification the wiring was to be handed over to the owner of the house in faultless condition within twenty days from the signing of the contract, and the fittings (which the house-owner was to supply) were to be fixed and handed over in similar condition within fourteen days of their delivery by the owner of the house to the contractor:—*Held*, that the 5*l.* was agreed upon as liquidated damages for each day's delay in executing each part of the contract, the times limited in the contract being two separate periods, at the expiration of each of which the damages began to accrue. *Stegmann v. O'Connor*, 81 L. T. 627—C.A.

Partly Performed Contract—Amount Recoverable—Penalty.—In an action on a contract, and alternately on a *quantum meruit*, to recover the price of certain specified work, if the contract is not properly carried out, the plaintiff

can only recover the real value of the work done and the materials supplied. *Chapel v. Hickes* (2 C. & M. 214) followed. A contractor undertook to deliver up the whole of certain work in connection with wiring and blocks for electric light within twenty days of signing the contract; and, further, to properly fix and connect the fittings within fourteen days of the delivery to him of such fittings. He then wrote: "I undertake to carry out the work in connection with the cables, wires, and fittings in strict accordance with the specification and schedule within the times stated in the said specification for the sum of 76*l.* 10*s.*, and I consent to pay the sum of 5*l.* for liquidated damages and not as a penalty for every day exceeding the number of days within which the work has to be completed":—*Held*, that 5*l.* per day was payable for delay at either stage of the contract. *Stegmann v. O'Connor*, 80 L. T. 234—D.

Arbitration Clause in Principal Contract Incorporated in Sub-Contract.—A contractor, who had contracted with a railway company for the construction of certain works, entered into a sub-contract for the execution of part of the work. In the contract between the principal contractor and the sub-contractor it was stipulated that the work was to be executed "according to plans and specifications," which included a "general specification," forming part of the contract between the principal contractor and the railway company. This "general specification" contained a clause providing that disputes were to be submitted to arbitration. In an action by the sub-contractor against the principal contractor for certain sums alleged to be due under the sub-contract, the principal contractor pleaded that the claims made in the action fell within the arbitration clause of the "general specification," which he maintained was imported into the sub-contract:—*Held*, that the arbitration clause of the general specification—while it was incorporated in the sub-contract to the effect of making the decisions of an arbiter in questions between the railway company and the principal contractor binding upon the sub-contractor—was not incorporated in the sub-contract *quoad* matters which concerned only the rights *inter se* of the principal contractor and the sub-contractor. *Goodwins, Jardine & Co. v. Brand*, 7 F. 995—Ct. of Sess.

Plant and Materials on Premises—Lien of Building Owner after Notice—Judgment against Builder—Seizure of Plant and Building Materials in Execution—Notice by Building Owner Subsequent to Seizure—Rights of Parties to Plant.—By a building contract it was provided that, if the builder should fail to proceed with due diligence with his part of the contract, the employer might give the builder notice to proceed with the work, and that after such notice had been given the builder should not remove from the site any plant or building materials placed thereon for the purpose of the work, and that the employer should have a lien upon the plant and building materials from the date of the notice, and that, in the event of the builder not proceeding with the work within seven days, the employer might enter upon the site and take possession of all the plant and building materials, when all the building materials should become the property of the employer

absolutely, and he should have a lien upon the plant until the works were completed. A judgment having been obtained against the builder, the sheriff entered upon the works and seized the plant and building materials under a writ of *fi. fa.* Two days afterwards the employer gave the builder notice to proceed with the work, and, upon non-compliance with the notice, claimed that he was entitled to the building materials and had a lien upon the plant in priority to the execution creditor. The County Court Judge decided in his favour only in respect of the building materials:—*Held*, that the employer had no interest in the plant until the notice was given; and that, therefore, at the time when the plant was seized it was free from any lien or incumbrance. *Byford v. Russell*, 76 J. J. K.B. 744; [1907] 2 K.B. 522; 97 L. T. 104—D.

— **Default of Contractor in Executing Works—Rights of Employer.**—A building contract based on the theory that the employer is to be put in possession of completed works, and providing that all plant and materials brought on the ground by the contractor shall be considered the property of the employer until the completion of the contract has been duly certified, and that on default of the contractor the employer may enter upon and take possession of the works, materials, and plant, and the expense incurred in completing the works shall be a debt due from the contractor, vests the plant and materials in the employer at law subject to a condition that upon the due completion of the contract the contractor shall be at liberty to remove them. Therefore, if the contractor makes default in performing his part of the contract, and the works are in consequence never completed, neither he nor his trustee in bankruptcy can recover the plant or materials from the employer. *Hart v. Portgait Harbour*, 72 L. J. Ch. 426; [1903] 1 Ch. 690; 88 L. T. 841; 51 W. R. 461—Farwell, J.

The effect of such a contract is to provide not only machinery to enable the employer to secure the performance of the contract, but also a security for the employer that the work shall be performed, of which security the employer is entitled to avail himself if, by the default of the contractor, the work is not performed at all. *Ib.*

Sumpter v. Hedges (67 L. J. Q.B. 545; [1898] 1 Q.B. 673) and *Barrell, Ex parte; Parnell, in re* (44 L. J. Bk. 138; L. R. 10 Ch. 512), applied. *Keen & Keen, In re; Collins, ex parte* (71 L. J. K.B. 487; [1902] 1 K.B. 555), distinguished. *Ib.*

— **Extraordinary Expenses—Indemnity by Contractor in Respect of Damage to Property.**—Under a contract for the construction of a reservoir made between a contractor and a water company, the contractor was to be absolutely and solely responsible for “injury or damage to person and property of any description whatever which may be caused by, or result from, the execution of the works”:—*Held*, that under this clause the contractor was liable to reimburse the water company the expenses recovered from them by the district council in respect of damage done to the roads over which extraordinary traffic had passed in

connection with the work of construction of the reservoir. *Croydon Rural Council v. Sutton District Water Co.*, 71 J. P. 513; 6 L. G. R. 35—D.

5. — **Lien of Coachbuilder—Hire-purchase Agreement—Authority of Hirer of Carriage to Employ Coachbuilder to Repair Carriage.**—A person who hires a dogcart under a hire-purchase agreement, and undertakes “to keep and preserve the said dogcart from injury,” has implied authority from the owner to employ a coachbuilder to do necessary repairs to the dogcart, and, if he does so, will create a lien in favour of the coachbuilder not only as against himself, but also as against the owner of the dogcart. *Keene v. Thomas*, 74 L. J. K.B. 21; [1905] 1 K.B. 136; 92 L. T. 19; 53 W. R. 336; 21 T. L. R. 2—D.

— **Gas-pipes—Damage to, in Execution of Sewerage Works—Indemnity by Contractor.**—Under a contract for the execution of certain sewerage works (which had to be carried out under the direction of the district council's engineer) the contractor agreed to “save the district council harmless and indemnified from all claims and actions for or in respect of any damage or injury to persons or property arising from or occasioned by the neglect, default, or misconduct of the contractor, or of any person employed by the contractor or otherwise howsoever from or by the execution of the works.” In the course of the work damage was caused to the gas-mains for which the district council were held liable to the gas company, whereupon the council claimed to be indemnified by the contractor. At the trial the jury found that the injury to the gas-mains was due to the nature of the work and not to the mode in which it was executed:—*Held*, that the district council was not entitled to be indemnified by the contractor in respect of such damage. *Ilford Gas Co. v. Ilford Urban Council*, 67 J. P. 365—C.A.

— **Railway Company—Contractors—Agreement for Construction—Completion—Interest on Shares—Payment out of Penalties Due from Contractors.**—By a contract for making the line of the plaintiff railway, it was to be completed to the satisfaction of the engineer of the company in two years from the commencement of the works. The contract price was to be paid in debentures and shares of the company, which were to be issued at the request of the contractors to their nominees, or offered for public subscription. The contractors, having requested the debentures and shares to be offered for public subscription, entered into an agreement to pay to the company interest on the debenture and preference stock issued by the company until the railway was completed. The works were commenced on January 15, 1890, but the time for completion was afterwards extended to May 31, 1892. They were not completed for more than a year after the time fixed. Interest on the debentures and preference stock in the meantime became due which was not paid by the contractors, and was therefore paid by the company. This action was afterwards brought, and certain of the matters in dispute were referred to arbitration, but the award was to be enforced only in the present action:—*Held*, that the contractors

had not completed the line within the time fixed, and were liable to pay the interest between October 1 and December 31, 1892; but that the arbitrator having found that the company were liable for not taking over the line when it was completed, the contractors were entitled to have the amount for which the company were so liable applied in reduction of the interest, but that the contractors were not liable for the interest between January 15 and May 31, 1892, between which dates the time for completion was extended:—*Held also*, that it was

not *ultra vires* the company to apply penalties due from the contractors in payment of interest on shares, as such penalties were not capital, and dividends can be paid out of other money besides profits. *Alcoy and Gandia Railway v. Greenhill*, 79 L. T. 257—C.A.

YEAR.

See TIME.